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ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORANDUM FOR THE CLAIMANT

CLAIMANT		RESPONDENT
THE FEDERATION OF PALMENNA	V.	CANSTONE FLY LIMITED

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No.	Abbreviation	Citation	Page cited at
ARTICLES AND BOOKS			
1.	Branson, John David, *The Abuse of Process Doctrine Extended*	Branson, John David, *The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration*, Journal of International Arbitration 38, no. 2 (2021): 187–214	39
2.	Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*	Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Boulder Colo. ed) (Oxford University Press, 1st Ed, 2013), at 5.32 – 5.37	54
3.	Hervé Ascensio, *Abuse of Process in International Investment Arbitration*	Hervé Ascensio, *Abuse of Process in International Investment Arbitration* Chinese J. Int'l L. 764–765 (2014)	39
4.	ILC, *Draft Articles on Prevention of Transboundary Harm*	ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries*, 2001, Yearbook of the International Law Commission (2006-II)	52
5.	ILC, *commentary on ARSWIWA*	ILC, *Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third*	53

No.	Abbreviation	Citation	Page cited at
		session, 2001, Yearbook of the International Law Commission (2006-II)	
6.	Markus Petsche, *The Fork in the Road Revisited*	Markus A. Petsche, The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches, 18 Wash. U. Global Stud. L. Rev. 391 (2019)	38
7.	Philippe Sands, Jaqueline Peel, *Principles of International Environmental Law*	Philippe Sands, Jaqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 2018) at p 749	52
8.	Singer*, Sutherland Statutory Construction*	N. Singer, *Sutherland Statutory Construction* (The Lawbook Exchange Ltd, 7th Ed, 2014), at [47.07]	42
9.	Stefan Leimgruber, *Declaratory Relief in International Commercial Arbitration*	Stefan Leimgruber, *Declaratory Relief in International Commercial Arbitration* (ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2014, Volume 32 Issue 3) pp. 467 - 489	50
10.	"What is Impact Assessment?"	"What is Impact Assessment?", *Convention on Biological Diversity* (April 2010)	43

No.	Abbreviation	Citation	Page cited at
		<<https://www.cbd.int/impact/whatis.shtml#environmental>> (Accessed 16 June 2024)	
COURT DECISIONS			
11.	*C v D*	**Hong Kong Court of Final Appeal** 30 June 2023 *C v D* [2023] HKCA 440	23
12.	*Candid Prod Inc v Int'l Sking Union*	**US District Court for the Southern District of New York** 29 January 1982 *Candid Productions, Inc. v International Skating Union and Beat Hasler* 530 F Supp 1330, 1337 (SDNY 1982)	25
13.	*CME v Czech Republic*	**Svea Court of Appeal** 15 May 2003 *CME Czech Republic B.V. v. The Czech Republic* 42 ILM 919 (2003)	34
14.	*Fluor Enters v Solutia*	**US District Court for the Southern District of Texas** 18 May 2001 *Fluor Enters v Solutia* 147 F Supp 2d 648, 651 (SD Tex 2001)	26

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15.	*Holloway v Chancery Mead*	**England and Wales High Court** 30 July 2007 *Holloway v Chancery Mead* [2008] 1 All ER (Comm) 653	24
16.	*Nichols v Marsland*	**England and Wales Court of Appeal** 1 December 1876 *Nichols v Marsland* (1876) 2 Ex D 1	56
17.	*Republic of Sierra Leone v. SL Mining Ltd*	**England and Wales High Court** 15 February 2021 *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm)	23, 29
18.	*Sulamérica*	**England and Wales Court of Appeal** 16 May 2012 *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102	27
19.	*Usahasama v Abi Construction*	**Kuala Lumpur High Court** 29 April 2016 *Usahasama SPNB-LTAT Sdn Bhd v Abo Construction Sdn Bhd*	22, 23

No.	Abbreviation	Citation	Page cited at
		[2016] MLJU 1596	
20.	*Wah v Grant Thornton*	**England and Wales High Court** 14 November 2012 *Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others* [2012] EWHC 3198	24
21.	*White v Kampner*	**Supreme Court of Connecticut** 31 May 1994 *White v Kampner* 641 A2d 1381, 1382 (Conn 1994)	26
ARBITRAL AWARDS			
22.	*Benvenuti v Congo*	ICSID Case No. ARB/77/2 8 August 1980 *Benvenuti et Bonfant s.r.l. v. People's Republic of the Congo*	33
23.	*Bosnian Genocide*	I.C.J. Reports 2007 26 February 2007 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*	32

No.	Abbreviation	Citation	Page cited at
24.	*Caratube v Kazakhstan*	ICSID Case No. ARB/13/13 27 September 2017 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*	34
25.	*Barcelona Traction*	[1964] ICJ Rep 6 24 July 1964 *Case concerning the Barcelona Traction, Light and Power Co Ltd (New Application, 1962), Belgium v Spain*	46
26.	*Dow v Isover*	ICC Case No. 4131 (1982) 23 September 1982 *Dow Chemical France et al. v Isover Saint Gobain*	34
27.	*Elliott v. Korea*	PCA Case No. 2018-51 20 June 2023 *Elliott Associates L.P. v. Republic of Korea*	53
28.	*Eskosol v Italy*	ICSID Case No. ARB/15/50 4 September 2020 *Eskosol S.p.A in liquidazione v Italian Republic*	40
29.	*GAMI*	UNCITRAL (NAFTA)	31, 32

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		15 November 2004 *GAMI Investments, Inc. v. United Mexican States*	
30.	*Genin v Estonia*	ICSID Case No. ARB/99/2 25 June 2001 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*	37H&H
31.	*H&H v Egypt*	ICSID Case No. ARB 09/15 6 May 2014 *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*	38
32.	*Kompozit v Moldova*	SCC Emergency Arbitration No. EA (2016/095) & SCC Case No. 2016/113 14 June 2016 *Kompozit LLC v. Republic of Moldova*	28
33.	*Mason Capital v Korea*	PCA Case No. 2018-55 11 April 2024 *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*	55
34.	*Micula v Romania*	ICSID Case No. ARB/05/20 11 December 2013	55

No.	Abbreviation	Citation	Page cited at
		Ioan Micula, Viorel Micula and others v. Romania (I)	
35.	*Orascom v Algeria*	ICSID Case No. ARB/12/35 31 May 2017 *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*	39, 40
36.	*Pantechniki S.A. Contractors*	ICSID Case No. ARB/07/21 30 July 2009 *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*	37
37.	*Quiborax S.A. v Plurinational State of Bolivia*	ICSID Case No. ARB/06/2 16 September 2015 *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*	49
38.	*SGS v Pakistan*	ICSID Case No. ARB/01/13 6 August 2003 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*	31, 34
39.	*ST-AD GmbH*	PCA Case No. 2011-06 (ST-BG) 18 July 2013 *ST-AD GmbH v. Republic of Bulgaria*	28

No.	Abbreviation	Citation	Page cited at
40.	*Teinver v Argentina*	ICSID Case No. ARB/09/1 21 December 2012 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*	28
41.	*Trail smelter case*	Ad Hoc Arbitration 11 March 1941 *Trail smelter case (United States of America, Canada)*	52
42.	*Videndi*	ICSID Case No. ARB/97/3 3 July 2022 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*	36
RULES, STATUTES AND TREATIES			
43.	ARSWIWA	Responsibility of States for Internationally Wrongful Acts *Responsibility of States for Internationally Wrongful Acts (2001)*	49
44.	Model ADR Clauses	Model ADR Clauses for Commercial Contracts *Model ADR Clauses for Commercial Contracts 2020 edition*	27

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45.	UNCC Decision and Penal Reports	Governing Council, UN Compensation Commission *Governing Council, UN Compensation Commission, Decision 7 UN Doc. S/23765, Annex (1992)* United Nation Compensation Committee, Penal Report *United Nation Compensation Committee, Penal Report F4/5 (2005) and F4/5(2005)*	52
46.	UN Environmental Programme Goals and Principles of EIA	United Nations Environmental Programme Goals and Principles of Environmental Impact Assessment Preliminary Note *United Nations Environmental Programme Goals and Principles of Environmental Impact Assessment Preliminary Note (1987)*	43
47.	VCLT	Vienna Convention on the Law of Treaties V*ienna Convention on the Law of Treaties (1969)*	49

STATEMENT OF JURISDICTION

The **Federation of Palmenna** (“**Palmenna**”) and the **Independent State of Kenweed** (“**Kenweed**”) have agreed, pursuant to Article 12 of the Palmenna-Kenweed Bilateral Investment Treaty (“**PK-BIT**”) signed between them, to submit any dispute arising between the countries or investors to arbitration administered in Kuala Lumpur, Malaysia in accordance with the Asian International Arbitration Centre Rules 2021 (“**AIAC Rules**”).

QUESTIONS PRESENTED[1]

(a) Whether the pre-arbitration steps stated in Article 12 of the PK-BIT must be complied with before the Claimant can commence arbitration proceedings against the Respondent;

(b) Whether the Claimant is precluded from initiating arbitration proceedings against the Respondent due to similar legal proceedings previously commenced in the Claimant's domestic courts by activists against SZN Company Limited, a 30% shareholder of the Respondent;

(c) Whether the Respondent has breached its obligations under the PK-BIT; and

(d) If issue (c) is decided in the affirmative, whether the Claimant is entitled to an award of declaration and damages.

[1] Pursuant to paragraph 58 of the 19th LAWASIA International Moot Problem 2024.

STATEMENT OF FACTS

1. The Claimant is one of the world's leading producers of palm oil.[2] Recent challenges, such as heavier rainfall and flooding,[3] have contributed to the removal of the previous government in favour of M Akbar ("**PM Akbar**") as the Claimant's new Prime Minister in June 2021.[4]

2. In August 2021, the Claimant entered into a Memorandum of Understanding ("**MOU**") with its neighbouring state, Kenweed, to encourage investments between the two states.[5] Discussions had taken place earlier in July 2021 between PM Akbar; Prime Minister Gan Ridhimajoo of Kenweed ("**PM Gan**"); and Tara Sharma ("**CEO Tara**") (CEO of Kenweed's largest energy company, KLT Company Limited ("**KLT**")). In these discussions, the three parties discussed the possibility of Mehstone Star Limited ("**Mehstone**"), a company incorporated in Kenweed, setting up a subsidiary in the Claimant for the production of palm oil biodiesel.[6] KLT holds 40% of Mehstone's shares, and Kenweed's Ministry of Trade and Investment ("**MTI**"), which PM Gan is minister of, holds the remaining 60%.[7]

3. During these discussions, PM Akbar emphasised the importance of sustainable practices in palm oil production, and assured PM Gan that "*as long as [he does] what it takes to ensure [his] business is environmentally sound, [PM Akbar] would help do whatever it takes for company to set up in Palmenna*".[8]

[2] Record, [2].
[3] Record, [11].
[4] Record, [11].
[5] Record, [13].
[6] Record, [14].
[7] Record, [10].
[8] Record, [15].

4. On 3 October 2021, the PK-BIT was officially signed between the Claimant and Kenweed.[9] Canstone Fly Limited ("**Canstone**") was subsequently incorporated in the Claimant on 26 October 2021 and secured two plants in Appam and Karheis. 70% of Canstone's shares are held by Mehstone, with the remaining 30% being held by SZN Company Limited ("**SZN**"); a company owned by Luke Nathan, CEO Tara's fiancé.[10]

5. The nominees of SZN in Canstone would manage its day-to-day operations while general policies would be determined by CEO Tara.[11] However, Luke Nathan's consistent appearances in public meant that SZN was deemed to be the "*face*" and "*operating force*" of Canstone in the Claimant.[12]

6. Canstone achieved profitability by the end of 2022, contributing to 20% (2,722,000 tonnes) of Palmenna's total production for that year.[13] However, it faced a scare in mid-February 2023 when the Karheis plant received an unsigned note detailing an alleged leak in one of its tanks storing transesterified palm oil.[14] Transesterification involves the purification of palm oil by washing away excess alcohol, catalyst residues and other contaminants.[15] Jakey Jake's request for Alan to investigate the Karheis plant was rejected.[16] Two weeks later nearby farmers were hospitalised, and although Jakey travelled to Appam to discuss this with Alan, Canstone has not taken any further investigation into the incident.

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[9] Record, [20].
[10] Record, [9].
[11] Record, [22].
[12] Record, [27].
[13] Record, [27].
[14] Record, [28].
[15] Record, [28].
[16] Record, [29].

7. Months later, on 6 September 2023, during a Board meeting, Alan requested for a consulting firm to be hired to conduct an Environmental Assessment Report ("**EIA**") on behalf of Canstone.[17] The Board responded that it would deliberate and provide an answer no later than 15 December 2023. Until then, Alan decided to put further Reports on hold.[18]

8. Before the Board could decide, Appam witnessed one of the worst flash floods in its history on 26 November 2023.[19] Canstone was the only factory in operation at the time of the flood. Shortly after the disaster subsided, nearby occupiers were admitted to the hospital due to respiratory tract injuries.[20] Doctors found that the injury could have been caused by the inhalation of irritant gases or exposure to corrosive chemicals which had travelled through inland waters. Of the thirty-nine persons hospitalised, thirteen of them were Canstone's employees.

9. Following the flooding event, Canstone initiated an independent investigation into its facilities, revealing that the pressure relief valves on its storage tanks were compromised.[21] On 15 December 2023, activists initiated legal actions against the Government of Palmenna and SZN in the High Court of Palmenna on the grounds of negligence, citing Canstone's alleged neglect in its drainage and ventilation systems[22] On 14 February 2024, the High Court of Palmenna found Palmenna and SZN jointly

[17] Record, [33].
[18] Record, [33].
[19] Record, [35].
[20] Record, [36].
[21] Record, [39].
[22] Record, [41].

liable for negligence and ordered for compensation to be paid to the victims of the incident.[23] This decision is now on appeal.[24]

10. A conference call was initiated by PM Akbar on 1 March 2024 in an attempt to resolve the situation but parties ended the call after the discussion reached an impasse, with Tara remarking that there was "*no point in talking*" to the Claimant anymore.[25] On 6 March 2024, the Claimant commenced arbitral proceedings against the Respondent pursuant to Art 12 of the PK-BIT.[26]

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[23] Record, [45].
[24] Record, [47].
[25] Record, [51].
[26] Record, [54].

SUMMARY OF PLEADINGS

I. THE PRE-ARBITRATION STEPS NEED NOT BE COMPLIED WITH BEFORE THE CLAIMANT CAN COMMENCE ARBITRATION

1. The pre-arbitration steps in Art 12 of the PK-BIT ("**Pre-Arbitration Steps**") need not be complied with as the terms are uncertain and therefore unenforceable. Even if the Pre-Arbitration Steps are enforceable, they should not be enforced where prospects of reaching an amicable settlement are futile, which is the case here.

II. THE DOMESTIC LEGAL PROCEEDINGS DO NOT PRECLUDE THE CLAIMANT FROM INITIATING ARBITRATION

2. The doctrines of *res judicata*, *lis pendens* and abuse of process are not attracted as the domestic legal proceedings in the High Court of Palmenna do not take place within the same legal order as the current arbitration.

3. The doctrine of *res judicata* does not operate to preclude the Claimant from bringing a claim before this tribunal because there is no "final and conclusive judgement" on the previous proceedings, as the prior domestic proceedings initiated in the High Court of Palmenna are on appeal.

4. Further, and in the alternative, even if the tribunal were to find that *res judicata* applies, its requirements have not been made out, since the domestic proceedings initiated in the High Court of Palmenna involved different parties, a different subject matter, and different relief or damage being sought. Therefore, the Claimant is not precluded from bringing forth the present arbitral proceedings.

III. THE RESPONDENT HAS BREACHED ARTICLES 4 AND 5 OF THE PK-BIT

5. Article 4(1) of the PK-BIT requires an EIA to be submitted to the relevant ministry of the Claimant, the Ministry of Natural Resources and Environmental Sustainability, if it is an activity which *"may have significant environmental impact*". The operation of the Respondent's biofuel plants is an activity which "*may have significant environmental impact*", but an EIA has not been submitted. Hence, the Respondent breached Art 4 of the PK-BIT.

6. Article 5 of the PK-BIT requires the Respondent to not discharge any polluting matter into the Claimant's inland waters. Pursuant to Art 5(3) of the PK-BIT, where there is such a discharge, "*the occupier of a property from which such discharge originates is presumed to have caused the discharge*". The evidence shows that a discharge originated from the Respondent's facility Therefore, pursuant to Art 5(3) of the PK-BIT, the Respondent is presumed to have caused said discharge, thus breaching its obligations under Article 5 of the PK-BIT.

IV. CONSEQUENTLY, THE CLAIMANT IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES

7. The Claimant seeks an award of both declaration and damages as neither alone is sufficient to provide full reparation to the Claimant for the harm caused by the breaches of the PK-BIT. Following the principle of full reparation, the Claimant seeks compensation in the form of damages for the environmental damage caused to the Claimant's rivers, as well as satisfaction by way of declaratory relief which will serve the practical purpose of vindicating the Claimant and quelling its political instability.

PLEADINGS

I. THE PRE-ARBITRATION STEPS NEED NOT BE COMPLIED WITH BEFORE THE CLAIMANT CAN COMMENCE ARBITRATION

1. Despite the Claimant's earnest attempts to comply with the Pre-Arbitration Steps, they are ultimately uncertain and therefore unenforceable. Even if the Pre-Arbitration Steps are enforceable, they should not be enforced given that adherence would be futile. Further, given that non-compliance with the Pre-Arbitration Steps is an issue of admissibility, the Tribunal has the jurisdiction to examine the current claims and the current arbitration is not precluded.

A. Non-compliance with the Pre-Arbitration Steps is an issue of admissibility and therefore does not affect this Tribunal's jurisdiction

2. The Tribunal may choose to proceed with the arbitration regardless of compliance with the Pre-Arbitration Steps because this issue concerns when the claims should be heard instead of which forum they should be brought before. Accordingly, the issue is a matter of admissibility and not one of jurisdiction. Hence, the Tribunal is not deprived of its jurisdiction.

3. Malaysian law, which is the law of the seat, currently considers pre-arbitration steps as pre-conditions to arbitration which affect the tribunal's jurisdiction, as was decided in *Usahasama* [27] There, the court assumed, without canvassing the debate between

[27] *Usahasama SPNB-LTAT Sdn Bhd v Abi Construction Sdn Bhd* ("***Usahasama v Abi Construction***") [2016] MLJU 1596.

jurisdiction and admissibility, that the lack of fulfilling the conditions precedent would deprive the Tribunal of its jurisdiction.[28]

4. However, this is not representative of the current developments in the majority of other Commonwealth jurisdictions. When the aforementioned debate was presented before other Commonwealth courts, such as in recent English and Hong Kong decisions like *SL Mining*[29] and *C v D*[30] respectively, they unanimously held that the non-compliance of pre-arbitration steps was an issue that concerned the admissibility of a claim and not the jurisdiction of the tribunal.

5. Accordingly, if the Malaysian courts were to re-consider this issue again, they would take into consideration the relevant developments in Common law and hold that the issue of non-compliance with pre-arbitration steps is a matter of admissibility which does not deprive the Tribunal of its jurisdiction.

6. Hence, the Tribunal has the jurisdiction to decide whether to hear the claim regardless of compliance with the pre-arbitration steps. Given the uncertainty of the steps and futility of complying with them, as explained below, the claims should not be stayed nor dismissed.

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[28] *Usahasama v Abi Construction* at [18].[29] *The Republic of Sierra Leone v SL Mining Ltd* ("***SL Mining***") [2021] EWHC 286.

[29] *The Republic of Sierra Leone v SL Mining Ltd* ("***SL Mining***") [2021] EWHC 286.

[30] *C v D* [2022] HKCA 729.

B. The Pre-Arbitration Steps are unenforceable because they lack certainty

7. Pre-arbitration clauses are only enforceable if they are "*sufficiently certain*" such that there is no need for further agreement at any stage before matters can proceed.[31] The clauses need to be "*sufficiently certain*" so the court can objectively determine, from the pre-arbitration clause itself, what minimum behaviour or actions are required to fulfil the pre-arbitration requirements.[32] In the present case, the Pre-Arbitration Steps are inherently uncertain as both the negotiation and mediation steps lack these crucial details and are therefore unenforceable.

8. The relevant parts of Art 12 of the PK-BIT are reproduced below:

Article 12: Dispute Resolution

1. Any dispute between the Parties arising from, relating to or in connection with this BIT shall be referred:

(a) first, to the higher management of Parties in an attempt to settle such dispute by amicable and good faith negotiation;

(b) second, if the dispute is not resolved via negotiation, to mediation;

(c) third, if the dispute is not resolved through mediation within 90 (ninety) days from the commencement of the mediation to arbitration [...]

[31] *Holloway v Chancery Mead* [2008] 1 All ER (Comm) 653 at [81].

[32] *Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others* [2013] 1 All ER (Comm) 1226 at [60].

(1) The Negotiation Step is uncertain

9. Art 12(1)(a) which states that the parties shall "*attempt to settle such dispute by amicable and good faith negotiation*" (the "**Negotiation Step**").[33] is not sufficiently defined to enable the tribunal to determine objectively what the minimum required of the parties is, and at what point the process fails without breach. While the term "*good faith*" may be understood as being honest or having "*meaningful*" discussions with the aim of "*ending the dispute amicably*",[34] such iterations are insufficient to fill the gaping hole that is the lack of procedural steps needed for parties to have exhausted the Negotiation Step.

10. For example, in *Candid Productions*, a clause similarly requiring "*[negotiation] in good faith*" was unenforceable. Since the term "*good faith negotiations*" was so amorphous, the court could not decide at which point a party's requests during negotiations were considered contrary to 'good faith' negotiation. Further, the court could not imply requirements of good faith that were not stated in the contract, such as "*[making] offers and counter-offers*" and "*[continuing] negotiations for a sufficient minimum period of time*" as doing so would be to "*impermissively make a contract for the parties*" instead of "*enforcing any bargain the parties themselves may have reached*".[35]

11. In stark contrast, in cases where negotiation steps were deemed to be valid, the terms were far more detailed and precise, setting out clearly the practical steps for the negotiations:

[33] PK-BIT, Art 12(1)(a).

[34] Steven Reinhold, "*Good Faith in International Law",* UCL Journal of Law and Jurisprudence at p 56.

[35] *Candid Productions v. International Skating Union*("***Candid Productions***"), 530 F. Supp. 1330 (S.D.N.Y. 1982) at note 1333.

(a) The dispute resolution clause in *Fluor Enters v Solutia* provided for multiple stages of negotiations, where each stage required the efforts of different levels of management for a specified time before the next resolution effort could begin.[36] For example, the first stage stipulated that the project manager for each party would meet "*at least once*" and that the dispute could only be referred to the senior executives for the next stage if the project managers could not resolve the dispute "*within twenty (20) days of their first meeting*".

(b) In *White v Kampner*, a similar clause to negotiate in good faith was enforced in part because the dispute resolution clause specified that at minimum two negotiation sessions were required as a precondition to an arbitration.[37]

12. The Negotiation Step is more similar to the clause in *Candid Productions* than that in *Fluor Enters v Solutia* and *White v Kampner* as it merely states that parties should "*attempt to settle [the] dispute by amicable and good faith negotiation*". There is no clear procedure outlined, such as the event which would trigger negotiations like in *White v Kampner*, or the minimum number of negotiations required as stated in *Fluors Enters v Solutia*.

13. Hence, there is no basis upon which negotiations may be considered to have been fulfilled nor which requests may be said to be so unreasonable that the negotiations were not fulfilled in good faith. Since these thresholds cannot be defined without further agreement, Art 12(1)(a) is too uncertain to be enforceable.

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[36] *Fluor Enters v Solutia Inc.*, 147 F. Supp. 2d 648 at note 1.
[37] *White v Kampner*, 641 A2d 1381, 1382 (Conn 1994).

(2) The Mediation Step is also uncertain

14. Art 12(1)(b) states that the dispute should be referred *"to mediation [if] the dispute is not resolved via negotiation*" (the "**Mediation Step**").[38] This step is also too uncertain to be enforced as it lacks key details, such as: the process for the appointment of a mediator, a mediation institution and which mediation rules/frameworks should apply.[39]

15. The lack of such details has been cited as a reason for unenforceability. For example, in *Sulamérica*, the clause similarly stated that parties should seek to have their disputes resolved "*amicably by mediatio*n", and this was found to be unenforceable.[40] While the court acknowledged parties' intentions for the clause to be enforceable,[41] the clause was nonetheless too uncertain as it lacked crucial details such as a "*clearly defined mediation process*" and "*provisions for the appointment of a mediator*."[42] This rendered the clause unenforceable, which thus did not create any obligations of any kind.[43]

16. Similarly, in the present case, the mediation clause is absent of crucial details, such as which mediation framework should be used. This is not a mere technical point, as the uncertainty over these points will likely lead to disagreements among the parties regarding which mediation framework to use. As both countries possess equally successful mediation frameworks,[44] it would be difficult to determine which is the

[38] PK-BIT, Art 12(1)(b).
[39] *Sulamé Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* ("***Sulamérica***") [2012] 2 All ER (Comm) 795 at [35]; Model ADR Clauses for Commercial Contracts (2020 Edition) at example 5: "*Multi-tiered process: Negotiation – Mediation – Arbitration or Litigation*".
[40] *Sulamerica* at [5].
[41] *Sulamérica* at [33] and [36].
[42] *Sulamérica* at [35].
[43] *Sulamérica* at [36].
[44] Clarification, 1.

obvious choice or which framework the parties intended to govern disputes at the time of signing.

C. Even if the Pre-Arbitration Steps are enforceable, they should not be enforced in the event of futility

17. Even if the Pre-Arbitration Steps are enforceable, they should not be insisted upon in the event of futility, which is the situation faced presently. Tribunals and courts have acknowledged the futility exception to enforcement of pre-arbitration steps.[45] This was the case in *Kompozit v. Moldova*, where the cooling-off period provided for in the treaty was not enforced due to futility, as evidenced by Moldova's repeated refusal to engage in discussions, despite Kompozit sending a Notice of Dispute in compliance with their dispute resolution clause.[46]

18. Likewise, in the present case, there is no chance of a successful resolution even if the Pre-Arbitration Steps were complied with. This is demonstrated by the Respondent's conduct in rejecting any possibility of further discussion despite the Claimant's earnest attempts to comply with the Pre-Arbitration Steps.

19. The Claimant complied with the Negotiation Step by initiating a conference call with CEO Tara, Luke Nathan and Alan on 1 March 2024 where both parties "*[presented] their perspectives and [proposed] causes of actions*" and there were "*efforts to reach a*

[45] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ("***Tienver v Argentina***") ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) at [126] - [129]; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (18 July 2013) at [364]; *Kompozit LLC v. Republic of Moldova*, ("***Kompozit v Moldova***") SCC Emergency Arbitration No. EA (2016/095) & SCC Case No. 2016/113, Emergency Award on Interim Measures (14 June 2016) at [55].
[46] *Kompozit v Moldova* at [55].

consensus".[47] This evinced a sufficient exchange of views and discussion for the parties to have attempted good faith negotiation as instructed in the Negotiation Step. However, the Claimant's attempt at complying with the Pre-Arbitration Steps was put to an end "*abruptly*" by the Respondent's representative, CEO Tara, who told PM Akbar that it "*seem[ed] like there [was] no point in talking to [the Claimants] anymore*."[48]

20. Evidently, despite genuine efforts by the Claimant to comply with the Pre-Arbitration Steps, the parties' positions are too diametrically opposed for such compliance to result in effective redress. Further, CEO Tara's dismissive attitude towards (what she labelled as) the Claimant's "frivolous" claims, proves that further negotiations would be pointless since her stance and views towards the dispute is fixed.[49]

21. The Respondent's refusal to conciliate despite the Claimant's attempt to resolve the dispute clearly indicated that waiting beyond 6 March 2024 to commence arbitration was unnecessary. Therefore, the Respondent's insistence on the compliance with the Pre-Arbitration Steps is contradictory to their actions, causing their protests to ring hollow.

22. Finally, the use of the word "*shall*" in Art 12(1) of the PK-BIT does not necessarily result in the pre-arbitration steps being enforceable. In *SL Mining*, the multi-tier dispute resolution clause likewise used the obligatory term "*shall*" but did not preclude the commencement of arbitration.[50] This was because the cooling-off period was tied to the objective of reaching an amicable settlement.[51] Consequently, non-compliance was not

[47] Record, [51].
[48] Record, [51].
[49] Record, [57].
[50] *Republic of Sierra Leone v SL Mining* ("***SL Mining***") [2021] EWHC 286 at [32].
[51] *SL Mining* at [34].

an absolute bar to commencing arbitration given that there was not a "*cat's chance in hell of an amicable settlement*" within the cooling-off period.[52]

23. Similarly, given that the prospect of amicable settlement is lost, insistence on adhering with the Pre-Arbitration Steps would be pointless and misaligned with the parties' primary intention of resolving the dispute amicably and efficiently.

II. THE DOMESTIC PROCEEDINGS DO NOT PRECLUDE THE CLAIMANT FORM INITIATING ARBITRATION

24. The legal proceedings between the activists, the Claimant and SZN in Palmenna ("**Domestic Proceedings**") do not preclude the commencement of arbitration against the Respondent, as the Domestic Proceedings and current arbitration are not parallel proceedings. Naturally, the doctrines that serve to preclude or stay parallel proceedings – *res judicata*, *lis pendens* and the doctrine of abuse of process do not apply.

25. First, the domestic proceedings do not take place within the same legal order as the current arbitration. Second, the doctrine of *res judicata* should not apply as the domestic proceedings are still on appeal. Finally, even if the aforementioned doctrines are attracted, they will not preclude the initiation of the arbitration as the proceedings are not sufficiently similar to be parallel.

[52] *SL Mining* at [36].

A. The doctrines of res judicata, lis pendens and abuse of process do not apply as the proceedings do not take place within the same legal order

26. The doctrines of *res judicata*, *lis pendens* and abuse of process do not preclude the current arbitral proceedings. These doctrines are not applicable to the present arbitration as the Domestic Proceedings apply domestic Palmennian law while the present arbitration applies International law. Hence, both proceedings do not take place within the same legal order.[53]

27. Where a domestic court, such as the High Court of Palmenna, lays down a decision that implicates the parties or subject-matter of a subsequent international arbitration, the domestic court decision is only relevant to the extent that the tribunal is subsequently required to assess matters under domestic law.[54]

28. For instance, in *GAMI*, an arbitration was brought regarding loss due to expropriation under the NAFTA, despite the expropriation itself having been litigated in the Mexican courts previously. The tribunal held that the Mexican court's decision on the legality of an expropriation was an authoritative expression of national law, which the tribunal would "*[respectfully] consider insofar as it [applied] norms congruent with those of NAFTA*".[55] However, each jurisdiction was "*responsible for the application of its own laws*". The Mexican court was responsible for determining whether the expropriation was legitimate *under Mexican law*, while the tribunal was responsible for determining

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[53] *SGS v Pakistan* at [147].

[54] The Coordination of Multiple Proceedings in Investment Treaty Arbitration, Hanno Wehland at 5.32 - 5.37 referring to *GAMI Investments, Inc. v. United Mexican States* ("***GAMI***"), UNCITRAL (NAFTA), Final Awards (15 November 2004).

[55] *GAMI* at [41].

whether there had been breaches of *international law* by the respondent. Accordingly, the Mexican court's pronouncement on *domestic national laws* did not deprive the tribunal of its jurisdiction to hear the Claimant on *international law*.[56]

29. Similarly, the Domestic Proceedings are determinations made by Palmenna's domestic courts regarding the *tort of negligence* under *Palmennian law*. This is distinct from the tribunal's responsibility to determine if the Respondent has breached its *treaty obligations* under *international law*. Consequently, while the Tribunal may consider the High Court's decision as an "*expression of national law*", said decision does not preclude the Claimant from relying on the PK-BIT and bringing its claims before the Tribunal.

B. The doctrine of res judicata does not apply as the domestic proceedings are not final and conclusive

In any event, the current arbitration is not precluded under the doctrine of *res judicata* as the Domestic Proceedings are currently on appeal. *Res judicata* requires that former proceedings be a "*final and conclusive decision on the merits*".[57] As the Claimant's and SZN's appeals challenge the merits of the Palmennian High Court's decision on negligence, then the domestic proceedings cannot be a final and conclusive decision until the Palmennian Court of Appeal's judgement is handed down. Accordingly, the doctrine of *res judicata* is not attracted.

[56] *GAMI* at [41] - [43].

[57] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, Judgement (26 February 2007) at [126].

C. The doctrines of res judicata and lis pendens do not apply as the two proceedings are not sufficiently similar

30. In any event, even if *res judicata* applies, both proceedings are not parallel as the Triple Identity Test (which is the leading test to be used in determining whether proceedings are parallel for both doctrines) is not satisfied. Under the Triple Identity Test, proceedings are only parallel if they involve (a) the same parties; (b) the same cause of action; and (c) the same object.[58] Here, all three of these elements are not met.

(1) First, the proceedings do not involve the same parties

31. The parties in the domestic proceedings do not involve identical parties to the current proceedings. In the domestic proceedings, the claimant is the activists and the co-defendants are the Government of Palmenna and SZN.[59] On the other hand, in the current arbitration, the Claimant is the Government of Palmenna and the Respondent is Canstone.[60] Most notably, the activists are not present nor represented in the current arbitration. Furthermore, SZN is a distinct and separate legal entity despite being a 30% minority shareholder of the Respondent.

32. While some cases have viewed a controlling shareholder and the company as the same economic entity, this has only applied in cases where the shareholder in question

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[58] *Benvenuti et Bonfant s.r.l. v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award (8 August 1980), 21 I.L.M. 740 (1982).
[59] Record, [41].
[60] Record, [41].

exercised a high level of control over the company This was only the case when the controlling entity was a majority shareholder, or parent of a wholly owned subsidiary.[61]

33. However, SZN does not exercise a high degree of control over the Respondent's operations. While SZN may appear to significantly influence the Respondent due to Luke Nathan's publicity, the reality is that it was agreed from the Respondent's inception that SZN would only handle the day-to-day operations of the Respondent.[62] Meanwhile, CEO Tara of Mehstone, the majority shareholder, would retain control over the general policies.[63] The representatives of SZN still must report to the Board of Directors during crucial decision-making, such as requests for the allocation of additional provisions and resources.[64] Consequently, the Respondent cannot be considered the same party as SZN and therefore, the parties to both proceedings are distinct.

(2) Second, the proceedings do not involve the same cause of action

34. Proceedings are not parallel if they involve different legal grounds and factual circumstances of the claim.[65] For instance, in *SGS v Pakistan,* while the factual circumstances of the claims were similar, they were not parallel because one was a contract-based claim while the other was based upon a treaty.[66] Likewise, while both proceedings involve the disaster in Appam, the different legal ground of negligence in the Domestic Proceedings (versus a treaty claim in the current arbitration) results in

[61] *Dow v Isover* at p 136; *CME v Czech Republic*, Legal Opinion at [228] citing *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2 Award (21 October 1983) at p 17.
[62] Record, [22].
[63] Record, [22].
[64] Record, [33].
[65] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award (27 September 2017) at [494].
[66] *SGS v Pakistan* at [161] and [182].

different legal standards and relevant facts applied. This is evident from the following comparison table, which lays out the multiple differences between the two proceedings.

Point of comparison	Domestic proceedings	International arbitration proceedings
Factual focus	Whether the biodiesel factory had inadequate drainage and ventilation systems.	Whether there was a discharge of oil or polluting matter into the river from the Respondent's factory.
	No counterpart.	Whether the Respondent appointed a "*qualified person*" to conduct an EIA and submitted it to the Claimant's Ministry of Plantation Industries and Commodities.
	Whether the authorities failed to take proactive and preventative measures.	No counterpart.
Legal ground	Negligence.	Breach of treaty obligations.
Legal Standard	Duty of care owed by the Claimant and SZN to the victims under Palmennian law.	Treaty obligations owed by the Respondent to the Claimant under international law.

35. The standards for a finding of negligence and a breach of the PK-BIT are different, as a finding of negligence will depend on the duty of care owed by SZN to the citizens of Palmenna, while a breach of the PK-BIT will depend on treaty interpretation and

standards of international law. In contrast to a claim for negligence, which depends on the actions of the tortfeasor, a claim for a breach of Art 5 of the PK-BIT is dependent on whether there was a leak, not on whether the Respondent's actions were negligent. Therefore, it is possible for the Respondent to have breached Art 5 of the PK-BIT by discharging environmentally damaging material, even if SZN was not liable for negligence in the domestic proceedings.[67] This resolves a chief concern behind the preclusion of parallel proceedings, as there is no danger of contradictory or incompatible decisions.

36. Further, the claims in both proceedings focus on different facts. The Domestic Proceedings concerned inadequacies of the biodiesel factory's systems in relation to the Appam incident and the resultant injuries, as well as the Claimant's alleged failure to take preventative measures to prevent such an incident. In contrast, while the present arbitration also involves the Appam incident, the focus is on the breach of Art 5 of the PK-BIT, which covers the discharge of environmentally damaging material into the river,[68] without regard to the adequacy of the factory's systems.

37. The Claimant also relies on the Karheis incident as further evidence[69] and is claiming that the Respondent breached Art 4 of the PK-BIT by failing to submit an EIA, whereas the activists have made no mention of the Karheis incident or EIAs at all. In fact, it would be impossible for such a matter to surface in the Domestic Proceedings, as the PK-BIT was kept confidential and only made known to the signatories and the Respondent's

[67] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2022) at [95]-[96].
[68] PK-BIT, Art 5.
[69] Clarification, 6.

shareholders and board of directors.[70] Therefore, the activists could not have possibly raised this issue in the Domestic Proceedings.

(3) Third, the proceedings do not involve the same object

38. The last element requires that the relief sought in both proceedings be identical and is meant to address the problem of double recovery.[71] Presently, the relief sought in each proceeding is different, as the activists in the domestic proceedings seek damages on behalf of the victims, while the Claimant seeks damages for environmental damage as well as declaratory relief. Therefore, this final element, as well all other elements of the Triple Identity Test are not fulfilled.

D. Even if the Triple Identity Test is not used, the proceedings are still not sufficiently similar

39. Some arbitral tribunals have adopted an alternative test to the Triple Identity Test, known as the Fundamental Basis Test ("**FBT**"). The FBT states that proceedings are parallel and thus precluded if they arise from the same "*normative source*"[72] or from the same "*considerations that gave rise*" to two parallel disputes.[73]

40. The FBT should not be adopted by this Tribunal. Where the Triple Identity Test is criticised for being too restrictive, the FBT has been equally criticised for being vague

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[70] Clarification, 5.
[71] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) at [332].
[72] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) at [61].
[73] *Luchetti v. Peru*, ICSID Case No. ARB/03/4, Award (7 February 2005) at [53].

and having unclear requirements. Furthermore, while international law has made significant progress in addressing the faults of the Triple Identity Test, as discussed above at [32], this is not the case for the Fundamental Basis Test. Notably, it is unclear as to what is meant in the Fundamental Basis Test's referral to "*normative source*" and to what extent cases must be distinguished from each other to be "*autonomous claims*",[74] although cases applying this test focus more on the factual matrix and "*subject matter*" of the dispute.[75]

41. In any case, even if the Fundamental Basis Test is applied in the present case, the two proceedings will fail the test as they do not stem from the same normative source. This has been used to refer to the specific conduct relied upon in different sets of claims, as was the case in *H&H v Egypt*, where both claims centred on Grand Hotel's alleged violation of the contract and their refusal to honour the option to buy granted to the investor.[76]

42. Here, unlike *H&H v* Egypt, the claims do not revolve around the same event, as discussed earlier at [36]—[37]. Instead, the current proceedings concern a wide range of the Respondent's behaviour and obligations that are distinct from singular event which was the basis for the Domestic Proceedings.

[74] Markus A. Petsche, The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches, 18 Wash. U. Global Stud. L. Rev. 391 (2019) at p 418.
[75] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ("***H&H v Egypt***") ICSID Case No. ARB 09/15, Award (6 May 2014) at [367].
[76] *H&H v Egypt.*

E. The Claimant is not precluded from arbitration on the basis of abuse of process

43. Finally, the doctrine of abuse of process does not apply to preclude the present proceedings. Abuse of process is a recognised principle of international law derived from the principle of good faith which prohibits the exercise of a procedural right in a manner contrary to the purpose for which the right was established.[77] It has been used to preclude the initiation of multiple and successive arbitrations of the same economic harm. However, it is not applicable in this case because the proceedings are still not sufficiently similar and the arbitration proceedings were brought in good faith.

44. The test for abuse of process was laid out in *Orascom v Algeria*,[78] where the proceedings were precluded on the basis that the two arbitration proceedings involved the "*same investment, same measures and the same harm*".[79]

45. In *Orascom v Algeria*, while the claimant's subsidiary filed and concluded an arbitration by settlement under the Egypt-Algeria BIT, the claimant concurrently commenced a separate arbitration under a different BIT. Although the two proceedings involved different parties and BITs, the Tribunal nonetheless held that the subsequent arbitration was precluded as both arbitrations aimed to recover for the "*same economic harm*", and because the claimants in both arbitrations were part of the same "*vertical corporate chain*". Consequently, through the subsidiary's arbitration, the rest of the companies

[77] Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, Chinese J. Int'l, pp. 764–765.
[78] Branson, John David, *The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration* ("**Branson, John David, *The Abuse of Process Doctrine Extended***"), Journal of International Arbitration 38, no. 2 (2021): 187–214 at p 1208.
[79] *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*, ("***Orascom v Algeria***") ICSID Case No. ARB/12/ 35, Award, (31 May 2017) at [542].

higher up the corporate chain, including the claimant in the second arbitration, would have been "*made whole*" as well.[80]

46. This reasoning does not apply here as the Claimant is not seeking multiple relief, and indeed, could not do so, since they were defendants in the domestic proceedings (and not the ones initiating *both* proceedings). Furthermore, the relief sought in both proceedings is different, as the Claimant seeks declaratory relief and damages for environmental harm while the activists seek damages for the injuries caused. Consequently, the Claimant would not be "*made whole*" in the same way by success in either one of the proceedings.

47. Further, the initiation of the current arbitration is not an abuse of process as it was not done with such knowledge or intention. This was a key factor in *Orascom v Algeria*'s Decision on Annulment, which highlighted the connection between "*full knowledge*" of the abusiveness of a party's conduct and a finding of an abuse of process.[81] This was echoed by *Eskosol v Italy* distinguishing *Orascom v Algeria*, on the basis that the multiple shareholders of the same investment each had a legitimate, separate right and that there was no "*deliberate manoeuvring*" by the claimant in order to have a "*second bite at the apple*".[82]

48. Presently, since the Claimant was the defendant in the Domestic Proceedings, the two proceedings were not successive attempts by the Claimant to claim for identical harm. The Claimant had to defend themselves in the Domestic Proceedings and, in the present proceedings, simply wish to exercise their right to arbitration, as separate from the

[80] *Orascom v Algeria* at [498].
[81] *Orascom v.Algeria*, ICSID Case No. ARB/12/ 35, Decision on Annulment, (17 Sep 2020) at [314].
[83] Clarification, 9.

activists' claims, to recover for the environmental harm caused by the Respondent's breaches of the BIT.

III. THE RESPONDENT HAS BREACHED ART 4 AND 5 OF THE PK-BIT

A. The Respondent has breached Art 4 of the PK-BIT

49. Article 4 of the PK-BIT mandates that any investor, when undertaking an activity which "*may have a significant environmental impact*" must have a qualified person conduct an EIA and thereafter submit this EIA to the Claimant's Ministry of Natural Resources and Environmental Sustainability.[83]

50. The Claimant's position on the Respondent's breach of Art 4 of the PK-BIT is set out in three parts:
    (a) First, the operation of the Respondent's plants is one which "*may have a significant environmental impact*", therefore necessitating an EIA;
    (b) Second, the Respondent had not carried out, nor submitted, any EIA in relation to its plant operations.
    (c) Finally, the Claimant is not estopped from claiming a breach of Art 4 of the PK-BIT

[83] Clarification, 9.

*(1) The operation of the Respondent's plants is one that has "*significant environmental impact*"*

51. The Respondent carries obligations under Art 4 of the PK-BIT as their biodiesel production operations "*may have a significant environmental impact*". Although biodiesel production is not included in the list of activities enumerated in Art 4(2) of the PK-BIT, it is not an exhaustive list, since the phrase "*shall include*" is a term "of *enlargement, not limitation*".[84] The Respondent's activities are therefore caught by Art 4 of the PK-BIT, since they are similar to the activities in the aforementioned list, which forms the "*context*" and "*object*" to be considered when interpreting treaties.[85]

52. The Respondent's activities bear resemblance to the aforementioned examples. Under Art 4(2)(e)(i), for example, the production of over 50 tonnes of petrochemicals a day is an activity which "*may have a significant environmental impact*". Similarly, the Respondent's daily production of biodiesel in 2022 is well over this metric at 745 tonnes per day.[86] Further, the production of petrochemicals bears striking similarities to the Respondent's transesterification of palm oil, given that they both result in wastewater after treating their respective products. As such, the Respondent's operations are likely an activity which may "*may have a significant environmental impact*", and therefore required an EIA to be done.

[84] N. Singer, *Sutherland Statutory Construction* (Seventh Edition) at 47.07.
[85] VCLT Art 31.
[86] Record, [27].

(2) The Respondent has not carried out, nor submitted, any EIA in relation to its plant operations.

53. The Respondent has not fulfilled its obligation to conduct and submit EIAs. No EIAs were ever mentioned to be conducted, and the "*Reports*" conducted by the in-house experts on "*the condition of the machinery and equipment*" of the plants[87] ("**Reports**") are not EIAs as they do not fulfil the basic requirements of an EIA.

54. While it is true that the definition of an EIA is broad, it must, minimally, evaluate the likelihood of any adverse impact on the environment. For instance, Principle 4 of the United Nations Environmental Programme ("**UNEP**") describes an EIA as including an assessment of potential environmental impacts,[88] both long term and short term. The Convention on Biological Diversity, the principles of which both signatories have sworn to uphold in the PK-BIT,[89] endorses UNEP's description and further describes an EIA as a tool which should evaluate the environmental, social and economic impacts of a project prior to decision-making.[90]

55. In contrast to the wide scope of these requirements, the Reports focused exclusively on the "*condition of the machinery and equipment*" instead of any external environmental impact.[91] While they were stated to be "*crucial*" for a "*preliminary evaluation of the potential environmental risks*",[92] this does not mean they were actually EIAs. Their

[87] Record, [25].
[88] United Nations Environmental Programme Goals and Principles of Environmental Impact Assessment Preliminary Note, (January 16, 1987) Principle 4.
[89] PK-BIT Preamble.
[90] "What is Impact Assessment?", *Convention on Biological Diversity* (April 2010). <<https://www.cbd.int/impact/whatis.shtml#environmental>> (Accessed 16 June 2024).
[91] Record, [33].
[92] Record, [33].

narrower focus on the internal operations of the plant simply means that they would be useful as one component of any future evaluation with a wider scope. Since the focus and objective of the Reports and an EIA is mis-aligned, the Reports are not equivalent to an EIA. Additionally, Art 4(3) of the PK-BIT also mentions "*recommendations*" as part of the EIA to be conducted, but no such recommendations were ever included in the Reports.

56. This conclusion is echoed by the actions of Alan and Jakey Jake themselves, as they never treated the Reports as an EIA. For instance, Jakey Jake requested that Alan conduct an EIA upon receiving new of a possible leak and Alan requested for a consulting firm to be hired to conduct an EIA on behalf of the Respondent despite the existing reports.[93] Even if the content of the Reports did match up to that of an EIA, their veracity and reliability is suspect due to Alan's "*lackadaisical approach to his responsibilities*",[94] having spent most of his time in Appam in furtherance of his personal relationship instead of supervising both plants equally.[95]

57. Additionally, there was no "*qualified person*" who could have conducted an EIA in the Respondent's employ. Alan's expertise is limited to the workings of biodiesel factories instead of evaluating environmental impacts. Further, his request for the services of a "*consulting firm*" in order to have a "*locally qualified person*" with the necessary expertise conduct the EIA[96] also implies that none of the Respondent's employees had the expertise to conduct an EIA. An external vendor would not be necessary if they had the qualifications to conduct one or had conducted one before.

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[93] Record, [33].
[94] Record, [47].
[95] Record, [26].
[96] Record, [33].

58. Even if Alan is a "*qualified person*" by virtue of his experience in the industry, there is no mention of similar experience with regard to the in-house experts such as Jakey Jake who actually conducted the Reports. Moreover, due to Alan's aforementioned "*lackadaisical attitude*" and the allegation that he has been signing off on reports without "*proper scrutiny*",[97] it is unlikely that he had any significant input in the Reports despite his supervisory role. Therefore, the Respondent did not appoint a "*qualified person*" who could conduct an EIA and the Reports are not EIAs.

(3) The Claimant is not estopped from claiming a breach of Art 4 of the PK-BIT

59. Finally, the Claimant is not estopped from claiming a breach of Art 4 of the PK-BIT as the requirements of a clear and unambiguous representation, as well as detrimental reliance are not fulfilled. PM Akbar's statements to PM Gan do not constitute a representation that an EIA was unnecessary. Vague statements that PM Akbar would not "*rush the timeline of submitting the necessary papers to the relevant Ministry*" stated before the PK-BIT was even drafted cannot constitute a representation regarding an obligation to submit an EIA which had not even manifested yet.

60. The Claimant's silence for the next few years cannot by itself constitute a representation either, and PM Akbar's statements are unable to provide the necessary context because they were not explicitly regarding the specific obligation to submit an EIA. This is especially so given that even after PM Akbar's statements, the PK-BIT was still drafted

[97] Record, [47].

such that the onus lied on the Respondent to submit an EIA, which is an explicit affirmation of the Respondent's continuing obligation to submit an EIA.

61. Further, there is no detrimental reliance on the part of the Respondent as the Respondent is not discernibly worse off as a result of their failure to submit an EIA.[98] The current claim cannot be considered detrimental reliance either as the loss and hence detriment has not yet been crystallised.

B. The Respondent has breached Art 5 of the PK-BIT

62. Article 5(1)(a) and Art 5(1)(d) of the PK-BIT mandate that an investor "*shall not discharge, or cause to enter into any river or inland water*", any "*poisonous ... matter*", or "*oil of any nature*" (collectively, the "**Discharge**"). Article 5(3) of the PK-BIT raises a presumption that where such Discharge occurs, the owner of the property from which it originates shall be presumed to have caused it to enter the river, unless the contrary is proved. Therefore, the Claimants need only establish that the contamination originated from the Respondent's facility. The cumulative strength of the circumstantial evidence allows a clear inference beyond any reasonable doubt that there was a Discharge.

63. First, there was a leak in the Respondent's tanks caused by broken pressure relief valves regulating the accumulation of pressure and hazardous fumes in said tanks.[99] The accumulation of pressure in the biodiesel tanks, especially as the Respondent's operations were still ongoing,[100] would have rapidly caused a leak in the tank. Further, the pressure

[98] *Case concerning the Barcelona Traction, Light and Power Co Ltd (New Application, 1962), Belgium v Spain* (Preliminary Objections) [1964] ICJ Rep 6, 24 July 1964 at [36].
[99] Record, [39].
[100] Record, [34].

relief valves were likely broken at the beginning of and not after the flood since they were compromised "*due to the impact*" of the floodwaters,[101] thus causing the Discharge to leak into inland waters during the flood.

64. The likelihood of the Discharge caused by a malfunction such as the broken valves is further emphasised by the similar incident in the Karheis factory previously. There, a warning of a leak in the Respondent's tanks containing refined palm oil went unheeded without any detailed investigation,[102] soon after which nearby farmers were hospitalised due to suspected contamination.[103]

65. Not only is this similar to the current incident, with the only common factor being the involvement of the Respondent's factory, but after Alan was informed, he travelled to Karheis and returned a month later,[104] despite his established preference of remaining in the Appam facility due to his personal entanglements.[105] This, coupled with indications of a cover up, [106] reveals a worrying pattern regarding the Claimant's tanks and operating systems which reinforces the idea of a leak occurring.

66. In the present case, it is likely that the contamination was caused by a Discharge originating from the Respondent's factory, since the Respondent was the only factory in operation during the flood, [107] all patients hospitalised lived near the Respondent's factory, and, of these patients, a third were the Respondent's own employees.[108] Hence,

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[101] Record, [39].
[102] Record, [28]-[29].
[103] Record, [30].
[104] Record, [32].
[105] Record, [26].
[106] Record, [30]-[31].
[107] Record, [34]
[108] Record, [36].

the source of the contamination was in close proximity with the Respondent's employees, and indeed very likely the Respondent's factory itself.

67. Furthermore, the contaminants which could have caused the infections were described as "*corrosive chemicals*"[109] or "*toxic chemicals*",[110] including "*traces of biodiesel*".[111] Since the Respondent's factory is a biodiesel factory, and there were "*hazardous fumes*" accumulating in the tank, the contaminants complained of is likely the Discharge. The "*traces of biodiesel*", as a product derived from palm oil and a type of "*toxic chemical*", fits both the descriptions in Art 5(1)(a) and Art 5(1)(d) of the PK-BIT of "*poisonous ... matter*" as well as "*oil of any nature*" which comprise the Discharge.

68. While neighbouring factories were seen wheeling machinery in and out of their premises after the flood had subsided,[112] this does not mean they were also damaged or a source of the contaminants and is ultimately immaterial in introducing doubt to the Claimant's case. It is unclear whether these neighbouring factories are biodiesel factories which could have been the source of the "*traces of biodiesel*".[113] Even if the other factories were an additional source of the contaminants, this does not negate the Respondent's Discharge, nor absolve the Respondent from liability under Art 5 of the PK-BIT.

[109] Record, [36].
[110] Record, [40].
[111] Clarification, 13.
[112] Clarification, 10.
[113] Additional Clarification, 3.

IV. CONSEQUENTLY, THE CLAIMANT IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES

69. The Claimant is entitled to both an award of declaration and damages, because neither of them alone is sufficient to provide full reparation for the loss suffered by the Claimant.

70. While an award of declaration *and* damages is less common, tribunals are empowered to do so. For example, Art 34 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Act ("**ARSIWA**") states that tribunals should aim to order "*full reparation*" for injury caused, in the form of "*restitution, compensation, and satisfaction, either* <u>*singly or in combination*</u>". [114] ARSIWA is applicable to the current dispute as they "*restate customary international law and [that] its rules on reparation have served as guidance to many tribunals in investor-State disputes*".[115]

71. As such, the tribunal should award both declaratory relief and damages, because:
    (a) The requirements for declaratory relief have been met; and
    (b) Damages for the environmental damage caused to the Claimant's land is necessary, as a separate injury from the one covered under declaratory relief.

[114] *Responsibility of States for Internationally Wrongful Acts (2001)*, Article 34.
[115] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ("**Quiborax v Bolivia**") ICSID Case No. ARB/06/2, Award (16 September 2015)* at [555].

A. The Claimant is entitled to declaratory relief as the requirements have been met

72. The two requirements for declaratory relief are first, that there is a real and existing conflict which puts the legal positions of at least one of the parties at risk, and secondly, that the declaration serves a practical purpose.[116]

73. The first requirement is fulfilled, as there exists a real and existing conflict regarding the Claimant's culpability in the injuries suffered by its citizens. Tribunals define "*real and existing*" conflict to mean that the claimant must have an "*actual*" or "*minimum*" interest in obtaining declaratory relief. For example, a 2011 ICC Award noted that *"arbitral tribunals ... rarely dismiss a claim for declaratory relief for lack of sufficient interest*." [117] However, a party seeking a "*a mere declaration*" usually must "*justify an actual interest*" and "*establish that it has a specific and determined benefit from such declaration, and not a theoretical interest only.*"[118]

74. The second requirement is also fulfilled as a declaration would serve a practical purpose of clarifying that the Respondent's breach of its obligations in the PK-BIT, and not the Claimant, was what caused the respiratory tract infections. This would resolve the current political instability faced by the Claimant instead of merely restating the award itself which was the case in *Europe Cement v. Turkey*, where the tribunal declined to make a

[116] Stefan Leimgruber, *Declaratory Relief in International Commercial Arbitration* (Kluwer Online).
[117] ICC Award (unreported) by a three-member arbitral tribunal seated in Zurich (November 2009); see also ICC Final Award, Case No. 12502 in Yearbook Commercial Arbitration, 2009, p. 130.
[118] ICC Award (unreported) by a three-member arbitral tribunal seated in Zurich (November 2009); see also ICC Final Award, Case No. 12502 in Yearbook Commercial Arbitration, 2009, p. 130.

specific declaration of the claimant's wrongdoing since the award would in any event "*provide … a form of 'satisfaction' to Turkey*".[119]

75. Since liability under Art 5 is established by simply determining that a leak originated from the Respondent's facility (unlike the declaration, which shows that the leak *caused* the injuries to neighbouring citizens), the declaration provides relief beyond the ordinary fact-finding process. Additionally, even if the reasoning in the award included a finding of causation of the injuries, it would not provide similar "*satisfaction*" as AIAC proceedings are confidential unless agreed otherwise[120] and the contents of the PK-BIT have been confidential thus far.[121]

B. The Claimant is also entitled to damages for environmental harm

76. The Discharge caused a loss in the form of an adverse impact on both the environment and human health which can be compensated by damages.

(1) There was loss in the form of environmental harm

77. The Claimant suffered loss in the form of both pure environmental damage and consequential environmental damage due to the Respondent's breaches of Art 4 and 5. Pure environmental damage refers to material damage to environmental resources such as the contamination of the Claimant's River. Consequential environmental damage

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[119] *Europe Cement Investment & Trade S.A. v. Republic of Turkey* ("***Europe Cement v. Turkey***"), ICSID Case No. ARB(AF)/07/2, Award (13 August 2009) at [181].
[120] AIAC Rules, Rule 21.
[121] Record, [20]; Clarification, 5.

concerns the resultant damage to people or property such as the adverse impact on human health as evident from the respiratory tract infections of the Claimant's citizens.[122]

78. The Claimant is entitled to more than nominal damages due to the extent of the damages, which can be determined with reference to the magnitude of environmental harm required to trigger liability under international law. This is determined by whether the damage has a "*serious consequence*"[123] or is "*significant*". "*Significance*", as understood in the commentaries of the 2006 Draft Principles on the Allocation of Loss of Transboundary Harm, refers to something more than "*detectable*" but not necessarily "*serious*" or "*substantial*". It must lead to a "*real detrimental effect on ... human health ... environment*" and be measurable by "*factual and objective standards*".[124]

79. These standards are fulfilled in this case with regard to both pure and consequential environmental damage. Pure environmental damage includes damage to ecology and biodiversity,[125] which naturally follows from the contamination of the rivers and is "*detrimental*" to the environment. Consequential environmental damage is also made out as the Discharge did have a detrimental defect on human health in the form of the respiratory tract injuries, which is no doubt a "*serious consequence*". The harm done is also measurable by reference to the high number of victims afflicted and hospitalised at more than 129 and 39 respectively.[126]

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[122] Philippe Sands, Jaqueline Peel, Principles of International Environmental Law, Cambridge University Press (2018), Chapter 16 Liability for Environmental Damage at p 749; *Certain Activities Carried Out by Nicaragua in the Border Area* ("*Costa Rica v. Nicaragua*"), Compensation, Judgment, I.C.J. Reports 2018, p. 15 at [41].
[123] *Trail Smelter Case (United States of America, Canada)* ("***Trail Smelter Case***") Ad Hoc Arbitration, Award (11 March 1941) at pp. 254-255.
[124] ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, *Yearbook of the International Law Commission*, UN GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10 (2001), Art 2 at [4].
[125] Governing Council, UN Compensation Commission, Decision 7 UN Doc. S/23765, Annex (1992) at [35]; UNCC, Penal Report F4/5 (2005) at [353] – [366]; UNCC, Penal Report F4/5(2005) at [442]–[456].
[126] Record, [36].

80. Claiming for consequential environmental damage in the form of the risk caused to and general adverse impact on human health is distinct from claiming for the personal injuries to the victims.[127] The relevance of human health to environmental damage is evident from the definition of environmental damage in treaties such as the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety in the context of the Convention on Biological Diversity ("**CBD**") which includes "*risks to human health*" and accounts for "*adverse [impacts] on human health*". This standard is applicable in the present case, as the Preamble of the PK-BIT covenants to uphold the principles of the CBD. Art 5(1)(a) of the PK-BIT also mentions that investors shall not discharge polluting matter which is "*detrimental or injurious to public health, safety or welfare*", further emphasising that the consequences of environmental harm to public health can indicate environmental damage.

(2) The breach of Art 4 and Art 5 of the PK-BIT caused the environmental harm

81. The Respondent's breaches of Art 4 and Art 5 of the PK-BIT caused the environmental damage as both factual and legal causation are made out. Factual causation requires the damage to have been actually caused by the act or breach in question, while legal causation is made out if the damage is sufficiently closely linked to the breach.[128] Factual causation is determined using the but-for test, which establishes factual causation if the consequence would not have occurred but-for the conduct or breach in question.[129]

[127] Governing Council, UN Compensation Commission, Decision 7 UN Doc. S/23765, Annex (1992) at [35].
[128] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, ("**ARSWIWA Commentaries**") *Yearbook of the International Law Commission,* UN GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10 (2001), Art 31 at [10]; *Elliott Associates L.P. v. Republic of Korea,* ("***Elliott v. Korea***") PCA Case No. 2018-51, Award (20 June 2023) at [815].
[129] *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, ("***Mason Capital v Korea***") PCA Case No. 2018-55, Final Award (11 April 2024) at [807].

82. Applying the but-for test, factual causation is made out as the environmental harm illustrated above would not have happened but-for the Respondent's breaches. The Respondent's failure to conduct EIAs, even when recommended that they do so after the Karheis incident, contributed to the malfunctions that likely resulted in the Discharge. The pure environmental damage in the form of the contamination to the river would not have occurred but-for the Discharge, as the only source of the contaminants in the river as explained at [63] – [67].

83. The consequential environmental damage in the form of an adverse impact on health also would not have occurred but-for the Discharge, as the injuries were caused by "*exposure to corrosive chemicals*" which may have been the hazardous fumes released from the broken valve or the biodiesel found in the water.[130]

84. Even if the Respondent was not the only source of the discharge and either (or both) of the other two neighbouring factories discharged contamination which resulted in environmental damage as well, factual causation is still made out. Since it is assumed that the Respondent did breach Art 4, Art 5(1)(a) and Art 5(1)(d) of the PK-BIT for the purposes of the Tribunal's consideration of this issue, and Art 5(1)(a) in particular mentions that the forbidden discharge would be "*detrimental or injurious to public health, safety or welfare… or to other beneficial uses of such river*", it is by extension established that the assumed discharge would have caused environmental damage in this vein.

[130] Record, [36].

85. Therefore, the Respondent is still one of the concurrent factual causes of environmental damage. In such cases involving concurrent or cumulative causation, the existence of another contributing cause, such as the factories, does not exclude the factual causality of another,[131] unless they break the chain of causation, which is not the case here as discussed below at [88].

86. Legal causation on the part of the Respondent is also made out, as the environmental damage was not too remote nor unforeseeable. Legal causation determines whether the conduct in question should be recognised as a cause for legal purposes and turns on whether the damage caused was too remote or unforeseeable such that the chain of causation was broken.[132]

87. Presently, the environmental damage was foreseeable. Any discharge of contaminants such as hazardous fumes or biodiesel, given the Respondent's large scale of production, would undoubtedly result in significant pollution and detrimentally affect human health as recognised in Art 5(1)(a) of the PK-BIT, which mentions the inherent negative effects of certain contaminants on "*human health*".

88. There is no intervening event which breaks this chain of causation.[133] An intervening event only releases the Respondent from liability if it either caused a specific, severable part of the damage or makes the original wrongful conduct too remote.[134] Even if the other two factories contributed to the environmental damage, any contamination

[131] ARSWIWA Commentaries, Art 31 at [12].
[132] ARSWIWA Commentaries, Art 31 at 10; *Mason Capital v Korea* at [807].
[133] *Mason Capital v Korea* at [807].
[134] *Ioan Micula, Viorel Micula and others v. Romania (I),* ("***Micula v Romania***") ICSID Case No. ARB/05/20, final award (11 December 2013) at [948].

attributed to them is not distinguishable or severable from the Respondent's own discharge. The only distinguishable element of the contaminants was in fact biodiesel, which merely cements the Respondent's contribution to the injury, and there was no further evidence of any chemical traces distinctive of either of the other two factories.

89. Natural events such as the flood can be an intervening event that makes the original conduct too remote if it was unforeseeable, as held in *Nichols v Marsland*.[135] There, a freak rainfall was held to be an Act of God which was not reasonably foreseeable and thus broke the chain of causation when defendant's pool overflowed and subsequently flooded claimant's land despite safeguards.

90. However, in the present case, the flood was foreseeable as there were similar occurrences and warning signs leading up to the flood itself. The Claimant experiences monsoons twice a year, including during the month in which the flood occurred.[136] The Claimant had also been experiencing harsher rainfall and flooding which had previously caused environmental damage.[137] There were even warnings before the flood in the form of "*heavy rainfall that lasted for several days*", which other neighbouring factories took as a sign to "*immediately shut down*" and order an "*emergency evacuation*".[138] This demonstrates that the possibility of such a flood was foreseeable, despite the Claimant's senior Federal Counsel's statement that the rain was an act of God.

91. Additionally, unlike *Nichols v Marsland*, the Respondent's failure to submit an EIA in breach of Art 4 of the PK-BIT demonstrates a lack of adequate safeguards, despite the

[135] *Nichols v Marsland* (1876) 2 Ex D 1.
[136] Record, [2] and [35].
[137] Record, [11].
[138] Record, [34].

fact that events such as the Karheis incident should have prompted them to conduct a thorough investigation of their systems as suggested by Jakey Jake. Therefore, their failure to do so means that the damages were caused solely by the Respondent's failures and not influenced by the flood.

V. CONCLUSION

92. In summary, the present proceedings are not precluded on the basis of either non-compliance with the Pre-Arbitration Steps or parallel proceedings. The Respondent has breached Art 4 and Art 5 of the PK-BIT and accordingly, the Claimant is entitled to an award of declaration and damages.