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19TH LAWASIA INTERNATIONAL MOOT COMPETITION : 2024

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE
KUALA LUMPUR, MALAYSIA

MEMORIAL FOR RESPONDENT

A CASE CONCERNING:

PALMENNA-KENWEED BILATERAL INVESTMENT TREATY

BETWEEN

FEDERATION OF PALMENNA **… CLAIMANT**

AND

CANSTONE FLY LIMITED **…RESPONDENT**

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 7

QUESTIONS PRESENTED 8

STATEMENT OF FACTS 9

SUMMARY OF PLEADINGS 12

PLEADINGS 14

I. THE PRE-ARBITRATION STEPS ARE MANDATORY TO BE COMPLIED BY THE CLAIMANT BEFORE COMMENCING THIS ARBITRATION PROCEEDING. 14

A. PRE-ARBITRATION STEPS ARE CONDITION PRECEDENT TO ARBITRATION. 15

B. THE NON-COMPLIANCE OF THE PRE-ARBITRATION STEPS WILL AFFECT THE JURISDICTION OF THE TRIBUNAL. 17

C. THE PRE-ARBITRATION CLAUSE IS CERTAIN TO BE ENFORCEABLE BY THE PARTIES. 18

ISSUE II: THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING THE ARBITRATION PROCEEDING. 22

A. THE CLAIMANT IS BARRED TO INITIATE THIS ARBITRATION PROCEEDING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL. 22

i. THE PROCEEDINGS WERE INITIATED BY THE SAME PARTIES OF “IN PRIVITY” OF THE CONTRACT. 23

ii. PRESENCE OF IDENTICAL ISSUES IN THE HIGH COURT OF PALMENNA PROCEEDINGS AND THIS ARBITRATION PROCEEDING. 25

iii. WHEREBY THE PARTY FACING ESTOPPEL HAD A FULL AND FAIR OPPORTUNITY TO CONTEST PRIOR DECISION. 26

III. THE RESPONDENT HAD NOT BREACHED THEIR OBLIGATIONS UNDER THE PK-BIT. 26

A. THE RESPONDENT DID NOT BREACH ARTICLE 4 OF THE PK-BIT. 27

i. THE RESPONDENT HAD APPOINTED A QUALIFIED PERSON TO CONDUCT THE EIA. 28

ii. THE RESPONDENT HAD SUBMITTED THE EIA TO THE RELEVANT

MINISTRY. 30

B. THE RESPONDENT DID NOT BREACH ARTICLE 5 OF THE PK-BIT. 31

i. THE RESPONDENT HAD TAKEN DUE DILIGENCE IN THEIR OPERATION. 32

ii. THE CLAIMANT HAD FAILED TO DISCHARGE THE BURDEN OF PROOF. 34

IV. THE CLAIMANT IS NOT ENTITLED TO THE AWARDS OF DECLARATION AND DAMAGES. 37

A. THE PRESENCE OF THE NEIGHBOURING FACTORIES BREAKS THE CAUSATION. 38

B. THE OCCURRENCE OF HEAVY FLASH FLOOD BREAKS THE CAUSATION. 39

PRAYERS FOR RELIEFS 41

INDEX OF AUTHORITIES: TREATIES AND CONVENTIONS

1.	Asian International Arbitration Centre Rules 2023	17, 35
2.	Convention on Biological Diversity	29, 33
3.	IBA Rules on the Taking of Evidence in International Arbitration 2020	35, 37
4.	Paris Agreement	29
5.	United Nations Framework Convention on Climate Change	29, 33-34
6.	Vienna Convention on Law of Treaties 1969	16, 21

INDEX OF AUTHORITIES: JUDICIAL DECISIONS

1.	*Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt*, ICSID Case No. ARB/12/11	25
2.	*Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5	41
3.	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29	36
4.	*Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22	38

5.	*BG Group PLC v Republic of Argentina* 572 US 25 (2014)	18
6.	*Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5	39
7.	*Chevron Corporation and Texaco Petroleum Corporation v Ecuador* (II), PCA Case No. 2009-23	37
8.	*CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8	29
9.	*Compania De Aguas Del Aconquija S.A. v Argentine Republic*, ICSID Case No. ARB/97/3	35
10.	*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgement) [2015] ICJ Rep 665,	28
11.	*Corfu Channel case (UK v Albania)* (Judgement) [1949] ICJ Rep 4	35
12.	*Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1	18-19
13.	*Deutsche Telekom AG v The Republic of India*, PCA Case No. 2014-10	40
14.	*Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41	28
15.	*Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104	20

16.	*Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v Romania*, ICSID Case No. ARB/15/31	30
17.	*ICC Case No. 8790/2000*	40
18.	*Joseph Charles Lamire v Ukraine*, ICSID Case No. ARB/06/18	38
19.	*Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6	24
20.	*Ministry of Oil and Minerals of the Republic of Yemen v Canadian Nexen Petroleum Yemen & Ors*, ICC Case No. 19869/MCP/DDA	35
21.	*Methanex Corporation v United States of America*, UNCITRAL case	35
22.	*Perenco Ecuador Limited v The Republic of Ecuador*, ICSID Case No. ARB/08/6	39
23.	*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7	18
24.	*Prince v Lockhart*, 971 F.2d 118 (8th Cir. 1992)	23
25.	*PT Wilmar Bioenergi Indonesia & Ors v European Commission*, Judgement of the General Court (Fourth Chamber, Extended Composition)	36
26.	*Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgement) [2010] ICJ Rep 14	32-34
27.	*Ronald S. Lauder v Czech Republic,* UNCITRAL case	38

28.	*RSM Production Corporation and others v Grenada*, ICSID Case No. ARB/10/6	24-25
29.	*Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13	28
30.	*Saluka Investment B.V. v The Czech Republic*, UNCITRAL case	29
31.	*Saramaka People v Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights	32
32.	*The Kingdom of Belgium v The Kingdom of the Netherlands*, PCA Case No. 2003-02	30
33.	*The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3	28
34.	*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada*, PCA Case No. 2009-04	31
35.	*Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227	38

<u>INDEX OF AUTHORITIES: JOURNALS</u>

Baohua Wang et al., “Enabling Catalysts for Biodiesel Production via Transesterification,” *Catalysts* 13, no. 4 (April 13, 2023): 740-763.	37

	Jose Magnaye and August Reinisch, “Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration,” *The Law and Practice of International Courts and Tribunals* 15, no. 2 (September 22, 2016): 264–86.	24
3.	Markus Petsche, “The enforceability of mediation clauses: A critical analysis of English case law,” *Journal of Strategic Contracting and Negotiation* 5, no. 1–2 (June 1, 2021): 43–59.	20

STATEMENT OF JURISDICTION

The parties, Federation of Palmenna, the CLAIMANT and Canstone Fly Limited, the RESPONDENT have agreed to the following. First, the law governing the procedure of the arbitration shall be Malaysian law considering the *lex arbitri* is Malaysia. Second, the governing framework for the arbitration should be the Asian International Arbitration Centre (AIAC) Rules 2023.

QUESTIONS PRESENTED

I. Whether the pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Government of Palmenna against Canstone;

II. Whether the Government of Palmenna is precluded from initiating an arbitration against Canstone;

III. Whether Canstone had breached its obligations under the PK-BIT; and

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

STATEMENT OF FACTS

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

→ CLAIMANT is located in Southeast Asia and a Member State of the Commonwealth of Nations. It is known and characterised by diverse landscapes, including coastal plains, mountain ranges and tropical rainforests. This makes the CLAIMANT one of the world's leading producers of palm oil.

→ RESPONDENT is an investor incorporated in the CLAIMANT. It is owned by two shareholders from the Independent State of Kenweed (hereinafter **"Kenweed"**), with Mehstone Ltd owns 70% of Canstone whilst SZN owns 30%. The RESPONDENT secured biodiesel plants in Appam and Karheis.

→ The Palmenna-Kenweed Bilateral Investment Treaty (**"PK-BIT"**) was signed between the CLAIMANT and Kenweed on 3 October 2021 in order to reinforce the longstanding traditional ties of friendship and cooperation between both countries. Following the successful signing of the PK-BIT, the RESPONDENT was incorporated in the CLAIMANT and began its operation in both facilities.

26 October 2021	Canstone secured two biodiesel plants in Appam and Karheis with Fey Lin and Jakey Jake as the in-house experts in both facilities. Alan Becky, a foreign expert from the Republic of Sokiyasu was hired as the second layer of protection. At this stage, a brief environmental assessment note and a report on the condition of the machinery and equipment were conducted.

Mid-February 2023	An unsigned note was received by Karheis facility detailing a potential leak in one of the tanks used to store the refined palm oil. Jakey contacted Alan to request for an urgent examination and Alan arrived two days later. After examining the report prepared in December 2022 to confirm his findings, Alan later signed off a report concluding the report was a hoax. Two weeks following the incident, nearby farmers were hospitalised due to suspected contamination.
Early November 2023	Palmenna experienced heavy rainfall that lasted for several days and water levels in rivers and streams began to rise.
23 November 2023	Flooding risk in the rural parts of the city in Karheis. Upon hearing this, Alan travelled to Karheis to supervise the monitoring and control systems of the storage tanks. In the Appam facility, Lee ordered the operations to resume as normal although the neighbouring factories were shut down for 3 days.
26 November 2023	Appam encountered one of the worst flash floods and after it fully subsided, more than 129 people were affected with respiratory tract injuries while 39 individuals were hospitalised. The causes of such injuries were inhalation of irritant gases or exposure to corrosive chemicals.

	Following the event, Canstone initiated an independent investigation and found that its pressure relief valve was compromised.
15 December 2023	Local activists led by Kevin Malhotra initiated legal actions against the CLAIMANT and SZN on the grounds of negligence.
14 February 2024	The High Court of Palmenna ruled in favour of the activists with the CLAIMANT and SZN were found jointly liable for negligence and ordered for compensation.
1 March 2024	PM Akbar from the CLAIMANT convened a conference call with the higher management of the RESPONDENT but the matter was unresolved and the path forward uncertain.

→ **Initiation of AIAC Proceedings.**

Pursuant to Article 12 of the PK-BIT, the CLAIMANT commenced arbitration proceedings against the RESPONDENT. The CLAIMANT has paid the security deposits and necessary fees under the AIAC Rules 2023. As part of the claim, the CLAIMANT seeks from the Tribunal for declaratory relief and damages. The RESPONDENT contends that legal proceedings of a similar nature were already commenced against SZN in the High Court of Palmenna.

SUMMARY OF PLEADINGS

ISSUE I: THE PRE-ARBITRATION STEPS ARE MANDATORY TO BE COMPLIED BY THE PARTIES BEFORE COMMENCING AN ARBITRATION.

The adherence to the pre-arbitration steps provided under Article 12 of the PK-BIT, including negotiation and mediation, is mandatory and constitutes a condition precedent to arbitration. It is the Respondent contention the binding nature of the BIT can be seen based on the wordings used in PK-BIT and the explicit requirement in Rule 2(1)(b) of the AIAC Rules 2023 that all pre-conditions must be satisfied before arbitration can commenced by the parties.

ISSUE II: THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING THE ARBITRATION PROCEEDING.

The Claimant is precluded from initiating arbitration under the doctrine of Collateral Estoppel due to ongoing litigation in the High Court of Palmenna, where a similar issue of negligence involving SZN and the Government of Palmenna has been addressed. The Respondent contends that all elements of Collateral Estoppel are met, the parties are in privity, the issues are identical, and the parties had a full and fair opportunity to contest the previous decision. Therefore, the Claimant should be precluded from pursuing arbitration on the same grounds.

ISSUE III: THE RESPONDENT HAD NOT BREACHED THEIR OBLIGATIONS UNDER THE PK-BIT.

The Respondent had not breached the Sustainability Obligation under Article 4 of the PK-BIT as the duties to appoint a qualified person and to submit the Environmental Impact Assessment (EIA) had been satisfied. Furthermore, the Environmental Obligation under Article 5 of the PK-BIT was also fulfilled as the Respondent had acted in accordance with the due diligence principle and there was no direct evidence to prove the discharge of biodiesel.

ISSUE IV: THE CLAIMANT IS NOT ENTITLED FOR THE AWARDS OF DECLARATION AND DAMAGES.

The chain of causation between the alleged Respondent's breach of the PK-BIT and the respiratory tract injuries suffered by the citizens of the Claimant was broken due to the presence of intervening event, which is the operations of the neighbouring factories during the flash floods in Appam facility. Due to lack of causal link, the awards of declaration and damages shall not be granted to the Claimant.

<u>**PLEADINGS**</u>

I. THE PRE-ARBITRATION STEPS ARE MANDATORY TO BE COMPLIED BY THE CLAIMANT BEFORE COMMENCING THIS ARBITRATION PROCEEDING.

1. Article 12 of the PK-BIT stipulates the dispute resolution mechanism in the event of a dispute arising out of the PK-BIT between the parties ("**DR Clause**"). The DR Clause portrays there (3) distinct stages that is to be adopted by the parties in the settlement of any dispute arising out of the PK-BIT.

2. It entails three (3) separate dispute resolution mechanism stages whereby, in the spark of a dispute, parties to first initiate a negotiation process with the higher management of the parties, as stipulated in the first limb of the DR Clause. Should the negotiation fail, the second limb is triggered whereby parties to then initiate a mediation process. If the mediation process is not be resolved within ninety (90) days from the commencement of mediation, the dispute will then be referred to arbitration administered by the Asian International Arbitration Centre ("**AIAC**") (collectively referred to as "**Pre-Arbitration Steps**").

3. It is the RESPONDENT's submission that CLAIMANT has failed to comply with the Pre-Arbitration Steps agreed in the Article 12 of the PK-BIT which affects the validity of today's proceeding. The bypass of Article 12(1)(b) of the PK-BIT can be seen in the facts as the CLAIMANT initiated this arbitration proceedings only 5 days after the negotiation has failed between the parties.[1] Therefore, it can be inferred that any forthcoming arguments and submission by

[1] Facts at Page 18 Para 54.

the CLAIMANT is clearly an afterthought argument for the CLAIMANT to escape the liability of not complying with the pre-arbitration steps.

4. The RESPONDENT submits that the pre-arbitration steps are mandatory to be complied with by the CLAIMANT before initiating this arbitration proceedings for two reasons. Firstly, the pre-arbitration steps are condition precedent to commence an arbitration. Secondly, the non-compliance of the Pre-Arbitration Steps will affect the jurisdiction of the tribunal. Lastly, the Pre-Arbitration Clause is certain to be enforceable by the parties.

A. PRE-ARBITRATION STEPS ARE CONDITION PRECEDENT TO ARBITRATION.

5. Pursuant to Article 12 of the PK-BIT, the Pre-Arbitration Steps are stipulated in the agreement with its primary purpose to ensure that the parties have attempted to resolve their disputes through a preliminary platform before engaging in Arbitration. By virtue of the doctrine of Pacta Sunt Servanda, this multi-tiered dispute resolution clause is obligatory in nature and not just mere suggestions or options to be exhausted by the parties.

6. According to Article 26 of the VCLT,[2] it has highlighted the binding effect of an agreement upon the parties to the treaty. It emphasized that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Based on the provision, it is clear that the parties have the obligation to undertake what has been agreed in the treaty between the parties.

[2] Article 26 of the Vienna Convention on Law of Treaties 1969.

7. Nevertheless, this is not happening in our current case as the CLAIMANT has clearly gone against the spirit of arbitration by not complying with the Pre-Arbitration Steps that has been clearly stipulated in Article 12 of the PK-BIT. It can be seen that the CLAIMANT initiated this arbitration proceedings only 5 days after the negotiation had failed between the parties. This is contrary to what has been agreed by the parties to exhaust the Article 12(1)(b) of the PK-BIT ("**Purported Mediation Clause**" or "**PMC**") before initiating this arbitration proceeding..

8. In supporting the RESPONDENT'S contention, the AIAC Rules 2023 which is the governing framework of the arbitration, has clearly mentioned that prior to an arbitration proceeding, the parties must have exhausted all the Pre-Arbitration Steps that have been agreed before the arbitration proceeding can be commenced between the parties. In Rule 2(1)(b) of AIAC Rules 2023[3] states that:

<u>Rule 2- Commencement of Arbitration</u>

1. The Party or Parties commencing arbitration under the AIAC Arbitration Rules shall file a notice of arbitration, as described in Article 3, with the AIAC, accompanied by the following:

b) confirmation that all existing pre-conditions to arbitration have been satisfied;

9. The term "Shall" has been explicitly stated in Rule 2 (1) of AIAC Rules 2023, which undoubtedly expresses the intention of the stipulated clause to impose obligation upon the parties of the treaty.

[3] Rule 2(1)(b) of the AIAC Rules 2023.

10. Even if reference were to be made to all the terms in the PK-BIT, the term "Shall" has been used instead of "May" which clearly indicates the parties commitment to be adhered to by all the terms and conditions under the PK-BIT.

11. This is affirmed in the judgement by the ICSID tribunal in the case of *Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*[4] where the tribunal was of the view that the term and usage of the word "Shall" in a Bilateral Investment Treaty clearly indicates the binding character of each step in sequence before the institution of arbitration by ordinary meaning.

B. THE NON-COMPLIANCE OF THE PRE-ARBITRATION STEPS WILL AFFECT THE JURISDICTION OF THE TRIBUNAL.

12. According to numerous precedents that have been decided by the tribunal and superior courts, the BIT shall be interpreted as a jurisdictional matter[5] and must be abide by all parties involved. The term in the agreement cannot simply be interpreted as something that merely touches on admissibility and discretionary especially in cases where it involved a bilateral investment treaty between countries.[6]

13. Professor Pierre-Marie Dupuy has established in his judgement in the case of *Daimler Financial Services AG v. Argentine Republic* where "(a)ll BIT-based dispute resolution provisions (…) are by their very nature jurisdictional." Furthermore, the tribunal in this case held that "18-month domestic courts

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[4] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award, para 33.

[5] *BG Group PLC v Republic of Argentina* 572 US 25 (2014) at pp 7-9.

[6] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, para 193.

provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere "procedural" or "admissibility-related" matter".[7]

14. In the present case, the parties have not adhered to the mediation clause or the stipulated 90-days cooling off period following the mediation process. The CLAIMANT initiated this arbitration proceeding only 5 days after the negotiation had failed between the parties, thereby failing to observe the mandatory pre-arbitration steps. The non-compliance of the Pre-Arbitration Steps will fundamentally impact the jurisdiction of the Arbitral tribunal.

C. THE PRE-ARBITRATION CLAUSE IS CERTAIN TO BE ENFORCEABLE BY THE PARTIES.

15. Pursuant to Article 12(1)(a) of the PK-BIT pertaining to the negotiation process between the higher management of the parties, it is RESPONDENT submission that the negotiation process has been commenced between the parties in a conference call between M Akbar together with Tara Sharma, Alan Becky and Luke Nathan[8] where both of the parties had presented all the available solutions and proposals but it ended with parties in conflict and failing to resolve the issue.

16. Following this event, the CLAIMANT might justify that their non-compliance with the PMC is due to the PMC being uncertain and unenforceable as it does not stipulate in the clause any information on the governing mediation framework to administer the mediation process between the parties. In spite of that, It is

[7] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, para 193
[8] Facts at Page 17 Para 49.

RESPONDENT's submission that the presence of a waiting period of 90 days after the PMC is exhausted is sufficient to eliminate the uncertainty of the PMC.

17. According an article journal titled "The enforceability of mediation clauses: A critical analysis of English case law",[9] it stated that a negative obligation not to commence arbitration until an expiry date is sufficiently certain because it is clear that such right arises upon the expiry of the relevant term. Hence, uncertainty which arises from indefiniteness is eliminated by the expiry period.

18. This principle has been affirmed by Mr. Justice Teare in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*,[10] where the court is of the opinion that a dispute resolution clause that provides a limited duration even without a proper procedure or framework is enforceable as the limited duration for the clause to be exhausted eliminates uncertainty due to its potential indefiteness of such process.

19. The presence of 90 days period[11] after the mediation clause is exhausted by the parties is sufficient to constitute the PMC to be certain and enforceable as the terms indicate that in order for the arbitration to be commenced by the parties, the 90-days period must be exhausted before the arbitration can be initiated which eliminate the uncertainty of the method of enforcement for the mediation.

20. The RESPONDENT concedes to the fact that the mediation clause is lack of information such as the governing framework of the mediation. However, in

[9] Markus Petsche, "The enforceability of mediation clauses: A critical analysis of English case law," *Journal of Strategic Contracting and Negotiation* 5, no. 1–2 (June 1, 2021): 43–59.
[10] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104, para 64.
[11] Article 12(1)(c) of the PK-BIT, Page 11.

order to decide on the enforceability of the PMC, the parties need to analyse the concept and nature of the mediation process in its entirety. It requires efforts by both parties to initiate and consent to the mediation.

21. The dispute over the ambiguity of the mediation clause can be simply resolved if the claimant had made any inquiry to the RESPONDENT to which mediation framework that this dispute shall be referred to. Even in Article 31 of the VCLT,[12] it has highlighted that the treaty shall be interpreted in good faith by the parties of the treaty which requires the parties to enforce what has been agreed in good faith.

22. Nevertheless, this matter is clearly absent in the mind of the CLAIMANT as they had no intention to follow what has been agreed in Article 12 of the PK-BIT in the first place.

23. To add, if the same literal approach of interpretation of treaty were to be made by the CLAIMANT is applied to the Article 12(1)(a) pertaining to negotiation process, it is our submission that the negotiation process has also not been complied by the parties in current proceeding

24. According to the term in Article 12(1)(a) of the PK-BIT,[13] the negotiation must be conducted by the Higher management of the parties. However, based on the facts, the negotiation was conducted through conference calls involving the MV Akbar

[12] Article 31 of the Vienna Convention on Law of Treaties 1969.
[13] Article 12(1)(a) of the PK-BIT, Page 11.

which is the Prime Minister of Palmenna and only the higher management of the Canstone, Tara Sharma, Alan Becky and Luke Nathan.[14]

25. In the Preamble of the PK-BIT,[15] the term "parties" refers only to the countries which are the Government of Palmenna and Government of Kenweed. The term parties does not include the investor under the BIT.

26. Moreover, in Article 1(2),[16] the term "Parties" and "Investors" have been differentiated on its meaning and references. The Claimant need to establish to this tribunal on the reasonable justification on why the claimant have not complied with the term in Article 12(1)(a) literally, if they were to undertook the mediation clause to be uncertain and thus unenforceable.

27. It is our submission that the pre-arbitration steps is certain and enforceable by the parties despite the presence of minor ambiguity on its governing framework for the mediation to be exhausted.

28. Thus, based on the argument presented by the RESPONDENT, it is RESPONDENT submission that the pre-arbitration steps is mandatory to be abide by the parties and failure non-compliance of the parties to the pre-arbitration steps would hold the arbitral tribunal lack of jurisdiction.

ISSUE II: THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING THE ARBITRATION PROCEEDING.

[14] Facts at Page 17 Para 49.
[15] Preamble of the PK-BIT, Page 1.
[16] Article 1(2) of the PK-BIT, Page 2.

29. Before the commencement of this arbitration proceeding, the High Court of Palmenna has delivered its judgement in relation to a sue by an activist upon the Governement of Palmenna and SZN to be jointly liable for negligence.[17]

30. Therefore, it is the contention of the RESPONDENT that the CLAIMANT is precluded from initiating the arbitration proceedings as the similar proceeding has been commenced in the High Court of Palmenna.

A. THE CLAIMANT IS BARRED TO INITIATE THIS ARBITRATION PROCEEDING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

31. The principle of Collateral Estoppel is a known test to determine an issue of preclusion where if the requirements are fulfilled, the party is estopped from re-litigating with another party an issue of fact or law that has been previously decided or addressed in prior litigation.[18]

32. In raising an issue of preclusion, there are few established test such as triple identity test and Collateral Estoppel. It is the RESPONDENT contention that Collateral Estoppel is a better approach that should be adopted by the tribunal considering that the CLAIMANT is a Common Law country and the RESPONDENT is a company that was incorporated in Palmenna.

[17] Facts at Page 16 Para 45.
[18] *Prince v Lockhart*, 971 F.2d 118 (8th Cir. 1992).

33. According to an Article titled "Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration",[19] the triple identity test has been described as a strict approach that is usually applied in Civil Law countries. In contrast, Collateral Estoppel has been described as a more substantive/transactional approach particularly used by Common Law countries.

34. Furthermore, the court in the case of *RSM et al. v Grenada*,[20] has recognized the doctrine of Collateral Estoppel as a general principle of law applicable in the international tribunals in deciding an issue of preclusion.

35. There are three requirements of Collateral Estoppel as established in the case of *Lao Holdings v Lao People's Democratic Republic*[21] which consists of:
    1. The proceedings were initiated by the same parties or "in privity" of the contract **(i).**
    2. The presence of identical issues **(ii)**.
    3. Whereby the party facing estoppel had a full and fair opportunity to contest prior decision **(iii).**

i. THE PROCEEDINGS WERE INITIATED BY THE SAME PARTIES OF "IN PRIVITY" OF THE CONTRACT.

36. The RESPONDENT concedes to the fact that SZN which were held negligent in the High Court of Palmenna is not the same party as Canstone due to the doctrine of separate legal entity. Nevertheless, according to the case of *Ampal-American*

[19] Jose Magnaye and August Reinisch, "Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration," *The Law and Practice of International Courts and Tribunals* 15, no. 2 (September 22, 2016): 264–86.
[20] *RSM Production Corporation and others v Grenada*, ICSID Case No. ARB/10/6, Award, para 4.6.5.
[21] *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6

Israel Corp v Arab Republic of Egypt,[22] where the tribunal had decided that the shareholder of a company is to be treated as a privy to the company for the purpose of Res Judicata. Otherwise, the shareholder would be able to approbate or reprobate from the same investment treaty.

37. There are two circumstances in current case to prove that Canstone is privy to SZN. Firstly, it can be seen that SZN holds a 30% shareholding in Canstone[23]. Despite the number of shares did not reach the majority shareholding to established ownership, SZN is still considered part of the higher management of Canstone as there are only two shareholders that owns Canstone shares.[24]

38. Moreover, in the facts of the case, SZN was deemed the "Face" and "Operating force" of Canstone in Palmenna. It can be established that Canstone is just a mere extension of SZN in Palmenna. Ceo of SZN, Luke Nathan also consistently appeared in public as a representative of Canstone. Even during the negotiation between the parties, Luka Nathan is present representing the Canstone higher management.

39. Based on all the evidence, it leads to irresistible conclusion that Canstone is in privity with SZN in the proceeding in High Court of Palmenna and SZN is the one who manage and and exercise control over Canstone in Palmenna.

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[22] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Award, para 260.
[23] Facts at Page 9 Para 21.
[24] *RSM Production Corporation and others v Grenada*, ICSID Case No. ARB/10/6, Award, para 7.1.5.

ii. PRESENCE OF IDENTICAL ISSUES IN THE HIGH COURT OF PALMENNA PROCEEDINGS AND THIS ARBITRATION PROCEEDING.

40. From the facts of the case, the activist initiated the legal proceedings in the High Court of Palmenna against Government of Palmenna and SZN on the ground of negligence and the High Court of Palmenna has ordered for the compensation to be paid to the citizens of Palmenna that suffered from respiratory tract infection.[25]

41. Similarity on the root in the Claimant's allegation can be found on the declaration made by the Claimant to initiate this arbitration proceeding which states that:

> "A declaration **that the failure and/or omission** of Canstone to abide by the terms of the BIT had resulted in respiratory tract infections amongst the citizens of Palmenna."[26]

42. It is the RESPONDENT's contention that the term use in the declaration is the failure and/or omission is indirectly indicating the term negligence but in different choice of words. The root of allegation centres on the same subject matter which is the citizens of Palmenna that suffered from respiratory tract infections.

43. Therefore, it is crystal clear that this arbitration proceeding was initiated on similar cause of action as both of this proceedings are discussing on same issue of negligence which concern the same subject matter which is the citizens of Palmenna that suffered from respiratory tract infections.

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[25] Facts at Page 15 Para 41.
[26] Facts at Page 18 Para 55.

iii. WHEREBY THE PARTY FACING ESTOPPEL HAD A FULL AND FAIR OPPORTUNITY TO CONTEST PRIOR DECISION.

44. Based on the facts of the case, both of the defendant in the High Court of Palmenna, Government of Palmenna and SZN is dissatisfied with the decision of the High Court of Palmenna. Due to this reason, both of the parties makes an appeal to the Palmenna Court of Appeal[27, 28].

45. On that account, both of the parties had a fair opportunity to review their case in the High Court of Palmenna and the Claimant should not resort to this arbitration solely for the reason of claiming the loss from the RESPONDENT that they had suffered in after losing the case in High Court of Palmenna.

46. As all the requirements of the Collateral Estoppel are fulfilled, it is RESPONDENT submission that the claimant is precluded from initiating this proceeding as the CLAIMANT is barred under the doctrine of Collateral Estoppel which refrain the parties from abusing the law to gain benefit from innocent parties which in current case, the RESPONDENT.

III. THE RESPONDENT HAD NOT BREACHED THEIR OBLIGATIONS UNDER THE PK-BIT.

47. The CLAIMANT argues that the RESPONDENT had breached the obligations under the PK-BIT. The provisions which have been breached are pertaining to the Sustainability Obligation under Article 4 of the PK-BIT and the Environmental Obligation under Article 5 of the PK-BIT.

[27] Facts at Page 16 Para 46.
[28] Facts at Page 16 Para 47.

48. It is a widely accepted principle in the arbitration proceedings that a party bears the burden of proof to establish the facts relied on to support its defense. This principle is well-known as *onus probandi incumbit actori* (he who asserts must prove).[29] Accordingly, the RESPONDENT shall establish the necessary and relevant facts to support its case before the Tribunal.

49. The RESPONDENT submits that the obligations under the PK-BIT had never been breached because, first, the RESPONDENT had not breached the Sustainability Obligation **(A.)** and second, the RESPONDENT had not breached the Environmental Obligation **(B.)**.

A. THE RESPONDENT DID NOT BREACH ARTICLE 4 OF THE PK-BIT.

50. Under international law, the investor has the obligation to conduct an Environmental Impact Assessment (hereinafter **"EIA"**) to assess the potential adverse associated with the operations in a host-State.[30] EIA also provides any recommendations and mitigation measures which must be adopted by the investors to minimise and prevent the environmental risks.[31]

51. In Article 4 of the PK-BIT, Sustainability Obligation focuses on the responsibility of any investor carrying out any activity which may have significant

[29] *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (31 January 2006), para 70; *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013), para 179.
[30] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgement) [2015] ICJ Rep 665, para 154.
[31] Appendix II of the Convention on Environmental Impact Assessment in a Transboundary Context 1991; *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41, Award (15 July 2024).

environmental risk in Palmenna to conduct an EIA. The requirement to have a valid EIA report is well-recognised in a myriad of conventions and agreements.[32]

52. These legal frameworks have been included in the Preamble of the PK-BIT as agreed by both parties. It is worthy to note that, although it is not binding, the object and scope of the treaty may be construed by making reference to the preamble.[33]

53. The RESPONDENT has three pertinent duties under the Sustainability Obligations that must be discharged throughout its operations in Palmenna. The duties are as follows:

    a. Duty to appoint a qualified person.

    b. Duty to conduct the EIA.

    c. Duty to submit the EIA to the relevant ministry.

54. The RESPONDENT, at all times, had discharged these duties appropriately because the RESPONDENT had appointed qualified persons to conduct the EIA **(i)** and the RESPONDENT had submitted the EIA to the relevant ministry in Palmenna **(ii)**.

i. THE RESPONDENT HAD APPOINTED A QUALIFIED PERSON TO CONDUCT THE EIA.

55. The appointment of a qualified person is paramount in determining the validity of the EIA report. There is no particular definition on what constitutes a qualified

[32] Article 4(1)(f) of the United Nations Framework Convention on Climate Change; Article 14(1)(a) of the Convention on Biological Diversity; Article 7(9)(c) of the Paris Agreement.
[33] *Saluka Investment B.V. v The Czech Republic*, UNCITRAL case, Partial Award (17 March 2006), para 299; *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para 274.

person to conduct the EIA. However, by referring to the judicial decisions, the Tribunal may consider the scope of the qualified person who must be appointed by the RESPONDENT pursuant to Article 4 of the PK-BIT.

56. The Permanent Court of Arbitration (hereinafter **"PCA"**) in *Iron Rhine Arbitration* stipulates the importance of having professional authorities and experts to ensure the EIA is thoroughly evaluated.[34] Furthermore, the ICSID Tribunal in *Gabriel v Romania* decided that the EIA report should be prepared by independent experts that have been retained by the developer.[35] Hence, the qualified person who must be appointed by the RESPONDENT should have the necessary expertise in the biodiesel field.

57. The RESPONDENT had appointed two in-house experts—Jakey Jake at the Karheis facility and Fey Lin at the Appam facility—who are responsible to ensure the machinery is in good working order and operating in accordance with the industry standards.[36] Since CEO Tara Sharma is known not to compromise on the quality and standards of the biodiesel plants,[37] it is more than probable that the in-house experts ought to have the qualifications to conduct the EIA in both facilties.

58. The brief environmental assessment note and a report on the condition of the machinery and equipment (**"RESPONDENT's Report"**) have been also

[34] *The Kingdom of Belgium v The Kingdom of the Netherlands*, PCA Case No. 2003-02.
[35] *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v Romania*, ICSID Case No. ARB/15/31, Award (8 March 2024), para 19.
[36] Facts at Page 10 Para 23.
[37] Facts at Page 10 Para 24.

conducted by the two in-house experts upon the request of Alan Becky at the early stage of the RESPONDENT's operation in Palmenna.[38]

59. Having 13 years of experience of overseeing biodiesel plants in Southeast Asia and is recognised as one of the most seasoned professionals in the industry, Alan is a qualified person hired by the RESPONDENT to confirm and validate the findings of the in-house experts.[39]

60. Since the RESPONDENT had appointed three persons with necessary expertise, the RESPONDENT hereby had discharged the duty to appoint a qualified person to conduct the EIA.

ii. THE RESPONDENT HAD SUBMITTED THE EIA TO THE RELEVANT MINISTRY.

61. A valid EIA report which is submitted to the authorities must contain the potential environmental risks and the recommended mitigation measures to be adopted by the investors. These requriements are enshrined in the PCA's case of *Bilcon of Delaware v Canada*.[40]

62. In the present case, the Reports conducted by the in-house experts do contain the potential environmental risks associated with their operations and mitigate those risks.[41]

[38] Facts at Page 10 Para 24.
[39] Facts at Page 10 Para 24.
[40] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2005), para 477.
[41] Facts at Page 10 Para 25.

63. The International Court of Justice (hereinafter **"ICJ"**) in the *Pulp Mills* case requires the investors to conduct and submit the EIA in three phases of operation: at the early stage, throughout the life of the project, and in the emergency case.[42] Moreover, the Inter-American Court of Human Rights in *Saramaka People v Suriname* requires the submission of the EIA to safeguard the relationship between the investor and host-State as well the stakeholders.[43]

64. Similarly, the RESPONDENT had conducted the EIA at the early stage of their operations and continuously presented it to the stakeholders every four months (April, August, and December).[44] The RESPONDENT submits that one of the important stakeholders mentioned in this fact refers to the Ministry of Natural Resources and Environmental Sustainability of Palmenna.[45]

65. The submission of the EIA by the RESPONDENT is crucial to preserve a transparent and informed decision-making process in its operations.[46] Therefore, the RESPONDENT had continuously submitted the EIA report to the relevant ministry in Palmenna.

B. THE RESPONDENT DID NOT BREACH ARTICLE 5 OF THE PK-BIT.

66. Environmental Obligation requires the investor not to discharge or cause to enter into any river any substances enumerated in paragraphs (a) to (d) of the Article 5(1) of the PK-BIT.

[42] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgement) [2010] ICJ Rep 14, para 205.
[43] *Saramaka People v Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 28 November 2007.
[44] Facts at Page 10 Para 25.
[45] Clarification 9.
[46] Facts at Page 10 Para 25.

67. The liability of the RESPONDENT as contended by the CLAIMANT is specifically regarding the discharge of any poisonous, noxious or polluting matter, impliedly referring to the biodiesel produced by the RESPONDENT in both facilities.

68. The RESPONDENT had never discharged the biodiesel into the river in Palmenna at any time. Nevertheless, the RESPONDENT had taken due diligence in their operation **(i)** and the CLAIMANT failed to discharge their burden of proof **(ii)**.

i. THE RESPONDENT HAD TAKEN DUE DILIGENCE IN THEIR OPERATION.

69. Since Palmenna experiences two monsoon seasons every year,[47] the country should be categorised under the scope of countries with areas prone to natural disasters.[48] Thus, to mitigate any environmental degradation, the ICJ in the *Pulp Mills* case has tabulated the due diligence principle that must be observed by the investors operating in a host-State, especially regarding the issue of environmental harm.

70. Firstly, the careful consideration of the technology to be used.[49] The RESPONDENT had fulfilled this first element of due diligence principle by installing automated monitoring and control systems to track inventory levels, monitor temperature and pressure as well as detect any abnormalities or leakages in the storage tanks.[50]

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[47] Facts at Page 3 Para 2.
[48] Article 4(8)(d), United Nations Framework Convention on Climate Change.
[49] *Pulp Mills* case, para 233; Article 16(1), Convention on Biological Diversity; Article 4(5), United Nations Framework Convention on Climate Change.
[50] Facts at Page 13 Para 34.

71. Secondly, the adoption of appropriate measures to mitigate and examine.[51] This standard had been satisfied by the RESPONDENT in both facilities.

72. In the Karheis incident, upon receiving an unsigned note, Alan had arrived at the facility and began his inspection. After confirming his findings with the Report prepared in December 2022, Alan later signed off a report concluding that the note was only a hoax.[52] This shows the examination measure taken by the RESPONDENT in the event of potential leakage in its storage tanks.

73. In the Appam incident, the RESPONDENT had repaired and enhanced its ventilation system once knowing the pressure relief was broken after the flood following an independent investigation. This is pivotal to minimise the impact of the incident and safeguard against future risks.[53]

74. Furthermore, the RESPONDENT had also stationed the employees at the Appam facility to ensure the facilities are maintained and to quickly respond to any emergency which may occur.[54] These facts portray the continuous precautionary actions implemented by the RESPONDENT to mitigate foreseeable risks during the flash floods.

75. Since the RESPONDENT had fulfilled the due diligence principle, the RESPONDENT has acted in accordance with the standard pratices. The ICJ clearly absolves the liability on the investors once these due diligence principles have been fulfilled.

[51] *Pulp Mills* case, para 197; Article 3(3) of the United Nations Framework Convention on Climate Change.
[52] Facts at Page 11 Para 29.
[53] Facts at Page 15 Para 39.
[54] Facts at Page 14 Para 38.

76. The International Chamber of Commerce (hereinafter **"ICC"**) has reaffirmed the aforementioned decision in the *Ministry of Oil and Minerals v Nexen Petroleum Yemen*, whereby the investor shall not be found liable if they have acted in accordance with the generally accepted standards of the industry.[55]

ii. THE CLAIMANT HAD FAILED TO DISCHARGE THE BURDEN OF PROOF.

77. In the arbitration proceedings, the burden of proof lies on the CLAIMANT to establish its case on the balance of probabilities.[56] The evidence adduced by the CLAIMANT is either direct or circumstantial.

78. In the submission, the CLAIMANT had directed the Tribunal to a myriad of circumstantial evidence. However, it is pertinent to highlight that circumstantial evidence could not stand alone and must be corroborated. The ICSID Tribunal in the *Methanex* case explicitly enunciates that each circumstantial evidence must be examined, in its own context and for its significance.[57] Moreover, the Tribunal in the proceedings has the discretionary power to determine the admissibility, relevance, materiality, and weightage of the circumstantial evidence.[58]

79. Referring to the *Corfu Channel* case, the ICSID Tribunal in another case of *Bayindir v Pakistan* decided that although the CLAIMANT may rely on circumstantial evidence, it must leave no room for reasonable doubt. The burden

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[55] *Ministry of Oil and Minerals of the Republic of Yemen v Canadian Nexen Petroleum Yemen & Ors*, ICC Case No. 19869/MCP/DDA, Final Award (4 February 2020), para 158.
[56] *Compania De Aguas Del Aconquija S.A. v Argentine Republic*, ICSID Case No. ARB/97/3.
[57] *Methanex Corporation v United States of America*, UNCITRAL case, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), para 3.
[58] Article 27(4) of the AIAC Rules 2023; Article 9(1) of the IBA Rules on Taking Evidence 2020.

of proof is switched to the RESPONDENT to cast any reasonable doubt to the circumstantial evidence adduced by the CLAIMANT.[59]

80. The RESPONDENT shall cast reasonable doubt on each and every piece of circumstantial evidence and inferences about facts adduced by the CLAIMANT.

81. Firstly, The CLAIMANT argued that the pressure relief valve was broken and had discharged biodiesel. In addressing this contention, the RESPONDENT submits that the pressure relief valve was broken after the flash flood as it was an act of God, as agreed by the CLAIMANT's Senior Federal counsel.[60] The flood was one of the worst predicaments ever encountered by Appam.[61] The issue of the act of God shall further be discussed in **Issue IV**.

82. Secondly, the RESPONDENT submits that the causes of the respiratory tract injuries are different to the by-products of transesterification. The General Court of European Unions in *Wilmar Bioenergi Indonesia v European Comission* has defined transesterification as a process in which palm oil is reacted with methanol to produce biodiesel and glycerin.[62]

83. As diagnosed by the doctors, the citizens had suffered from the injuries due to the **inhalation of irritant gases or exposure to corrosive chemicals**.[63]

[59] *Corfu Channel case (UK v Albania)* (Judgement) [1949] ICJ Rep 4, at p 18; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), para 142.
[60] Facts at Page 16 Para 43.
[61] Facts at Page 14 Para 35.
[62] *PT Wilmar Bioenergi Indonesia & Ors v European Commission*, Judgement of the General Court (Fourth Chamber, Extended Composition), 14 December 2022; Facts at Page 11 Para 28.
[63] Facts at Page 14 Para 36.

84. On the contrary, the by-products of the RESPONDENT's transesterification are **methyl or ethyl esters (biodiesel) and glycerin.** The by-products had gone through the purification process to remove excess alcohol, catalyst residues and other contaminants.[64] The purification process would minimise the risk of respiratory tract injuries if the gases are inhaled.because it has less harmful gas emission, such as carbon monoxide and carbon dioxide.[65]

85. Thirdly, Dr Ragu clearly states that it was inconclusive whether the infection was caused by the broken relief valve. In accordance with Article 5 of the IBA Rules 2020, Dr Ragu is a Party-Appointed Expert and his medical report must be taken with highest consideration by the Tribunal.

86. Additionally, in his report, he concluded that the flood could have potentially carried other various toxic chemicals and this seems to be a plausible cause of the infections.[66]

87. Since the RESPONDENT has cast reasonable doubt to the circumstantial evidence adduced by the CLAIMANT, the evidence could not stand alone and the liability shall not be attributed to the RESPONDENT.[67] The circumstantial evidence must be excluded if it is lack of sufficient relevance to the case or materiality to its outcomes.[68]

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[64] Facts, page 11, para 28.
[65] Baohua Wang et al., "Enabling Catalysts for Biodiesel Production via Transesterification," *Catalysts* 13, no. 4 (April 13, 2023): 740-763.
[66] Facts at Page 15 Para 40.
[67] *Chevron Corporation and Texaco Petroleum Corporation v Ecuador* (II), PCA Case No. 2009-23.
[68] Article 9(2)(a) of the IBA Rules on the Taking of Evidence in International Arbitration 2020.

IV. THE CLAIMANT IS NOT ENTITLED TO THE AWARDS OF DECLARATION AND DAMAGES.

88. The ICSID Tribunal in *Lamire v Ukraine* established that in order to award declaratory relief and damages to the CLAIMANT, a causal link must be connected between the initial cause as a result of the RESPONDENT's acts or omissions and the final effect suffered by the victims.[69] Failure to demonstrate a direct and proximate chain of causation shall render the RESPONDENT not liable and preclude any quantum of damages.[70]

89. Nevertheless, in accordance with the legal maxim of *novus actus interveniens*, the existence of intervening events would break the chain of causation between the initial cause and the final effect. The UNCITRAL Tribunal in *Lauder v Czech Republic* requires the RESPONDENT to establish that the intervening events have superseded the cause for the damage suffered by the victim in order to avoid the liability.[71]

90. PCA in *Yukos v Russian* further reaffirmed the position that once the RESPONDENT succeeds in establishing the presence of intervening events, both factual and legal causation shall be broken and the damage would be remote.[72]

[69] *Joseph Charles Lamire v Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011), para 163.
[70] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22.
[71] *Ronald S. Lauder v Czech Republic,* UNCITRAL case, Award (3 September 2001), para 234.
[72] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014), para 1775.

91. In the *Burlington* and *Perenco* cases, the Tribunal found that there are three types of circumstances which could be regarded as intervening events: the act of God, the act of the victim himself, and the act of third parties.[73]

92. The RESPONDENT submits that the presence of the neighbouring factories **(A.)** and the occurrence of heavy flash flood **(B.)** breaks the causation.

A. THE PRESENCE OF THE NEIGHBOURING FACTORIES BREAKS THE CAUSATION.

93. Although the CLAIMANT might contend that the neighbouring factories were shut down during the flash flood, this is inaccurate and there is a piece of context which must be highlighted.

94. During the three days of the operation's shutdown, no employees were stationed at the two neighbouring factories since there was an emergency evacuation.[74] In the absence of employees, the factories could not quickly respond to any predicament that might arise.

95. Following the flash flood, the factories were plastered with "Under Maintenance" signage. According to the general practices of factories, the signage indicates malfunctioning and broken equipment to be switched. For that matter, the heavy tanks and machinery were seen entering and leaving such facilities because the broken machines must be changed immediately.[75]

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[73] *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017), para 257; *Perenco Ecuador Limited v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaims (11 August 2015), para 379.

[74] Facts at Page 13 Para 34.

[75] Clarification 10.

96. Similarly, the Tribunal in the *Lauder* case absolved the respondent of liability once there was action by third parties intervening in the causation.[76]

B. THE OCCURRENCE OF HEAVY FLASH FLOOD BREAKS THE CAUSATION.

97. In the *ICC Case No. 8790/2000*, the Tribunal accepted the RESPONDENT's argument that drought is a natural catastrophe and beyond human's control. The *force majeure* event was invoked by the RESPONDENT to escape the liability and the ICC allowed the defence.[77]

98. Moreover, the PCA in *Deutsche Telekom v The Republic of India* has enumerated a list of acts of God that could discharge the liability on the RESPONDENT, including but not limited to, storm, earthquake, and **flood**.[78]

99. The occurrence of heavy flash flood in Appam facility in November 2023 was beyond human's control and unforeseeable. Although Palmenna experienced two monsson seasons and the RESPONDENT is ought to have anticipated the flood, Appam typically encountered southwest monsoon from May to September, concluding the unpredictablity of the event since it happened in November.[79]

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[76] *Lauder* case, para 234.
[77] *ICC Case No. 8790/2000*, Final Award (1 January 2000).
[78] *Deutsche Telekom AG v The Republic of India*, PCA Case No. 2014-10, Interim Award (13 December 2017), para 65.
[79] Facts at Page 3 Para 2.

100. Additionally, on 26th November 2023, Appam witnessed one of the worst flash floods it has ever experienced,[80] further supporting the defence of an act of God which breaks the chain of causation.

101. The flash floods in the Appam facility have also fulfilled the test of forseeability set out by the ICSID Tribunal in *Autopista v Venezuela*.[81] The flood made the performance of the PK-BIT impossible to achieve, the event was not forseeable, and could not be attributed neither to the CLAIMANT and the RESPONDENT.

[80] Facts at Page 14 Para 35.

[81] *Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003), para 108.

PRAYERS FOR RELIEFS

In light of the submission above, counsel for the RESPONDENT respectfully invites the Tribunal to declare that:

I. The pre-arbitration steps are mandatory to be complied by the parties before commencing an arbitration.

II. The Government of Palmenna is preculded from initiating the arbitration proceeding.

III. The Respondent had not breached their obligations under the PK-BIT.

IV. The Claimant is not entitled for the awards of declaration and damages.