

**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 RESPONDENT

TEAM MY2402

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Cases

Barcelona Traction case International Court of Justice, 5 February 1970

Henderson v Henderson (1843) 3 Hare 100, 67 ER 313

Salomon v A Salomon and Co Ltd [1897] AC 22

Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd [2013] UKSC 46

Treaty

Vienna Convention on the Law of Treaties 1969

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 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 Claimant has never attempted to settle the dispute through negotiation. From the very beginning, its Prime Minister, Akbar, sought to address the political challenges by convening a conference between himself and the stakeholders of the Respondent.
2. The Claimant did not follow the pre-arbitration steps, such as calling for mediation, which should have been pursued when the dispute could not be resolved amicably and in good faith through negotiation.

II

1. The Claimant is barred from initiating arbitration against the Respondent due to its lack of *locus standi*. Under the PK-BIT, the agreement can only be enforceable against an investor of the Parties by another investor of the Parties, whereas the Claimant is a Party itself and not an investor.
2. The Respondent is an independent legal entity and, as an investor incorporated in the Claimant's jurisdiction, it is not a signatory Party to the PK-BIT.
3. The Claimant cannot pre-empt the appeals process within its jurisdiction by resorting to arbitration. The Claimant's High Court has ruled that it acted negligently in enforcing environmental laws and taking adequate measures against the imminent threat of flooding.

III

1. The Respondent did not breach its obligations under the PK-BIT.
2. The Respondent took all necessary measures to prevent polluting matter from leaking from its plants.

3. Notwithstanding the Claimant's failure to implement appropriate legal measures ensuring PK-BIT compliance by all relevant entities within its jurisdiction, the Respondent maintained a rigorous EIA system.

IV

1. The Claimant is not entitled to an award of declaration or damages, as such provisions are not stipulated in the PK-BIT. There are no exceptional circumstances that would justify the introduction of implied terms into the PK-BIT to address the Claimant's failure to enact appropriate legal mechanisms for enforcing the agreement within its jurisdiction.
2. From the outset, the Respondent has taken all necessary measures to ensure that no environmental harm was done.
3. There is no evidence to support that the Respondent breached any legal obligations.

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 NOT BEEN COMPLIED BEFORE THE COMMENCEMENT OF THE ARBITRATION

The Claimant has never attempted to settle the dispute through negotiation. From the outset, its Prime Minister, Akbar, sought to address the political challenges by convening a conference between himself and the stakeholders of the Respondent. However, it did not follow the pre-arbitration steps, such as calling for mediation, which should have been pursued when the dispute could not be resolved amicably and in good faith through negotiation.

Factum:

1. The former Prime Minister, Elsie, of the Claimant State attacked its present Prime Minister, Abar, for the disaster arising from the flood on 26 November 2023.⁹
2. On 1 March 2024, Prime Minister Abar of the Claimant convened a conference call involving Tara Sharma, Alan, and Luke Nathan to find a solution to the dispute.¹⁰
3. Akbar emphasized the urgency of find a solution to the ongoing challenges plaguing the political landscape of the Claimant.¹¹
4. The parties abruptly concluded the call in frustration leaving the matter unsolved. Before leaving the call, Sharma told Akbar, “I can’t believe you are so unreasonable... seems like there is no point in talking to you anymore”.¹²

Arguments:

Prime Minister Akbar of the Claimant State convened a conference call aimed at finding a solution to the political controversy surrounding the disaster. The Respondent, being merely an investor corporation from Kenweed State, should not become entangled in the politics of another country.

⁹ Paragraph 36, Moot Problem 2024.

¹⁰ Paragraph 49, Moot Problem 2024.

¹¹ Paragraphs 50, Moot Problem 2024.

¹² Paragraph 51, Moot Problem 2024.

1. The Respondent has never attempted to settle the dispute with the Claimant amicably and in good faith. It attempted to involve the Respondent in finding a solution to its political problems, which was deemed unreasonable. Therefore, the Respondent must assert its stance in no uncertain terms and express its frustration by stating that “there is no point in talking anymore”. Accordingly, following the Respondent's refusal of the Claimant's request, the Claimant ought to proceed to mediation.
2. The absence of specific mediation procedures under the PK-BIT and the breakdown in negotiations do not make mediation impossible. It is the Claimant which referred the dispute to arbitration. Therefore, it has the responsibility to call for mediation before going to arbitration in accordance with Article 12(1)(b) of the PK-BIT in ensuring all the pre-arbitration steps are complied with. Otherwise, it makes the mediation provision of the agreement a mockery. The absence of such a call should be considered as the failure of the Claimant to comply with the pre-arbitration steps.

The arbitral proceedings against the Respondent would not have been initiated had it not been political intervention. It was unusual for the Prime Minister of the Claimant State to engage in negotiations calling for a solution involving the Respondent's stakeholders. The Respondent was caught off guard by Abar's request. Involvement in another nation's politics would not be conducive to the interests of either the Respondent or Kenweed State, as it could be construed as unwarranted intervention in the affairs of a sovereign nation.

II. THE CLAIMANT IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST THE RESPONDENT

The arbitration proceedings initiated by the Claimant should not continue.

Factum:

1. Upon the incorporation of the Respondent into the Claimant on 26 October 2021, Kenweed's Prime Minister, Gan, directed that the terms of the PK-BIT be disclosed and communicated to its shareholders and board of directors.¹³
2. On 15 December 2023, activists initiated legal actions against the Claimant and SNZ for negligence, alleging that the Respondent did not provide adequate drainage and ventilation systems leading to the disaster.¹⁴ On 14 February 2024, the High Court of Palmenna ruled in favour of the activists.¹⁵
3. Thereafter, the Claimant argued that the disaster was “an act of God.... Even if you install a million-dollar worth of drainage and pipelines with the highest quality there is, there is still no guarantee that what happened will not happen.... one certain thing is that the Government is not a fault”.¹⁶
4. On 14 February 2024, the High Court of Palmenna ruled that the Claimant and SNZ were jointly liable for negligence due to their failure to provide adequate drainage and ventilation systems. The court ordered compensation to be paid to the victims of the incident.¹⁷
5. The Respondent alleged that the arbitration is an attempt to nullify the above ruling against the Claimant.¹⁸
6. On 1 March 2024, the Prime Minister of the Claimant convened a conference with the Respondent’s stakeholders calling for a political solution.¹⁹

¹³ Paragraph 5, The Correction and Clarifications to the Moot Problem.

¹⁴ Paragraph 41, Moot Problem 2024.

¹⁵ Paragraph 45, Moot Problem 2024.

¹⁶ Paragraph 43, Moot Problem 2024.

¹⁷ Paragraph 45, Moot Problem 2004.

¹⁸ Paragraph 57, Moot Problem 2004,

¹⁹ Paragraphs 49 and 50, Moot Problem 2024.

Arguments:

The Claimant State is barred from initiating arbitration against the Respondent: i) It lack *locus standi*; ii) The Respondent is an independent legal entity and, as an investor incorporated in the Claimant's jurisdiction, it is not a signatory Party to the PK-BIT; and iii) The Claimant State cannot pre-empt the appeals process within its jurisdiction by resorting to arbitration.

1. It is submitted that the Claimant State lacks *locus standi* to initiate arbitral proceedings against the Respondent. Under Article 1(3) of the PK-BIT, the obligations stated therein are enforceable by investors of the Parties against other investors of the Parties, **or** between the Parties themselves. The Claimant State is a Party to the PK-BIT, whereas the Respondent is an investor of a Party to the PK-BIT.

- 1.1. The Respondent, a legal entity incorporated in the jurisdiction of the Claimant, is independent from its shareholders or any Party to the PK-BIT. The principle of corporate separateness facilitates cross-border transactions and contract formation in foreign jurisdictions. In *Salomon v A Salomon and Co Ltd*,²⁰ 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.”

- 1.2 Under the PK-BIT, the Parties have agreed to accord covered investments treatment in line with customary international law. In the *Barcelona Traction* case,²¹ the International Court of Justice determined that a Canadian company possessed a distinct legal personality separate from its shareholders. International law acknowledges principles generally accepted by domestic legal systems. In this instance, the Court elucidated:

“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

²⁰ [1897] AC 22.

²¹ *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>>.

them with the character of autonomous legal personae distinct from the personae of their shareholders.”²²

The Respondent, being an investor incorporated in the Claimant State's jurisdiction, necessitates that the PK-BIT be interpreted in light of the principle of corporate separateness. Consequently, the Claimant State, as a Party under the PK-BIT, can only enforce the agreement against another Party State and not against an investor of any Party.

2. The Claimant State has not implemented any legal instruments covered by the PK-BIT in accordance with its Article 2. Had the PK-BIT been implemented as part of its domestic law, its terms should have been transparent.

The Respondent is incorporated under the law of the Claimant State. The PK-BIT is an agreement made between the Claimant State and Kenweed State. The Respondent is not a Party to this agreement. Accordingly, the PK-BIT cannot be enforced against investors of either the Claimant or Kenweed, who are third parties to this agreement. The PK-BIT is an agreement between two sovereign States and cannot be enforceable against an individual or any legal entity that is not a Party to it.

3. Moreover, the Claimant State is appealing its High Court's ruling that found both the Claimant and SZN liable for negligence and subject to compensation. The High Court has ruled that the Claimant and SZN acted negligently in enforcing environmental laws and taking adequate measures against the imminent threat of flooding. Should the High Court's decision stand, it will set a binding precedent for the Claimant. *Res judicata*, the doctrine that a matter already judged cannot be litigated again, should apply, signifying the definitive resolution regarding the Claimant's liability. This principle is recognized by both international tribunals and domestic courts, ensuring that the same issue is not litigated twice.²³

²² Ibid, p. 55.

²³ F. Montero, L. Ruiz, and Perez-Llorca, *Res judicata and issue preclusion in international arbitration: an ICC case study* <<https://www.perezllorca.com/wp-content/uploads/es/actualidadPublicaciones/ArticuloJuridico/Documents/160712-cahiers-res-judicata-and-issue-preclusion-in-international-arbitration-fmm-lrm.pdf>>

- 3.1. In *Henderson v Henderson*,²⁴ The English Court of Chancery has ruled that a party cannot raise any claim in later litigation that they should have properly brought up in an earlier case. Consequently, the Claimant should be precluded from commencing arbitral proceedings until after the appeals court has issued its ruling.
- 3.2. In *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd*,²⁵ the British Supreme Court held that *res judicata* encompasses several legal principles, including: (i) estoppel by preventing the re-litigation of the same cause of action;²⁶ and (ii) protection against the general procedural abuse of legal process.²⁷

If the Claimant considered the Respondent as liable, it should have joined the Respondent in the activists' lawsuit. To the contrary, the Claimant has explicitly stated that the disaster was an act of God, thereby absolving the Respondent of liability as it was an unforeseeable and uncontrollable event. Thus, the Claimant should not be permitted to continue with this arbitration.

III. THE RESPONDENT HAD NEVER BREACHED ITS OBLIGATIONS UNDER THE PK-BIT

The Respondent did not breach its obligations under the PK-BIT.

Factum:

1. The Respondent employed two in-house experts, located in their respective plants, to conduct a brief environmental assessment and a report on the condition of the machinery and equipment (Report). The assessments were conducted every four months (April, August, and December) and presented to all stakeholders to ensure transparent and informed decision-making.²⁸ The Report was crucial for the biofuel plants in evaluating the potential environmental risks associated with their operations and mitigating those risks.²⁹

²⁴ (1843) 3 Hare 100, 67 ER 313

²⁵ [2013] UKSC 46 <<https://www.supremecourt.uk/cases/docs/uksc-2010-0013-judgment.pdf>>

²⁶ Paragraph 17, *Ibid.*

²⁷ *Ibid.*, pages 10-18.

²⁸ Paragraph 25, Moot Problem 2024.

²⁹ *Ibid.*

2. A foreign expert was hired from the Republic of Sokiyasu as a second layer of protection, empowered to confirm and validate the findings of the in-house experts and to conduct investigations into plant procedures, machinery, and safety operations.³⁰ Alan Beck, with 13 years of experience overseeing biodiesel plants, was tasked with this job.³¹
3. Under Article 4 of the BIT, the Respondent must submit the Report to the relevant ministry of the Claimant, specifically the Ministry of Natural Resources and Environmental Sustainability.
4. In mid-February 2023, an anonymous note detailed a potential leak in one of the tanks used to store refined palm oil that had undergone transesterification at the Karheis's plant. It is only after this process that excess alcohol, catalyst residues, and other contaminants are removed from the biodiesel.³²
5. The Respondent's in-house expert, Jakey, immediately called Alan to request an urgent examination of the machinery and equipment at the facility. Alan arrived two days later and reviewed the December 2022 Report, confirming his findings with his signature. He concluded that there was no sign of a leak and rejected Jakey's request for a detailed investigation into the Karheis's plant.³³ Alan took personal responsibility and updated the relevant stakeholders on this anonymous note.³⁴
6. Since early November 2023, the Claimant State has experienced heavy rainfall lasting several days, causing water levels in rivers and streams to rise. Neighbouring factories in Appam immediately shut down their operations for the next three days and had emergency evacuations.³⁵
7. The situation worsened in Appam. On November 26, 2023, the high rainfall intensity caused water to accumulate on streets and in low-lying areas. Due to the high percentage of impervious surfaces, the risk of flash flooding increased.

³⁰ Ibid.

³¹ Paragraph 24, Moot Problem 2024.

³² Paragraph 28, Moot Problem 2024.

³³ Paragraph 29, Moot Problem 2024.

³⁴ Paragraph 29, Moot Problem 2024.

³⁵ Paragraph 34, Moot Problem 2024.

On that day, Appam experienced its worst flash flood, which, however, receded relatively quickly the next day. However, the areas surrounding the Respondent's plant took more than a day for the floodwaters to fully subside.³⁶

8. Shortly after the disaster subsided, nearby residents were admitted to the hospital due to respiratory tract injuries. Doctors found that the injuries could have been caused by inhalation of irritant gases or exposure to corrosive chemicals traveling through inland waters or rivers. More than 129 people were affected, and 39 individuals, including 13 employees of the Respondent, were hospitalized. These patients exhibited similar symptoms and had difficulty breathing.³⁷
9. The Respondent initiated 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 the floodwaters. The Respondent's internal doctor, Dr Ragu, stated that it was inconclusive whether the infection was caused by the broken relief valve.³⁸ According to his medical report, various toxic chemicals could be present throughout the area.³⁹
10. The Claimant admitted that the disaster was "an act of God.... Even if you install a million-dollar worth of drainage and pipelines with the highest quality there is, there is still no guarantee that what happened will not happen.... one certain thing is that the Government is not a fault".⁴⁰
11. SZN argued that due to the ongoing monsoon season, which lasts from November to February, a comprehensive investigation into the disaster could not be carried out until the weather conditions improved.⁴¹
12. The High Court of Palmenna ruled that the Claimant and SZN jointly liable for the disaster.⁴² The allegations by the Plaintiff include that the Claimant was

³⁶ Paragraph 35, Moot Problem 2024.

³⁷ Paragraph 36, Moot Problem 2024.

³⁸ Paragraphs 39 and 40, Moot Problem 2024.

³⁹ Paragraph 13, Correction and Clarifications to Moot Problem.

⁴⁰ Paragraph 43, Moot Problem 2024.

⁴¹ Paragraphs 2 and 42, Moot Problem 2024.

⁴² Paragraph 45, Moot Problem 2024.

lackadaisical in enforcing environmental laws and taking preventive measures against the impending flood.⁴³

13. After the High Court of Palmenna ruled on 14 February 2024, the Claimant produced a statutory declaration from Jackey, an in-house expert at the Respondent's Karheis plant. In the declaration, Jackey stated that, based on hearsay information from colleagues at the Appam's plant, Alan was grossly incompetent.⁴⁴
14. Allegations surfaced suggesting that Jackey had accepted bribes from Alan to maintain his silence regarding the unethical practices.⁴⁵ However, Fey, another in-house expert for the Respondent at the Appam plant, attested that Alan was hardworking and took initiative to ensure the plant's safety and proper operation.⁴⁶

Arguments:

The Respondent has consistently upheld the obligations under the PK-BIT, particularly its environmental duty to refrain from discharging or causing the entry of any poisonous, noxious, or polluting substances into rivers, which could harm public health: i) The Respondent took all necessary measures to prevent polluting matter from leaking from its plants; and iii) Notwithstanding the Claimant's failure to implement appropriate legal measures ensuring PK-BIT compliance by all relevant entities within its jurisdiction, the Respondent maintained a rigorous EIA system. The Respondent had taken all proper measures to prevent the discharge of biodiesel under the provisions of the PK-BIT.

1. The Respondent has taken all reasonable measures to meet the requirements of the PK-BIT, which does not prescribe the specifics of an EIA report or the qualifications of the person preparing the report:
 - 1.1 In-house experts prepare a brief environmental assessment note and a report on the condition of the machinery and equipment. These reports are conducted every four months (in April, August, and December) and are

⁴³ Paragraph 41, Moot Problem 2024.

⁴⁴ Paragraph 47, Moot Problem 2024.

⁴⁵ Paragraph 48, Moot Problem 2024.

⁴⁶ Paragraph 48, Moot Problem 2024.

shared with all stakeholders to ensure a transparent and informed decision-making process. They identify all potential environmental risks, and the respondent maintains high quality and standards for the biodiesel plants without compromise.

- 1.2 Beyond the efforts of the in-house experts, an independent expert named Alan, with 13 years of experience overseeing biodiesel plants from a third country, was also engaged to review their findings. There was not a shred of evidence to question Alan's competence and integrity. The accusations against the Respondent and Alan are merely rumours and hearsay alleged by Jakey, who may have ulterior motives.
 - 1.3 These procedures exceed the expectations set by the PK-BIT, which lacks specific guidelines regarding the qualifications of the person conducting the EIA.
 - 1.4 Under Article 2(1) of the PK-BIT, the Claimant is obligated to implement its policies, procedures, and administrative rulings in a fair, reasonable, just, and transparent manner. This includes the procedures for vetting the EIA report.
 - 1.5 Reports submitted in accordance with Article 4(1) of the BIT were presented to all stakeholders, ensuring transparency. To date, the Claimant's Ministry of Natural Resources and Environmental Sustainability has not raised any concerns regarding these reports.
 - 1.6 The Respondent took every concern seriously, addressing them with due diligence. In mid-February 2023, there was an anonymous note detailing a potential leak in one of the tanks used for transesterification in Karheis. Alan was serious about the urgency of the issue and arrived within two days after being alerted by Jakey. Notwithstanding this informal allegation, the Respondent decided to address all concerns and made an inquiry. Alan concluded that there was no sign of a leak. He rejected, its in-house expert's request for a detailed investigation into the Karheis's plant because it was unfounded. Alan took personal responsibility by updating the relevant stakeholders on this allegation.
2. The PK-BIT stipulates that “no investors shall discharge, or cause to enter any river any poisonous, noxious, or polluting matter that will render or is likely to

render or contribute to rendering such river or part thereof harmful or detrimental or injurious to public health, safety, or welfare, or to animal or vegetable life or health or to other beneficial uses of such river.”⁴⁷ Article 5(3) of the PK-BIT provides that “[w]henver any such entry or discharge has been made, the owner or occupier of the property from which such entry or discharge originates shall, unless contrary is proved, be presumed to have discharged it or caused it to enter into such river.”⁴⁸

- 2.1 The Claimant asserts that the disaster was an act of God and that, despite installing high-quality drainage and pipelines worth a million dollars, the disaster could still have occurred.⁴⁹
- 2.2 Following the flooding event, the Respondent initiated 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 the floodwaters being an act of God.
- 2.3 There is no evidence to suggest that the entry or discharge was originating from the property of the Respondent. The Respondent’s internal doctor, Dr Ragu, stated that it was inconclusive whether the infection was caused by the broken relief valve. He reported that the flood could have potentially carried out various toxic chemicals throughout the area.
- 2.4 A comprehensive investigation into the disaster could not be carried out until the weather conditions improved, i.e. after February 2024. So far, the Claimant State has not carried out the investigation.

The Respondent had exercised due diligence beyond the expectations of the PK-BIT. All allegations about the Respondent's EIA issues and bribing Jakey were unsubstantiated rumours and hearsay. There is no admissible evidence to support these allegations. According to the Claimant's own statement, the disaster could not have been prevented as it was an act of God. In other words, the Respondent could not have breached the environmental provisions outlined in the PK-BIT.

⁴⁷ Article 5(1)(a), PK-BIT.

⁴⁸ Article 5(3)(a), PK-BIT.

⁴⁹ Paragraph 43, Moot Problem 2024.

Furthermore, there is no *prima facie* evidence suggesting that the toxic materials originated from the Respondent's premises in the absence of an investigation. The arbitral proceedings were initiated by the Claimant in an attempt to cover up its abdication of governmental responsibility: specifically, the Claimant failed to enforce environmental laws, including the implementation of legal instruments under the PK-BIT, and did not take adequate measures against the impending floods.

IV. IF THE RESPONDENT HAD BREACHED ITS OBLIGATIONS UNDER THE PK-BIT, THE CLAIMANT IS NOT ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES

The facts are summarized in the preceding Part III. The Claimant is not entitled to an award of declaration or damages: i) There are no provisions in the PK-BIT dealing with declaration or damages. There are no exceptional circumstances that would justify the introduction of implied terms into the PK-BIT to address the Claimant's failure to enact appropriate legal mechanisms for enforcing the agreement within its jurisdiction; ii) From the outset, the Respondent has taken all necessary measures to ensure that no environmental harm was done; and iii) There is no evidence to support that the Respondent breached any legal obligations. There is no indication that the Respondent's actions are likely to result in harm or contravene any international customary law or common law principle. The Claimant's allegations lack credibility.

1. The PK-BIT lacks provisions regarding declarations or compensation. In the instant case, it would be unfair and unreasonable for the Arbitral Tribunal to extend its jurisdiction to award declaration or damages over the Respondent, who is merely an investor and not a signatory Party to the PK-BIT. This exceeds the reasonable expectations of the Parties when the PK-BIT was established.

The Respondent acknowledged that the Arbitral Tribunal could award compensation and damages over activities covered by the PK-BIT's terms if the Claimant enacted corresponding legal provisions. However, the Claimant abdicated its power and duty to enforce environmental regulations and take necessary preventive measures against potential hazards. Thus, absent

additional legal grounds, the Claimant lacks eligibility for declaration and compensation. *A fortiori* the PK-BIT is not even a document subject to public inspection.⁵⁰

2. In-house experts have prepared a concise environmental assessment and a report on machinery and equipment conditions, aimed at identifying all potential environmental risks. These assessments are performed every four months (April, August, and December) and presented to all stakeholders to ensure transparency and informed decision-making. The Respondent upholds the highest standards for biodiesel plants without compromise.
 - 2.1. Beyond the in-house team, the Respondent has engaged an independent expert with 13 years of experience in supervising biodiesel plants from a third country to review their findings.
 - 2.2. These measures exceed the expectations set by the PK-BIT, which does not outline criteria for qualified personnel or the specifics of an EIA.
 - 2.3. The Respondent has taken all reasonable steps to meet its standards of care. It has treated all information regarding environmental safety with seriousness, as evidenced by its foreign expert's recommendation for an EIA in response to an unsigned note received by Alan in February 2023.
 - 2.4. The foreign expert appointed by the Respondent was meticulous about the quality of the EIA. On 6 September 2023, despite having previously inspected the Karheis plant and concluding that the allegations in the unsigned note were baseless amidst rumours of a cover-up, he proposed engaging an external consulting firm to conduct an independent EIA.⁵¹
3. The arbitral proceedings stem from an incident at the Appam's plant on 26 November 2023. Previously, there were unverified claims of possible leaks at the Karheis plant. The Respondent's foreign expert inspected this site during heavy rainfall on 23 November 2023. Regardless, events at Karheis were unrelated to Appam, where no environmental concerns were raised. The Respondent was fully aware of the risks associated with flooding and had engaged both in-house experts and a foreign expert to oversee its facilities.

⁵⁰ Paragraph 5, The Correction and Clarifications to the Moot Problem.

⁵¹ Paragraph 33, Moot Problems 2024.

- 3.1. The Respondent's own independent investigation disclosed that the pressure relief valves on its storage tanks were compromised, potentially due to the force of the floodwaters. Swift action was taken upon discovering this issue. The Claimant admitted that the mishap is an act of God.
- 3.2. Dr Ragu, the Respondent's in-house doctor, noted that the flood may have transported various toxic substances across the Appam's area. There are other unexplained causes related to environmental factors and operational procedures that need to be explored.
- 3.3. Assessing the Respondent's efforts to mitigate environmental risks was impracticable until the end of the monsoon season, running from November to February. As such, it was premature for the High Court of Palmenna to issue a ruling on 14 February 2024 without considering all pertinent evidence.
- 3.4. All accusations and allegations directed against Alan, the Respondent's foreign expert, alleging a lackadaisical approach to his duties and bribing Alan, were based on rumours and hearsay which are inadmissible in any legal forum, and contradicted, Fey, another in-house expert's opinion.

It would be manifestly unjust, unfair, and inequitable to grant the Claimant an award of declaration and damages against the Respondent. Not only is the Respondent not a party to the PK-BIT, there is no provision in the PK-BIT empowering the Arbitral Tribunal to award declaration and damages. The Respondent has taken all necessary measures to ensure a safe environment. It would also defy any sense of reasonableness given that the Claimant has admitted the disaster was an act of God. Moreover, the Claimant's High Court has ruled that the Claimant was liable for negligence and that it had to pay compensation to the victims.

PRAYER FOR RELIEF

The Respondent respectfully requests the Arbitral Tribunal to determine that:

- I. The pre-arbitration steps have not been complied before arbitration proceedings are commenced by the Claimant.
- II. The Claimant is precluded from initiating an arbitration against the Respondent.
- III. The Respondent had never breached its obligations under the PK-BIT.
- IV. The Claimant is not entitled to an award of declaration and damages.