THE 19TH LAWASIA INTERNATIONAL MOOT

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE

FEDERAL TERRITORY OF KUALA LUMPUR

FEDERATION OF MALAYSIA

2024

BETWEEN

THE FEDERTAION OF PALMENNA

(CLAIMANT)

AND

CANSTONE FLY LIMITED

(RESPONDENT)

MEMORIAL FOR CLAIMANT

TEAM MY2402

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INDEX OF AUTHORITIES

Cases

Treaty

ACRONYMS

Activists	Activists led by Kelvin Malhotra
AIAC	Asian International Arbitration Centre
AIAC Rules	AIAC Arbitration Rules 2023
Canstone	Canstone Fly Limited
CBD	Convention on Biological Diversity
CEO	Chief Executive Officer
Disaster	The events stated in paragraphs 34 to 36 of the Moot Problem 2024
EIA	Environmental Impact Assessment
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Kenweed	Independent State of Kenweed
KLT	KLT Company Limited
Mehstone	Mehstone Star Limited
MTI	Ministry of Trade and Investment, Palmena
NAFTA	North American Free Trade Agreement
PK-BIT	Bilateral Investment Treaty between The Federation of Palmenna and The Independent State of Kenweed
SZN	SZN Company Limited
Toxic Chemicals	Poisonous, noxious, or polluting matters, including residues and other contaminants separated from biodiesel, irritant gases, and other corrosive chemicals

UNFCCC	United Nation Framework Convention on Climate Change
WTO agreements	The Marrakesh Agreement Establishing the World Trade Organization and its Covered Agreements
VCLT	Vienna Convention on the Law of Treaties 1969

STATEMENT OF JURISDICTION

1. The Palmenna-Kenweed BIT (PK-BIT), agreed upon between the Federation of Palmenna (Claimant) and the Independent State of Kenweed (Kenweed) on 3 October 2021, stipulates that any dispute arising out of or relating to this PK-BIT shall first be attempted to be settled between the Parties through negotiation amicably and in good faith.

2. If the dispute is not resolved via negotiation, then it shall be referred to mediation.

3. If the dispute is not resolved through mediation within ninety days, then it shall proceed to arbitration administered by the AIAC in accordance with the AIAC Rules 2023.

4. The PK-BIT stipulates that the obligations stated therein shall be enforceable by all investors of the Parties against the investors of the Parties, or between the Parties themselves as against one another.

5. The Respondent, which is incorporated in the Claimant State successfully secured two biodiesel plants in its cities of Appam and Karheis.

6. On 6 March 2024, the Claimant initiated arbitral proceedings under Article 12 of the PK-BIT against the Respondent, alleging that the Respondent's actions or omissions have breached the PK-BIT. The Claimant paid the required deposits and fees under the AIAC Rules.

7. The Respondent challenges the validity of the arbitration, contending that legal proceedings of a similar nature were already commenced against SZN, implying that the arbitration proceedings should be precluded. The Respondent also argues that the Claimant did not exhaust the pre-arbitration negotiation and mediation steps outlined in paragraphs 1 and 2 above.

8. The Respondent alleges that the arbitration is an attempt to invalidate the High Court of Palmenna's ruling against the Claimant.

QUESTIONS PRESENTED

I. Whether the pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Claimant.

II. Whether the Claimant is precluded from initiating an arbitration against the Respondent.

III. Whether the Respondent had breached its obligations under the PK-BIT.

IV. If the answer to issue III is in the affirmative, whether the Claimant is entitled to an award of declaration and damages.

STATEMENT OF FACTS

1. The Claimant, a former British colony, saw the incorporation of Canstone (the Respondent) on 26 October 2021. Mehstone and SZN held 70% and 30% of the shares, respectively.

2. To explore alternative revenue sources both domestically and internationally, the Claimant established its Mineral Technology Institute (MTI).

3. On 16 May 2021, Mehstone was founded for the purpose of processing palm oil into biofuel; MTI and KLT owned 60% and 40% of its shares, respectively.

4. Akbar became the Prime Minister of the Claimant on 3 June 2021. Sharma was appointed by Kenweed to explore collaborative opportunities with the Federation, including the possibility of Mehstone establishing a subsidiary in Appam for biofuel production.

5. The Claimant and Kenweed signed the PK-BIT on 3 October 2021.

6. SZN's nominees oversee the daily operations at the Respondent, while Sharma sets the general policies.

7. In-house experts ensure machinery is in optimal condition and plants comply with industrial standards. An additional layer of protection was added with the hiring of Alan, a foreign expert from the Republic of Sokiyasu, who reviews the work of the in-house experts and conducts safety operation investigations.

8. Every four months (April, August, and December), two in-house experts stationed in the Respondent’s plants in Appam and Karheis conduct assessments of environmental risks under Alan's supervision.

9. An anonymous note in mid-February 2023 expressed concerns about a possible leak in a refined palm oil tank in Karheis, noting that the palm oil had been processed through transesterification, removing excess alcohol, catalyst residues, and other impurities to create biodiesel.

10. Upon receiving the alert from in-house expert Jakey, Alan promptly arrived two days later to inspect the machinery and equipment, reviewing the December 2022 report to validate his findings. Alan determined there was no evidence of a leak and declined Jakey's request for a detailed investigation of the Karheis's plant.

11. Two weeks later, media outlets reported that nearby farmers had been hospitalized due to suspected contamination. Investigations were launched in response to the reports, but the results remained undisclosed.

12. Jakey shared his concerns with Lee, the senior manager at the Appam's plant, and Alan in Appam, but no action ensued. Alan assured the staff that the situation was under control before traveling to Karheis.

13. On 6 September 2023, Alan advised the Board of Directors and senior management of the Respondent to employ a local professional with expertise in environmental science, ecology, and engineering to fortify the company's environmental defence.

14. Heavy rainfall in early November 2023 caused water levels to surge in rivers and streams across the Claimant State. News reports on 23 November warned of flooding risks in rural Karheis. Alan travelled there to oversee the monitoring and control systems of the storage tanks. Neighbouring factories at the Appam's plant closed operations for three days as a precautionary measure and initiated emergency evacuations.

15. On 26 November 2023, the intense rainfall led to street flooding and inundated low-lying areas in Appam. Although the floodwaters in Appam receded relatively quickly the next day, those surrounding the Respondent's plant took over a day to subside completely.

16. After the floodwaters subsided, residents near the Respondent's plant were hospitalized with respiratory issues. Doctors diagnosed these injuries as likely resulting from inhaling irritant gases or being exposed to corrosive chemicals that had dispersed through inland waters or rivers. Over 129 people were affected, with

39 individuals, including 13 employees of the Respondent, needing hospitalization due to breathing difficulties.

17. The Respondent's subsequent investigation found that the pressure relief valves on the storage tanks had been damaged, possibly due to the impact of floodwaters. Dr Ragu, the Respondent's internal physician, confirmed the presence of various toxic chemicals, including biodiesel traces, in samples. He hypothesized that the flood might have transported additional toxic substances, contributing to the health crisis.

SUMMARY OF PLEADINGS

I

1. The pre-arbitration steps stipulated have been fully complied with prior to the Claimant commencing arbitration proceedings.

2. Due to the Respondent's stance that there was no point in communicating with the Claimant, it is considered to have waived its rights to the pre-arbitration steps.

3. Under the terms of PK-BIT, mediation is not a mandatory requirement.

II

1. The Claimant is not precluded from initiating an arbitration against the Respondent.

2. The Respondent and SZN are independent legal entities. The present dispute is between the Claimant and the Respondent; it does not involve the environmental activists who have been protesting against SZN separately.

3. In effect, the Respondent functions as an instrument of Kenweed, carrying out its directives.

III

1. The Respondent had breached its obligations under the PK-BIT.

2. The Respondent failed to comply with the EIA requirements under the PK-BIT.

3. The onus is on it to demonstrate that it did not discharge or cause toxic chemicals to enter any river.

IV

1. The Claimant is entitled to receive a declaratory judgment as well as damages.

2. In addition to the provisions of the PK-BIT, the Respondent remains liable under the domestic law applicable to the Claimant.

PLEADINGS

PREAMBLE

1. The PK-BIT is a bilateral investment treaty concluded between the Claimant State and Kenweed governed by international law under the VCLT. Both states are parties to the VCLT.[1]

2. The PK-BIT stipulates that the seat of arbitration shall be Kuala Lumpur, Malaysia.[2] Additionally, the agreement stipulates that the arbitration proceedings shall be conducted in the English language.[3]

3. Under the PK-BIT, each Party undertakes to implement its laws, regulations, judicial decisions, policies, procedures, and administrative rulings of general application in a fair, reasonable, just, and transparent manner.[4]

4. The obligations outlined in the PK-BIT shall be enforceable by investors of the Parties against other investors, or between the Parties themselves.[5]

5. The Parties agree to "accord covered investment treatment in accordance with customary international law."[6]

6. The Claimant is a former British colony.[7] It maintains a historical and contemporary connection to the Commonwealth.

7. The provisions of the VCLT shall apply in dealing with the application and interpretation of the BIT rules. This Convention provides rules, procedures, and guidelines for how treaties are interpreted. Under the VCLT, the rules of customary international law will continue to govern questions not regulated by its provisions.[8]

[1] Paragraph 4, Correction and Clarifications of the Moot Problem.
[2] Article 12(1)(c)(iv), PK-BIT.
[3] Article 12(1)(c)(v), PK-BIT.
[4] Article 2(2), PK-BIT.
[5] Article 1(3), PK-BIT.
[6] Article 10, PK-BIT.
[7] Paragraph 9, Moot Court Problem.
[8] Articles 31 and 32, VCTL.

I. THE PRE-ARBITRATION STEPS HAVE BEEN COMPLIED BEFORE THE COMMENCEMENT OF THE ARBITRATION

The Claimant has compiled with the pre-arbitration steps as provided by the PK-BIT. Given the Respondent's position that further communication was futile, it is deemed to have relinquished its entitlement to the pre-arbitration procedures.

Factum:

1. The CEO of KLT is Sharma, and the owner of SZN is Nathan.[9] It was determined that the nominees appointed by SZN within the Respondent were responsible for managing its day-to-day operations, whereas Sharma was the decision-maker for its overarching policies.[10]

2. On 1 March 2024, Abar, the Prime Minister of the Claimant State, convened a conference call involving Sharma, Alan, and Nathan to find a solution to the dispute.[11]

3. The parties abruptly concluded the call in frustration leaving the matter unsolved. Before leaving the call, Sharma addressed Akbar, saying, "I can't believe you are being so unreasonable… it seems like there's no point in talking to you anymore."[12]

Arguments:

The pre-arbitration steps stipulated in the PK-BIT have been fully complied with prior to the Claimant commencing arbitration proceedings: i) Due to the Respondent's stance that there was no point in communicating with the Claimant, it is considered to have waived its rights to the pre-arbitration steps; and ii) Mediation is not a mandatory requirement.

1. The Claimant, in good faith, attempted to resolve the dispute amicably with the Respondent. However, it was the Respondent's representative who resorted to abusive language during the conference, thereby making it impossible for the

[9] Paragraph 9, Moot Problem 2024.
[10] Paragraph 22, Moot Problem 2004.
[11] Paragraph 49, Moot Problem 2024.
[12] Paragraph 51, Moot Problem 2024.

Claimant, acting reasonably, to achieve an amicable and good-faith settlement of the dispute in accordance with Article 12(1) of the PK-BIT. The Respondent frustrated the mediation process by saying "there is no point in talking" to the Claimant's representative anymore. Its behaviour rendered it impossible for the parties to discuss agreeing to mediation, including the appointment of a mediator, the costs associated with mediation, and the procedural aspects. As a result, the mediation provision in the PK-BIT has been waived. The pre-arbitration steps have become a futile exercise, thus allowing the Claimant to move directly to arbitration.

2. The absence of specific mediation procedures under the PK-BIT and the breakdown in negotiations rendered mediation unfeasible. If mediation is mandatory, the PK-BIT should clearly state that it is required and outline the procedures for initiating the mediation process. Unfortunately, the PK-BIT is nebulous regarding whether or not mediation is mandatory. Whether or not mediation is mandatory depends on the intention of the Parties *inter alia*:
   2.1 Whether or not there are express words specifically stating that mediation is mandatory.
   2.2 Whether or not the procedures of mediation have not been spelled out.
   2.3 Have the mediation costs and the parties responsible for bearing them been specified?
   2.4 What are the consequences for not complying with the mediation provision?

   In reality, mediation works best when all parties voluntarily participate. If one party is uncooperative, the likelihood of a successful mediation is in doubt. If mediation is mandatory, the Respondent should seek enforcement of the clause through the courts. However, the Respondent's failure to do so should be deemed a waiver of its right to mediation, thereby allowing the dispute to proceed to arbitration.

The mediation was rendered impossible due to the Respondent's uncooperative behaviour coupled with the lack of established terms and procedures. Therefore, the Arbitral Tribunal can decide if the conditions for mediation were waived or not met.

II. THE CLAIMANT IS NOT PRECLUDED FROM INITIATING AN ARBITRATION AGAINST THE RESPONDENT

The Claimant is not precluded from initiating an arbitration against the Respondent. The Respondent and SZN are independent legal entities.

Factum:

1. On 5 December 2023, activists initiated legal actions against the Claimant and SZN for negligence, alleging that the Respondent did not provide adequate drainage and ventilation systems, which led to the disaster.[13]

2. The Respondent was incorporated on 26 October 2021, with 70% and 30% of its shares held by Mehstone and SZN, respectively. Mehstone, in turn, is 60% owned by MTI and 40% by KLT.[14]

4. MTI is a department of the Kenweed State.[15]

5. The CEO of KLT is Sharma, and the owner of SZN is Nathan.[16] It was determined that the nominees appointed by SZN within the Respondent were responsible for managing its day-to-day operations, whereas Sharma was the decision-maker for its overarching policies.[17]

6. On 14 February 2024, the High Court of Palmenna ruled that the Claimant and SZN are jointly liable for negligence due to their failure to provide adequate drainage and ventilation systems, and ordered compensation to be paid to the victims of the incident.[18]

7. The Respondent alleged that the arbitration is being used as a tool to circumvent the High Court of Palmenna's ruling against the Claimant.[19]

[13] Paragraph 41, Moot Problem 2024.
[14] Paragraphs 10 and 21, Moot Problem 2024.
[15] Paragraph 5, Moot Problem 2024.
[16] Paragraph 9, Moot Problem 2024.
[17] Paragraph 22, Moot Problem 2004.
[18] Paragraph 45, Moot Problem 2004.
[19] Paragraph 57, Moot Problem 2004,

Arguments:

The Claimant is not precluded from initiating an arbitration against the Respondent. The Respondent and SZN are independent legal entities. The present dispute in reality is between the Claimant State and Kenweed State, which are Parties to the PK-BIT.[20] This dispute does not involve the environmental activists who have been protesting against SZN separately.

Mehstone, which holds 70% of the Respondent's shares, is controlled by MTI, its majority shareholder with 60% of Mehstone's shares. Sharma, acting as the CEO of KLT, and Nathan, who owns SZN, serve as the directing minds of the Respondent. However, ultimate control lies with MTI, which exerts its influence as the controlling shareholder of Mehstone, itself a major shareholder in the Respondent. Since MTI, a department of Kenweed State, is the ultimate controlling entity, Kenweed State effectively operates the Respondent from behind the scenes. SZN is merely company owned by Nathan, a private individual.

SZN is an independent legal entity, distinct from the Respondent. The Respondent, as a separate and independent legal entity incorporated in the Claimant's jurisdiction, has not been a party to any legal action initiated by the activists. Consequently, the ruling of the High Court of Palmenna has no direct bearing on the Respondent's legal standing or liabilities. It is pertinent to note that SZN's role as a minority shareholder in the Respondent does not automatically equate to shared liability in the aforementioned court decision.

The legal principle of a company as an independent legal entity is pivotal for facilitating cross-border transactions, the establishment of subsidiaries, and the execution of contracts in foreign jurisdictions. This principle allows companies to leverage opportunities in new markets, capitalizing on favourable business climates. It also supports the formation of joint ventures between investors from different signatory states of the PK-BIT, enabling them to pool resources and mitigate risks collaboratively. In the context of this case, the MTI, in effect Kenweed State, through

[20] In *Barcelona Traction* [1970] ICJ Rep 3, the International Court of Justice held that "the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable under certain circumstances or for certain purposes…. the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."

its majority shareholding in Mehstone, entered into a joint venture with SZN, culminating in the incorporation of the Respondent.

1. In *Salomon v A Salomon and Co Ltd*,[21] Lord Halsbury LC said,

> "Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon, who is often referred to as Salomon."

At common law, when a company is duly incorporated, it becomes an independent legal person with its own rights and liabilities distinct from those of its promoters or shareholders. The motives of those who were instrumental in the company's formation are immaterial when determining the entity's legal rights and responsibilities.[22]

2. It is universally established under common law and international commercial law that a company possesses an independent legal identity. This principle is echoed in the provisions of the PK-BIT, which commits the Parties to accord covered investments treatment in line with customary international law.

2.1. Under the PK-BIT, the Parties agree to "accord covered investment treatment in accordance with customary international law."[23]

2.2. Drawing upon the landmark *Barcelona Traction* case,[24] the International Court of Justice underscored that a Canadian company was a separate legal entity from its shareholders, with a distinct legal personality. In this case, the Court held:

> "Each legal system consequently laid down the rules governing the structure and working of commercial companies within the national territory, but always with the end in view of endowing them with the character of autonomous legal personae distinct from the personae of their shareholders."[25]

[21] [1897] AC 22.
[22] Ibid.
[23] Article 10, PK-BIT.
[24] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*), International Court of Justice, 5 February 1970 <https://www.icj-cij.org/case/50/judgments>.
[25] Ibid, p. 55.

3. Under the PK-BIT, the Parties have agreed to reinforce their mutual rights and obligations as outlined in the WTO agreements.[26] Though the WTO agreements do not contain explicit provisions recognizing the company as an independent legal entity, they acknowledge the significance of private sector engagement in international trade and the role of companies as key players in the global economy.

   The General Agreement on Trade in Services highlights the role of companies in delivering services across borders, recognizing that services can be provided by any entity, including companies, and that these entities are entitled to establish and function in foreign markets.[27]

   Although there is no specific clause acknowledging companies as independent legal entities, the WTO agreements implicitly recognize the critical role of private sector participation in international trade, providing a framework that facilitates the operation and competition of companies in global markets.

Interpreting the PK-BIT through the lens of the doctrine that recognizes companies as independent legal entities, as enshrined in customary international law and reflected in the spirit of the WTO agreements, it follows that legal proceedings instituted against SZN, an independent entity, by a third party, such as the activists, should bear no relevance to this arbitration. Furthermore, this arbitration cannot annul the judgment of the High Court of Palmenna against the Claimant, as the court's ruling does not address the liability of the Respondent.

[26] Preamble.
[27] Article XVI(2)(e), General Agreement on Trade in Services, WTO.

III. THE RESPONDENT HAD BREACHED ITS OBLIGATIONS UNDER THE PK-BIT

The Respondent has breached its duties under the PK-BIT. It has an environmental obligation not to discharge or cause to enter into any river any poisonous, noxious, or polluting matter harmful to public health.

Factum:

1. In mid-February 2023, an unsigned note detailed a potential leak in one of the tanks used for storing refined palm oil that had undergone transesterification at the Karheis's plant. After this process, excess alcohol, catalyst residues, and other contaminants are removed from the biodiesel.[28]

2. The Respondent's in-house expert, Jakey, promptly called Alan, requesting an urgent inspection of the machinery and equipment at the facility. Alan arrived two days later and reviewed the December 2022 report to confirm his findings, signing off on it. He concluded there was no evidence of a leak and denied Jakey's request for a thorough investigation into the Karheis's plant.[29]

3. Two weeks later, following reports of nearby farmers being hospitalized due to suspected contamination, investigations were carried out, but the results were not disclosed. A confidential source informed Jakey that an undisclosed amount of compensation was paid to the victims in exchange for withdrawing their reports.[30]

4. Jakey shared his suspicions with Lee and Alan in Appam, but they took no action. Alan reassured the employees that everything was under control. He travelled to Karheis and remained there for a month before returning to Appam.[31]

5. On 6 September 2023, Alan advised the Board of Directors and senior management of the company, including Luke Nathan and Tara Sharma, suggesting the need for a locally qualified individual with expertise in

[28] Paragraph 28, Moot Problem 2024.
[29] Paragraph 29, Moot Problem 2024.
[30] Paragraph 30, Moot Problem 2024.
[31] Paragraph 31, Moot Problem.

environmental science, ecology, engineering, and related fields to ensure the company's facilities were properly insulated against environmental risks.[32]

6. Since early November 2023, the area experienced heavy rainfall lasting several days, causing river and stream water levels to rise. On 23 November 2023, news reports warned of a flooding risk in rural parts of Karheis. Alan travelled to Karheis to oversee the monitoring and control systems of the storage tanks. Automated systems track inventory levels, monitor temperature and pressure, and detect abnormalities or leaks. Nearby factories in Appam immediately ceased operations for three days and initiated emergency evacuations.[33]

7. Lee attempted to contact Alan to confirm whether the company should resume operations. Without success, he ordered operations to continue as usual, allowing employees to work for bonuses.[34]

8. The situation deteriorated in Appam. On 26 November 2023, heavy rainfall led to water accumulation on streets and low-lying areas. With a high percentage of impermeable surfaces, the risk of flash flooding increased. That day, Appam faced its worst flash flood, which receded relatively quickly the next day. However, the areas around the Respondent's plant took over a day for floodwaters to fully subside.[35]

9. Soon after the disaster abated, nearby residents were admitted to the hospital with respiratory injuries. Doctors determined that the injuries could have been caused by inhaling irritant gases or being exposed to corrosive chemicals traveling through inland waters or rivers. Over 129 people were affected, with 39 individuals, including 13 company employees, hospitalized. These patients displayed similar symptoms and struggled to breathe.[36]

10. The Respondent launched an independent investigation into its facilities, revealing that the pressure relief valves on its storage tanks had been compromised, possibly due to the impact of floodwaters. Its internal doctor

[32] Paragraph 33, Moot Problem.
[33] Paragraph 34, Moot Problem.
[34] Paragraph 34, Moot Problem.
[35] Paragraph 35, Moot Problem.
[36] Paragraph 36, Moot Problem.

reported that it was inconclusive whether the infections were caused by the malfunctioning relief valve, noting that the flood could have carried other toxic substances. According to the medical report, samples showed the presence of various toxic chemicals, including traces of biodiesel.[37]

11. After the High Court of Palmenna's decision on 14 February 2024, new evidence surfaced. Jakey signed a statutory declaration alleging that the Respondent had bribed to cover up cases relating to oil spills, and he formed the opinion that Alan was grossly incompetent.[38]

Arguments:

The Respondent had breached its obligations under the PK-BIT: i) The Respondent has failed to hire qualified persons and to follow the required procedures in EIA under the PK-BIT; ii) The Respondent had breached its obligations under the PK-BIT through the failure of its agents to take proper measures to prevent the discharge of the biodiesel; and iii) The onus is on it to demonstrate that it did not discharge or cause toxic chemicals to enter any river.

1. The PK-BIT requires the Respondent to appoint a qualified person to conduct an EIA and to submit a report thereof to the relevant ministry of the Claimant State in carrying out any activity which may have a significant environmental impact therein.
    1.1 The foreign expert, Alan, appointed by the Respondent, has 13 years of experience overseeing biodiesel plants located around Southeast Asia and is regarded by Sharma for his loyalty and trustworthiness. However, there is no evidence that he is qualified to conduct environmental impact assessments. Jakey, an in-house expert for the Respondent, has signed a statutory declaration stating that Alan was grossly incompetent.
    1.2 The Respondent merely conducted a brief environmental assessment note and a report on the condition of the machinery and equipment.

[37] Paragraph 13, Correction and Clarifications to Moot Problem.
[38] Paragraph 47, Moot Problem 2024.

1.3 There is no evidence to suggest that the Respondent has submitted any environmental impact assessment report to the relevant ministry of the Claimant State.

1.4 An in-house expert of the Respondent, Jackey, was in the opinion that Alan, the foreign expert of the Respondent, was grossly incompetence, and signed a statutory declaration that the Respondent made bribes to cover up cases relating to oil spills.

2. The Respondent violates Article 5 of the PK-BIT, which stipulates that no investor shall discharge, or cause to be discharged, any poisonous, noxious, or polluting substance that could harm or contribute to harming public health, safety, welfare, or animal or plant life, or impair the beneficial uses of waterways. It was fully conscious of the risk that the toxic chemicals it stores could jeopardize its neighbourhoods if they are not properly stored.

2.1 In mid-February 2023, an unsigned memo detailed a potential leak in one of the tanks used for transesterification at the Karheis's plant. Alan, the foreign expert, determined that there was no evidence of a leak and disregarded the in-house expert's plea for a thorough investigation of the Karheis's plant.

2.2 Alan failed to appreciate the severity of the situation, arriving two days after being notified by Jake, the in-house expert at the Karheis's plant. This demonstrated the Respondent's failure to promptly implement critical safety measures at its facilities in Karheis and Appam, which should have similar protocols, machinery, and safety practices.

2.3 Before the flooding incident, the Respondent looked into suspected contamination leading to the hospitalization of local farmers near its Karheis's plant. However, the findings of this investigation were not disclosed by the Respondent.

2.4 The Respondent should have been aware of the issues with the pressure relief valves prior to the flooding. Had it not known, it would have refuted liability to the affected farmers and revealed the investigation's outcomes.

2.5 Lee, the senior manager of the Appam's plant, should not have resumed its operation without receiving confirmation from Alan.

2.6 The Respondent's internal doctor noted that the flood could have potentially spread various toxic chemicals. This suggested that the flood might have carried toxic chemicals from the Respondent's plant. Although the doctor stated that it was uncertain whether the infection was caused by the broken relief valves, the possibility of the toxic chemicals originating from the Respondent's plant was not excluded. According to the internal doctor's medical report, the toxic chemicals contained traces of biodiesel.

2.7 Of the 39 individuals hospitalized for respiratory tract injuries near the Respondent's plant, 13 were its employees. The disproportionately high number of affected employees suggested that the toxic chemicals originated from the Respondent's plant.

2.8 The Respondent did not take preventative action to suspend operations at Appam, unlike other neighbouring factories. The experience at Karheis on 23 November 2023, should have served as a warning for the Respondent, giving it three days until 26 November 2023, to implement appropriate measures.

3. Article 5 of the PK-BIT stipulates that no investor shall discharge, or cause to be discharged, any poisonous, noxious, or polluting substance that could harm or contribute to harming public health, safety, welfare, or animal or plant life, or impair the beneficial uses of waterways.

3.1 Under Article 5(3) of the PK-BIT, the owner or occupier of the property from which a discharge originates is presumed to have caused the discharge, unless proven otherwise.

3.2 The Supreme Court of Palmenna sided with activists who argued that the Respondent lacked the capacity to handle substantial volumes of liquids, particularly during heavy rains and flooding.[39]

3.3 An independent investigation post-flooding revealed that the pressure relief valves on the Respondent's storage tanks were compromised, likely due to the floodwaters' impact.

3.4 The aforementioned incidents give rise to a rebuttable presumption that the Respondent discharged or caused toxic chemicals to enter the rivers.

[39] Paragraph 41, Moot Problem 2004.

Under Article 5(1)(3) of the PK-BIT, the Respondent bears the burden of proving that it did not discharge or cause toxic chemicals to enter the river. The Respondent has not provided evidence to counter this rebuttable presumption, thus breaching its obligations under the PK-BIT.

IV. IF THE RESPONDENT HAD BREACHED ITS OBLIGATIONS UNDER THE PK-BIT, THE CLAIMANT IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES

The facts are summarized in the preceding Part III. The Claimant is entitled to receive a declaratory judgment as well as damages. In addition to the provisions of the PK-BIT, the Respondent remains liable under the domestic law applicable to the Claimant. Although the PK-BIT does not explicitly provide for declaratory relief or damages for breaches of its obligations, as a legal principle, terms necessary and essential for the effective operation of the agreement can be implied.

Article 31 of the VCLT stipulates that an international treaty, e.g. the PK-BIT, must consider "any relevant rules of international law applicable in the relations between the parties." Article 32 of the VCLT further states that "[r]ecourse may be had to supplementary means of interpretation, including the preparation work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (b) leads to a result which is manifestly absurd or unreasonable." Consequently, it can be inferred that the Arbitral Tribunal has the authority to issue a declaration and award damages to avoid a manifestly absurd or unreasonable result.

Article 35(1) of the AIAC Arbitration Rules indicates that "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate." Hence, despite the lack of explicit compensation provisions in the PK-BIT, the Claimant is entitled to seek its legal rights under customary international law and domestic law.

Given that the Claimant is formerly under British colonial administration, precedents from common law countries would be of assistance. The applicable law is that of the jurisdiction where the cause of action arose. The Respondent's liability is established under both international customary law and common law.

1. Under the precautionary principle, when there are reasonable grounds for concern about potential harm to the environment, the burden of proof rests with those proposing the activity or policy. This entails demonstrating that the proposed activity is unlikely to cause significant environmental harm before it proceeds. Incorporated into environmental laws and regulations, the precautionary principle guides decision-making concerning pollution control, biodiversity conservation, and natural resource management. Its aim is to foster sustainable development and prevent irreversible environmental damage through proactive measures designed to avert potential harm.
    1.1. This principle is supported by the International Court of Justice in the Pulp *Mills case* (*Argentina v Uruguay*).[40] The Court held that:
        > "[D]ue diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."[41]
    1.2. Earlier, the Court had invoked this principle in *The Gabcikovo-Nagymaros Project case* (*Hungary v Slovakia*).[42]
    1.3. There is no evidence that the Respondent has undertaken a comprehensive environmental impact assessment. Instead, they merely conducted a brief environmental assessment note and produced a report on the status of the machinery and equipment every four months.

2. In the absence of any provision to the contrary within the PK-BIT, the Arbitral Tribunal holds jurisdiction to apply the domestic law of the Claimant.

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[40] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), International Court of Justice, 20 April 2010 <https://www.icj-cij.org/case/135>.
[41] Paragraph 204, ibid.
[42] *Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) International Court of Justice, 25 September 1997 <https://www.icj-cij.org/case/92>.

2.1. In environmental counterclaims, i.e. legal claims made by defendants in response to allegations related to environmental issues, an academic writer has suggested that "when investment arbitral tribunals adjudicate … counterclaims, they essentially act as an alternative to domestic courts."[43] In *Methanex Corporation v United States of America*,[44] the tribunal held it had the power to apply the domestic law of the respondent state, i.e. State of California, in order to interpret and apply the provisions of the NAFTA agreement.

2.2. In *Burlington v Ecuador*,[45] the International Centre for Settlement of Investment Disputes held that:

"As regards the substance of the dispute, it is undisputed that Ecuadorian law applies to both the environmental and the infrastructure counterclaims. This being so, there is no common ground between the Parties with respect to the applicability to the environmental counterclaims … the relevance of international law."

These precedents demonstrate the international tribunals' readiness to engage substantively with national environmental law and remediation obligations. Consequently, the Arbitral Tribunal possesses the discretionary authority to apply either domestic or international legal frameworks, contingent upon the nature of the case before it.

3. The Respondent owes a duty of care. It should have foreseen that nearby occupiers and employees could be affected by its acts or omissions in failing to maintain its facilities properly. In *Donoghue v Stevenson*,[46] Lord Atkin said:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have

[43] Xuan Shao, "Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law", *Journal of International Economic Law*, 2021, 24, 157 – 179.
[44] *Methanex Corporation v United States of America*, UNCITRAL Arbitration Tribunal, August 2005 <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>
[45] *Burlington Resources v Republic of Ecuador*, ICSID Case No. ARB/08/5, 7 February 2017, https://www.italaw.com/sites/default/files/case-documents/italaw8206.pdf, para. 72.
[46] [1932] AC 562.

them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

3.1 The Respondent was in breach of its duty of care. The standard of care required is that of a reasonable person. In *Latimer v AEC Ltd*,[47] the court would look into the magnitude of the foreseeable risk. In *Paris v Stepney Borough Council*, [48] the known characteristics of the victims are considered relevant factors in determining the standard of care.

3.2 Unsolicited notes were given, warning in detail about a potential leak at the Karheis's plant. The request for a detailed investigation by the in-house expert at the Karheis's plant was ignored. What occurred at Karheis should have served as an early warning sign for the Appa's plant, considering they share the same procedures, machinery, and safety protocols.

3.3 The flooding incident at the Karheis's plant in November 2023 should have served as the ultimate warning signal. Upon this occurrence, other neighbouring factories at the Appam's plant promptly elected to cease operations. There is no justifiable rationale for the Respondent not to have responded similarly.

3.4 An independent inquiry commissioned by the Respondent disclosed that the integrity of the pressure relief valves on its storage tanks had been compromised.

4. Under the doctrine of *res ipsa loquitur*, the damages to public health would not have happened had it not been the negligence of the Respondent. In *Scott v London & Catherine Dock Co*,[49] This doctrine applies where "the thing is show to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the manage use proper care."

The Appam's plant is under the control and management of the Respondent. Among the 39 people hospitalized due to respiratory tract injuries, 13 were employees of the Respondent showing similar symptoms. Consequently, the burden of proof lies on the Respondent to demonstrate that it was not negligent.

[47] [1953] AC 643.
[48] [1951] AC 367.
[49] 3 H&C 596, 1865.

5. The test for remoteness of damage hinges on whether the outcome was reasonably foreseeable. If the Respondent could foresee the type of damage, e.g. respiratory tract injuries, they are liable for it, even if they did not specifically anticipate the exact outcome or the full extent of the damage. In *Hughes v Lord Advocate,*[50] It was determined that the foreseeability of the type of damage, rather than the precise extent of the actual damage, is the applicable standard, as setting the bar any higher would be considered overly stringent. The evidence indicates that both the in-house and foreign experts were acutely aware of the potential repercussions stemming from a leakage.

6. A public nuisance is an act or omission to discharge a legal duty which endangers the lives, safety, health, or comfort of the public, or some section of it. In *Cunard v Antifyre,*[51] the defendant owned a block of flats. He let the flats to tenants but retained possession of the roof. When a piece of guttering from the roof fell through the skylight of a kitchen and injured the wife of a subtenant, the defendant was found liable. This was based on the principle that, by being in control of the roof, he had a duty of care to prevent it from posing a danger to those who could foreseeably be affected. Accordingly, the Respondent, having control over its Appam's plant, should recognize that it bears a duty of care to ensure its plant does not become a source of danger to its neighbourhoods.

7. In *Rylands v Fletcher,*[52] Blackburn J. said," The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in his peril.. and …. is *prima facie* answerable for all the damage which is the natural consequence of its escape." The accumulation of 'toxic chemicals' within the Respondent's plant represents an unnatural condition. Consequently, the Respondent is accountable for the leakage that led to inhalation of irritant gases and exposure to corrosive chemicals, which dispersed through inland waters and rivers.

[50] [1963] AC 837.
[51] [1933] 1 KB 551.
[52] (1868) LR 3 HL 330.

The Respondent has neglected its duty of care by failing to implement reasonable preventive measures to avert respiratory tract injuries among its neighbours and employees. By allowing 'toxic chemicals' to pose a danger to those whom it could reasonably foresee would be impacted, the Respondent had breached its legal obligations. Consequently, the Claimant is entitled to a declaration and compensation for damages that have resulted as the direct and foreseeable consequence of the Respondent's actions or omissions.

PRAYER FOR RELIEF

The Claimant respectfully requests the Arbitral Tribunal to determine that:

I. The pre-arbitrations steps have been complied before arbitration proceedings are commenced by the Claimant.

II. The Claimant is not precluded from initiating an arbitration against the Respondent.

III. The Respondent had breached its obligations under the PK-BIT.

IV. The Claimant is entitled to an award of declaration and damages.