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ASIAN INTERNATIONAL ARBITRATION CENTRE

BETWEEN:

GOVERNMENT OF PALMENNA ……CLAIMANT

AND

CANSTONE FLY LIMITED……RESPONDENT

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

This Honourable Tribunal in Kuala Lumpur, Malaysia, has jurisdiction over the dispute between The Federation of Palmenna ["**Palmenna**"] and Canstone Fly Limited ["**Canstone"**] pursuant to Rule 1.1(a) of the Asian International Arbitration Centre Rules, 2021 [**"AIAC Rules"**] and Article 12 of the Palmenna-Kenweed Bilateral Investment Treaty [**"PK-BIT"**], as elaborated upon in the subsequent Pleadings.

QUESTIONS PRESENTED

I. WHETHER THE PRE-ARBITRATION STEPS MUST BE COMPLIED BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE?

A. Whether Article 12 provides for commencement of arbitration in case of a dispute?

B. whether the parties have an inherent right to effective remedy which is in consonance with the principles of international law?

II. WHETHER THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST CANSTONE?

A. Whether the principle of ELR does not empower the local courts to hear the matter?

B. Whether the futility of the local proceedings is an equitable exception to the rule of ELR?

C. Whether this Arbitral Tribunal has the jurisdiction to hear the matter?

D. Whether the arbitration constitutes a parallel proceeding?

III. WHETHER CANSTONE HAD BREACHED ITS OBLIGATIONS UNDER THE PK-BIT?

A. Whether the Respondent is responsible for the breach og obligations under the pk-bit?

B. whether the respondent breached the good faith principle and engaged in illegal activities such as corruption and bribery?

C. whether the respondent has violated the main purpose and object i.e., the preamble of the agreement which resulted in the breach of international law?

IV. WHETHER PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES?

A. Whether the Respondent's actions established a chain of causation?

B. Whether the Claimant is entitled to an award of compensation and moral damages?

C. Whether the Claimant is entitled to a declaratory award?

STATEMENT OF FACTS

1. The Federation of Palmenna ["**Claimant**"] and Canstone Fly Limited ["**Respondent"**], are parties to this arbitration. Palmenna is a leading producer of palm oil in Southeast Asia. Kenweed is its neighbouring country that is heavily reliant on tourism.
2. Kenweed established the Ministry of Trade and Investment ["**MTI**"], tasked with generating revenue. This initiative led to the creation of Mehstone Star Limited ["**Mehstone**"] for palm oil harvesting and refining. KLT, a Kenweedian company, holds 40% of the shares, while MTI holds 60%.
3. In **June-July 2021**, amid environmental and public health concerns, Kenweed experienced political developments, resulting in the appointment of M Akbar ["**PM Akbar**"] as Prime Minister of Palmenna. Akbar then proposed entering into a Memorandum of Understanding ["**MoU**"].
4. On **August 7, 2021**, Kenweed and Palmenna signed the MoU to establish a Mehstone subsidiary in Appam, Palmenna's capital, aiming to employ at least 70% of Palmenian citizens.
5. The parties materialized the MoU into a draft Bilateral Investment Treaty ["**BIT**"]. Subsequently, they signed and brought into force the Palmenna-Kenweed Bilateral Investment Treaty ["**PK-BIT**"] in Appam.
6. On **October 26, 2021**, as a result of the PK-BIT, Canstone Fly Limited ["**Canstone**"] was incorporated in Palmenna. Mehstone owns 70% of its shares, and SZN, a Kenweedian company, owns 30%. Canstone secured plants in Appam and Karheis and used Luke Nathan of SZN in its job advertisements. To ensure quality services, Canstone appointed in-house experts, including Alan Becky from the Republic of Sokiyasu as Quality Conductor ["**QC**"]. Over time, Alan developed personal relationships with the employees at Canstone's Appam facility.

7. In **February 2023**, Canstone's facility in Karheis received a warning about a palm oil leak within the plant. Jakey Jake ["**Jake**"], an in-house expert, contacted Alan, who inspected the plant and dismissed the need for detailed investigations due to cost concerns. He proposed conducting an Environmental Impact Assessment ["**EIA**"] soon. Nearby farmers were hospitalized due to suspected contamination, prompting Jake to meet with the employees at the Appam facility.
8. On **September 6, 2023**, the Board of Directors convened a meeting with Canstone's senior management, including Nathan and Tara Sharma from Kenweed. Nathan and Alan requested additional resources and provisions to minimize leakage risks in the facilities.
9. In **November 2023**, authorities reported flooding risks in rural Karheis. Alan traveled to Karheis to inspect the storage tank monitoring. However, due to fears of causing leakage, neighboring factories in Appam shut down and evacuated. Unable to reach Alan, Lee ordered Canstone to continue operations. By November 26, intense rainfall caused flash flooding in Appam. The flash floods led to respiratory injuries among nearby residents in Appam and Canstone employees due to irritant gases or chemicals carried by the floodwaters. Former Prime Minister Elsie criticized Canstone for prioritizing profit over safety, sparking protests led by local activist Kelvin Malhotra. Nathan defended Canstone, explaining emergency management efforts and launching an independent investigation, which revealed compromised pressure relief valves on storage tanks. Doctors confirmed the possible role of the valves in the health hazard.
10. On **December 15, 2023**, activists brought legal action against the Government of Palmenna and SZN for negligence, citing flaws in Canstone's drainage and ventilation systems. SZN argued that they could not conduct an accurate environmental assessment until after the monsoon season and claimed they were wrongly named in the action.

11. On **February 14, 2024**, the High Court of Palmenna held the Government of Palmenna and SZN jointly liable for negligence and ordered compensation for the victims. Nathan announced an appeal. Jake accused Alan of laxity in his approach and alleged bribery by Canstone.
12. On **March 1, 2024,** Akbar held a tense conference call with Tara Sharma, Alan, and Luke Nathan, which ended in disagreement.
13. On **March 6, 2024,** the Government of Palmenna initiated arbitration against Canstone, alleging breaches of the PK-BIT and seeking damages for respiratory infections among citizens. Canstone argued that the arbitration was invalid due to ongoing proceedings against SZN, failure to follow pre-arbitration steps, and misuse of arbitration to overturn a High Court ruling. The Asian International Arbitration Centre ["**AIAC**"] panel will address these issues and determine whether Palmenna is entitled to relief.

SUMMARY OF PLEADINGS

I. THE PRE-ARBITRATION STEPS ARE NOT MANDATORY BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE.

Pre-arbitration steps shall not be treated as mandatory requirement for the Government of Palmenna to commence arbitration against Canstone since these measures often prove unnecessary considering that the parties might not be able to reach an effective remedy through these lading to an impasse hence causing a delay in the dispute resolution process. Moreover, since the object and purpose of dispute resolution clauses are to provide the parties with an inherent right to effective remedy therefore the nature of these steps becomes merely procedural and not mandatory. Additionally, the Tribunal ultimately itself as per the arbitral rules has the discretionary power to determine questions of its own jurisdiction.

II. THE GOVERNMENT OF PALMENNA IS NOT PRECLUDED FROM INITIATING AN ARBITRATION AGAINST CANSTONE.

The claimant is not precluded from initiating an arbitration against the respondent because first, the principle of ELR does not empower the local courts to hear the matter, second, because futility of local proceedings is an equitable exception to the rule of ELR, third, because this arbitral tribunal has the jurisdiction to hear the matter, and fourth, because the arbitration does not constitute a parallel proceeding.

III. CANSTONE FLY LIMITED ["CANSTONE"] I.E., THE RESPONDENT HAS BREACHED ITS OBLIGATIONS UNDER THE PK-BIT AGREEMENT ["AGREEMENT"].

The Respondent has breached its obligations under the Palmenna Kenweed Bilateral Investment Treaty **["PK-BIT**"] as **[A]** Respondent is responsible for the breach of

environmental obligations; **[B]** Respondent is liable for human rights abuse; and **[C]** Respondent has violated the Preamble of the Agreement.

IV. GOVERNMENT OF PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES.

The Claimant seeks compensation and moral damages for the RESPONDENT'S internationally wrongful conduct, invoking customary international law and the Draft Articles on State Responsibility. The Claimant also requests a declaratory award for damage caused to the environment and public health concerns that followed.

PLEADINGS

I. THE PRE-ARBITRATION STEPS ARE NOT MANDATORY BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE

1. Pre-arbitration steps are not mandatory in nature since **[A]** Article 12 provides for commencement of arbitration in case of a dispute; and **[B]** The parties have an inherent right to effective remedy in consonance with the principles of international law.

A. Article 12 provides for commencement of arbitration in case of a dispute.

2. Article 12[1] specifically provides for arbitration as the mandated dispute resolution mechanism. Commanding the parties to various pre-arbitration mechanisms could, in many circumstances, prove itself to be either **[i]** inconsequential in nature, leading to a potential impasse; or **[ii]** prolonging the dispute resolution process, rendering the whole mechanism futile in its enforcement.

i. Unnecessary requirements leading to an impasse.

3. Agreements to negotiate do not ensure dispute resolution; they merely require an effort, which is frequently unsuccessful. They are too vague to be enforceable, and even if valid, they impose very limited obligations.[2]
4. Consequently, mediation, conciliation, and similar processes are necessarily consensual, leaving to the parties the decision whether or not to reach a settlement of their dispute.[3]
5. In *Ethyl Corp v. Canada*, wherein, '*the disputing parties should first attempt to settle a claim through consultation or negotiation'*, Tribunal observed that there was no

[1] Article 12, The PK-BIT, Moot Problem, 19th LAWASIA International Moot 2024, p. 11 ["**Proposition**"]
[2] Born, Gary, and Marija Šćekić, *'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'*, 2015
[3] *Id*

prospect of Canada changing its attitude as a consequence of negotiations. This rule is analogous to the international law requirement of exhaustion of remedies, which is disregarded when it is demonstrated that in fact no remedy was available and any attempt at exhaustion would have been futile.[4]

6. In a similar approach undertaken in *Ronal Lauder v. Czech Republic*[5], Tribunal opined that insistence on the cooling-off period (requiring notice or negotiation for a specified time period)[6] before arbitral proceedings would amount to be unnecessary and overly formalistic which would not serve the interest of the parties and hence it would not preclude Tribunal from having jurisdiction in the particular scenario.
7. *Here,* both parties failed to reach a consensus after a conference call, further efforts would likely be futile and only delay an otherwise effective dispute resolution process. Tara Sharma in the call themselves said that, "*seems like there is no point in talking to you anymore*" clearly highlighting their rigidity and intention of no further amicable resolution.
8. Since Article 12 of the Palmenna Kenweed Bilateral Investment Treaty [**"PK-BIT"**] provides multiple dispute resolution mechanisms there is a considerable responsibility on the parties to evaluate the potential advantages of negotiation compared to the promptness and conclusiveness of arbitration rather than adhering to a strict hierarchy.

ii. The restriction on arbitral proceedings would delay the process of dispute resolution.

[4] *Ethyl Corp. v. Canada*, 38 I.L.M. 708 [1999]
[5] *Ronald S. Lauder v. The Czech Republic*, IIC 205 [2001]
[6] *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1 [2011]; *Abaclat v Argentine Republic*, ICSID Case No ARB/07/5 [2011]

9. Purpose of arbitration is to provide a speedy dispute resolution mechanism which is effective in nature, helping the parties to overcome a potential deadlock and reach a solution.

10. The Tribunal, while considering a BIT which had a three-month waiting period to seek resolution via local remedies, conciliation, or other means observed that procedural objections could be easily corrected thereby having little practical effect other than to delay the proceeding.[7]

11. Tribunal in *SGS v. Pakistan*[8] involving the Pakistan-Switzerland BIT, accepted SGS's argument that waiting periods are procedural rules, not jurisdictional prerequisites, which might avoid arbitration if negotiations fail. It noted that consultation periods are usually considered procedural and not mandatory, meaning compliance is not a condition precedent.

12. Clauses requiring efforts to reach an amicable settlement, before commencing arbitration, '*are primarily expression[s] of intention*' and '*should not be applied to oblige the parties to engage in fruitless negotiations*' or to delay an orderly resolution of the dispute'.[9] Even in the present circumstance the pre-arbitral steps specified in PK-BIT considering the impasse between the parties would only pragmatically cause a delay in the arbitration procedure rather than leading to an actual resolution of the dispute.

B. <u>The parties have an inherent right to effective remedy which is in consonance with the principles of international law.</u>

[7] *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4 [2000]
[8] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13 [2003]
[9] ICC Case No 10256 [2000]

13. Such pre- arbitral steps often prove to be inconclusive. Even if such steps find place in the BIT, **[i]** they offer ineffective remedies; **[ii]** the Tribunal itself could determine its own jurisdiction, and **[iii]** the MFN clause circumvents ore arbitration requirements.

i. Pre- arbitration requirements are ineffective remedies.

14. A pre-specified dispute resolution clause in a treaty aims to provide parties with an inherent right to an effective remedy, aligning with international law principles. Even when there is a need to interpret an international treaty, Article 31 of the Vienna Convention on the Law of Treaties [**"VCLT"]**[10] provides for it to be read in light of their object and purpose.

15. A significant ruling in *Salini v. Morocco*[11] highlights the flexible nature of the pre-arbitration clause and recognizes that the intent is to encourage parties to explore non-adversarial avenues for resolving their disputes. However, it also underscores that the level of effort invested in seeking an amicable settlement need not be overly stringent or exhaustive.

16. In *Bayindir v. Pakistan*[12] Tribunal, while stating that the notice requirement outlined in Turkey-Pakistan BIT should not be a jurisdictional precondition, argued that enforcing a six-month consultation period would unnecessarily adopt a formalistic approach that fails to serve any legitimate interest of the parties involved.

17. The *Biwater Gauff v Tanzania*[13] Tribunal stated that the six-month period is procedural and advisory, not jurisdictional and mandatory. Its aim is to encourage amicable settlements, not to hinder arbitration proceedings when a settlement is not feasible. Therefore, non-compliance with this period would not stop the Tribunal from proceeding.

[10] Article 31, VCLT, 1969
[11] *Salini Costruttori v Morocco*, ICSID Case No ARB/00/4 [2001]
[12] *Bayindir Insaat Turizm Ticaret Ve, Sanayi AS v Islamic Repulic of Pakistan*, ICSID Case No ARB/03/29, [2005]
[13] *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22 [2008]

18. Hence, compliance with negotiation, mediation, conciliation, or similar procedural requirements in an arbitration agreement (or BIT) is not ordinarily a prerequisite to commencing arbitral proceedings. These decisions arise specifically in the context of provisions containing so-called 'cooling-off periods' (requiring notice and negotiations for a specified time period).[14]

19. *Here,* the main object and purpose of Article 3 of the PK- BIT is to provide an effective remedy. Therefore, when negotiation and conciliation (i.e., 'cooling-off periods') are evidently ineffective, parties should be permitted to bypass these procedural steps and proceed with more practical alternatives for resolving the dispute such as arbitration in the present matter.

ii. <u>The Tribunal could determine its own jurisdiction.</u>

20. The Tribunal has a crucial power[15] to determine its own jurisdiction according to the principle of *kompetenz-kompetenz,*[16] empowering arbitrators to make final ruling on their own jurisdiction.[17] Meaning, that non-compliance with pre-arbitral conditions does not nullify jurisdiction and they are necessarily questions of admissibility.

21. Scope of the arbitration clause includes all the questions and objections related. [18] In the arbitration, admissibility refers to preliminary aspects of the substantive merits of a claim (i.e., whether the claim is ripe to be heard).[19] Tribunals have provided that condition relating to the manner in which the right to have recourse to arbitration must

[14] *Supra Note* 4
[15] Richard W. Hulbert, '*Institutional Rules and Arbitral Jurisdiction: When Party Intent is Not 'Clear and Unmistakable*', 2008
[16] Margret L. Moses, *The Principles and Practice of International Commercial Arbitration,* 64 Cambridge University Press, 2008
[17] Gaillard Fouchard Goldman, *International Commercial Arbitration*, 1999
[18] Blackaby Et Al., *Redfern and Hunter on International Arbitration*, 2009
[19] *Waste Management Inc. v United Mexican States*, ICSID Case No ARB(AF)/98/2 [2000]

be exercised are a provision going to the admissibility of the claim rather than the jurisdiction of Tribunal.[20]

22. Article 23 of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules provides that Tribunal itself has the power to determine its jurisdiction and any objections related thereto.[21]

23. *Here*, the claim whether parties could pursue arbitration through Article 12 of the PK-BIT is a matter of admissibility. This also is ultimately within the scope of the Tribunal to determine and hence is a matter of admissibility which could be subsequently satisfied in due course as well.

24. This highlights that even though the parties have not complied with the pre-arbitration requirement they could still proceed with the arbitral proceeding where the necessity and the efficacy of such measure could be analysed by Tribunal dependant on the circumstances of the case.

iii. MFN clause circumvents the pre-arbitration requirements.

25. MFN clauses are present in almost all BITs, offering the more favourable treatment given to investors from a third country to the treaty's beneficiary. It aims to prevent discrimination amongst investors of different nationalities.[22]

26. Tribunal in ***Maffezini v. Spain***[23] saw the first application of the MFN clause to so-called procedural requirements, where an investor used the Argentina–Spain BIT, which required six months of negotiation and 18 months of local court litigation before arbitration. The claimant invoked the MFN clause to use the more favourable Chile–Spain BIT, allowing access to arbitration after six months of negotiation without the

[20] *Hochtief AG v Argentine Republic*, ICSID Case No ARB/07/31 [2016]; *Telefónica SA v Argentine Republic*, ICSID Case No ARB/03/20, [2011]
[21] Article 23, Part II, UNCITRAL Arbitration Rules, 2021
[22] Stephan W. Schill, '*Multilateralizing Investment Treaties through Most-Favoured-Nation Clauses'*, 2009
[23] *Maffezini v. Spain*, ICSID Case No ARB/97/7, [2001]

18-month litigation requirement. It ruled that dispute resolution mechanisms are part of the treatment accorded to investors under the BIT.

27. In ***Siemens v. Argentina***, Claimant sought to avoid an 18-month waiting period prior to submission of the case to international arbitration. The allegedly more favourable treatment consisted in the absence of an 18-month waiting period before submission of the dispute to international arbitration in the Argentina– US BIT. The Tribunal found that the MFN clause conferred such benefit.[24]

28. Hence, access to arbitration could be interpreted from other treatise thereby circumventing the procedural requirements provided in the specific BIT. Considering that Article 8 and 9 of the PK- BIT provide for national treatment and MFN, the same can be invoked to overcome the pre- arbitration requirements and enforcing the arbitration clause.

II. THE GOVERNMENT OF PALMENNA IS NOT PRECLUDED FROM INITIATING AN ARBITRATION AGAINST CANSTONE.

29. The claimant is not precluded from initiating an arbitration against the respondent because **[A]** The principle of ELR does not empower the local courts to hear the matter; **[B]** Futility of local proceedings is an equitable exception to the rule of ELR; and **[C]** this Tribunal has the jurisdiction to hear the matter, **[D]** The arbitration does not constitute a parallel proceeding.

A. <u>The principle of ELR does not empower the local courts to hear the matter.</u>

[24] *Siemens v. Argentina*, ICSID Case No. ARB/02/8 [2007]

30. The principle of ELR does not empower the local courts to hear the matter because **[i]** ELR is not a procedural requisite to arbitration; and **[ii]** ELR is waived off by virtue of article 12.

i. ELR is not a procedural requisite to Arbitration

31. For ELR to apply as a condition of consent to arbitration, the requirement must be contained in the instrument which codifies such consent [25] to ensure that both parties have a fair warning to expect a clear path of arbitration. [26] Moreover, absence of a clear ELR requirement in the agreement must be construed as a waiver of the requirement itself. [27] In case of pending proceedings, awaiting the domestic decision would amount to injecting an ELR requirement in a BIT which is silent on the same, creating policy implications. [28]
32. The dispute resolution clause to the PK- BIT is silent on the requirement for ELR. This implies that it is not a mandatory provision and hence need not be followed by the claimant before initiating arbitration.

ii. ELR is waived off by virtue of Article 12 of the PK-BIT

33. Unless expressly implied, ELR is considered waived off[29], and the same may also be implied by the conduct of the parties.
34. Presently, the consensus of the parties with regard to article 12, along with their lack of protest regarding the same fulfils the requirement of implied conduct. Hence, article 12 warrants for ELR to be considered waived off.

[25] *Generation Ukraine Inc. v. Ukraine,* ICSID Case No. ARB/00/9 [2003]
[26] *EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, [2012]
[27] Supra Note 19
[28] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration Proceedings, [2003]
[29] *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8 [2014]

B. <u>Futility of the local proceedings is an equitable exception to the rule of ELR.</u>

35. Futility of the local proceedings is an equitable exception to the rule of ELR in the present case because **[i]** the proceedings are ineffective, **[ii]** the proceedings can be seen to create an undue delay.

i. <u>The proceedings are ineffective.</u>

36. The exception of futility applies when there is no reasonable possibility of obtaining effective redress from the courts,[30] and there is hence, no virtual remedy.[31] Despite lack of express treaty language, the exception is available under customary international law [**"CIL"**].[32] This exception becomes more prominent considering the economic situation of the investor.[33] Moreover, it is acknowledged that a finding that domestic litigation would be futile, must be considered with caution, and the purpose must be to offer the state an opportunity to redress violation of the investor's rights under the relevant treaty before the latter may pursue the claims in international arbitration.

37. The local proceedings initiated by the citizens of Palmenna deal with an entirely distinct matter and appeal on the same creates further obscurity regarding their effectiveness.

ii. <u>The proceedings can be seen to create an undue delay.</u>

38. Local remedies need not be exhausted if there is an undue delay in the remedial process which is attributable to the state alleged to be responsible, [34] as is affirmed *Giovanni.*[35] In *TSA v. Argentina*, the local decision on appeal was deemed to be a highly formalistic

[30] *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, [2015]
[31] *Supra note* 29
[32] *Ickale Insaat Limited Sirketi v. Turkmenstan,* ICSID Case No. ARB/10/24, [2016]
[33] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/98/3, [2005]
[34] Dolzer R., Schreuer C., *Principles of International Investment Law*, Cambridge University Press, 2001.
[35] *Supra note* 29

reason by Tribunal to reject jurisdiction, and it was held that ELR would not prevent the initiation of proceedings. [36] This was similarly affirmed by *Teinver v. Argentina.*[37]

39. The delay created by pending proceedings before the court of appeal is uncalled for and creates greater room for deterioration of the relationship between the parties, as well as financial implications of the same on the daily operations of the Respondent.

C. <u>This Arbitral Tribunal has the jurisdiction to hear the present matter.</u>

40. This Tribunal has the jurisdiction to hear the matter because **[i]** Article 12 of the PK-BIT empowers the Tribunal to exercise jurisdiction, **[ii]** The matter essentially relates to a breach of the PK-BIT.

i. <u>Article 12 of the PK-BIT empowers the Tribunal to exercise jurisdiction.</u>

41. Arbitration must be the method of dispute resolution if the BIT unequivocally consents to the same, which can be inferred by the use of particular phraseology such as "*shall be submitted to arbitration*", among other phrases.[38]

42. The Tribunal will be deemed to have jurisdiction in all matters as long as they relate to the enforcement and observance of investment obligations under the BIT,[39] unless there is any specific mention to exclude jurisdiction.[40]

43. Article 12 of the PK- BIT states, "any dispute shall be referred to arbitration by the AIAC in accordance with prevailing arbitration rules at the time of the dispute." [41] Hence, the AIAC inherently possesses jurisdiction.

ii. <u>The matter essentially relates to a breach of the PK-BIT.</u>

[36] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, [2008]
[37] *Teinver, Transportes de Cercanias and Autobuses Urbanos del Sur v. The Argentine Republic,* ICSID Case No. ARB/09/1
[38] *EnCana Corporation v. The Republic of Ecuador*, UNCITRAL Arbitration Proceedings, [2006]
[39] *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL Arbitration Proceedings, [2004]
[40] *Supra note* 38
[41] *Supra note* 1

44. The Tribunal must exercise jurisdiction over such disputes insofar as the claim is essentially based on a breach of the BIT.[42]

45. In this arbitration, the claimants only assert a breach of the PK- BIT by the respondents. Hence, arbitration must be the preferred form of dispute resolution.

D. <u>The Arbitration does not constitute parallel proceeding.</u>

46. The arbitration does not constitute a parallel proceeding, because **[i]** it does not violate the principle of res judicata, and **[ii]** it does not violate the Fork In The Road ["FITR"] clause.

i. <u>It does not violate the principle of res judicata.</u>

47. Mere similarity of proceedings does not result in illegality, and each Tribunal being sovereign, may retain different solutions to the same problem. It is accepted practice that a Tribunal may consider some lines of reasoning to compare the same with those adopted by previous proceedings, and if it shares the same views on a specific point of law, it is free to adopt the same solution. [43] Previous proceedings may also provide for an instructive source for better interpretation. [44] Tribunals in *Lauder v. Czech Republic* [45] and *CME v. Czech Republic* [46] allowed claims based on the same facts and seeking of damages for the same harm.

48. Even though the claims before the domestic courts and Tribunal are similar as far as their contextual matrix is concerned, it does not render the arbitral proceedings illegal, as the final outcome of these proceedings may vary.

ii. <u>It does not violate the Fork In the Road ["FITR"] clause.</u>

[42] *Supra note* 7
[43] *Argentina AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, [2022]
[44] *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, [1986]
[45] *Supra note* 5
[46] *Supra note* 28

49. A Fork in the Road clause refers to that provision of the BIT which provides the final choice made by the parties with respect to their preferred mode of dispute resolution.[47] If a BIT expressly refers to arbitration as the mode, it constitutes a FITR clause.[48]

50. Here, article 12 is an FITR clause that abdicates the respondent's insistence on the exhaustion of ELR.

III. CANSTONE HAS BREACHED ITS OBLIGATIONS UNDER THE PK-BIT.

51. The Respondent has breached its obligations under the PK-BIT as **[A]** The Respondent is responsible for breach of obligations under PK-BIT; **[B]** The Respondent is liable for human rights abuse; and **[C]** The Respondent has violated the Preamble of the PK-BIT.

A. The Respondent is responsible for the breach of obligations under the PK-BIT.

52. The Respondent is responsible for the breach of PK-BIT as **[i]** It was negligent in carrying out its operations; **[ii]** It breached the good faith principle and engaged in corruption and bribery; **[iii]** It has violated Article 4 of the PK-BIT as well as customary international law; and **[iv]** It has violated Article 5 of the PK-BIT.

i. The Respondent was negligent in carrying out its operations.

53. The Respondent was negligent in carrying out its operations and thus, have violated Articles 4 and 5 of the PK-BIT.

54. Negligence is omission to do something that a reasonable person, influenced by the usual considerations that guide human behaviour, would do, or doing something that a prudent and reasonable person would not do.[49]

[47] *Supra note* 34
[48] Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash between Formalistic and Pragmatic Approaches*, 2023
[49] *Blythe v Birmingham Waterworks*, 11 Exch 781 [1856]

55. In *Copper Mesa v. Ecuador*,[50] Tribunal opined that if the investor's fault is more serious than simple negligence, the consequences could be much more severe.

56. *Here,* the Respondent engaged in various instances of negligence. *First,* the Respondent's job advertisements stating "*No experience needed*," and using handsome photo of Mr. Luke Nathan to attract applicants, suggesting lack of emphasis on hiring experienced professionals.[51] *Second,* Mr. Becky, hired to supervise the biodiesel plants in Appam and Karheis, exhibited unprofessional behaviour by spending most of his time at Appam facility, drinking with the Senior Manager and engaging in an intimate relationship with the in-house expert, Ms. Fey Lin.[52] When an unsigned note about a potential tank leak was received, Becky delayed his arrival at the Karheis facility and relied on an outdated report instead of initiating a new investigation. He rejected the request for a detailed investigation by Mr. Jakey Jake, the in-house expert, and threatened to deduct the investigation costs from Jake's bonus.[53] During severe floods, while other facilities were shut down, the Respondent continued operations, prioritizing profits over public health.[54] This resulted in the hospitalisation of nearby residents,[55] with an investigation revealing that the pressure relief valves on Canstone's storage tanks were compromised.[56] A timely investigation could have identified this issue.

57. The Respondent's failure to act prudently and professionally, breaches its obligations to adhere to accepted standards of decency and fairness. Hence, the actions of the Respondent amounted to negligence.

[50] *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-02 [2016].
[51] Paragraph 23, Proposition, p. 10.
[52] Paragraph 24, Proposition, p. 10.
[53] Paragraph 28, Proposition, p. 11.
[54] Paragraph 34, Proposition, p. 13.
[55] Paragraph 36, Proposition, p. 14.
[56] Paragraph 39, Proposition, p. 14, 15.

ii. <u>The Respondent breached the good faith principle and engaged in illegal activities such as corruption and bribery.</u>

58. The Respondent breached the good faith principle and engaged in illegal activities such as corruption and bribery.

59. Bribery, giving or receiving something of value in return for an illicit benefit, is the most commonly known form of corruption.[57] The World Trade Organisation [**"WTO"**], also aims to curb corruption and promote good governance.[58] The UN Convention against Corruption [**"UNCAC"**] recognises bribery as a form of corruption in both the public and private sectors, as outlined in Articles 15, 16 and 21.[59]

60. In *Inceysa vallisoletana v. el Salvador*, Tribunal invoked the principle of good faith as a 'supreme principle', which in the contractual field means '*absence of deceit and artifice during negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties.*' Tribunal determined that no one should profit from their own misconduct.[60]

61. In *World Duty Free v. Kenya*, Tribunal determined that bribery opposes the international public policy of most countries.[61] In *Lao Holdings v. Lao People's Democratic Republic*,[62] the subject matter of which was bribery, Tribunal determined that corruption, as a principle of CIL, must not be employed to secure or maintain business or any undue advantage in international business dealings.

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[57] Krista Nadakavukaren Schefer, *Corruption and the WTO Legal System*, 2009.
[58] Agreement on Import Licensing Procedures; Agreement on Pre-Shipment Inspection; Agreement on Government Procurement.
[59] Article 15, 16 & 21, UNCAC, 2005
[60] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 [2006]
[61] *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7 [2006]
[62] *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6 [2019]

62. After activists filed a case against SZN and the Claimant, the Respondent postponed an investigation until after the monsoon season,[63] raising suspicions of evidence tampering and thus, prolonging the exposure of citizens to further health hazards. Such a delay is not consistent with the duty to act in good faith, as it suggests an intentional effort to manipulate the process to the Respondent's advantage.

63. Mr. Jake's disclosure that the Respondent engaged in bribery to induce victims to withdraw their reports corroborates this.[64] This constitutes an attempt to secure an undue advantage by evading legal and regulatory accountability which directly contravene the principle of good faith along with international public policy and CIL. Since both the Claimant and Kenweed, a partial owner of the Respondent, are members to WTO, they are bound by its principles of anti-corruption.

64. The Respondent's engagement in bribery, breaches its obligations to adhere to accepted standards of decency and fairness and constitute bad faith.

iii. The Respondent violated Article 4 of the PK-BIT as well as customary international law.

65. The Respondent has violated Article 4 of the BIT[65] by failing to provide an Environmental Impact Assessment [**"EIA"**] to the Ministry of Natural Resources and Environmental Sustainability[66] for activities having significant environmental impact.

66. Article 4 of the agreement mandates that investors must:

i. conduct an EIA through a qualified individual for any activities likely to have significant environmental impact;

ii. Submit the EIA report to relevant ministry.

[63] Paragraph 44, Proposition, p. 16.
[64] Paragraph 47, Proposition, p. 17.
[65] Article 4, BIT, Proposition, p. 5.
[66] Point 9, Clarification, p. 2

Such activities include construction of oil and gas refineries and petrochemicals production. As per the PK-BIT, a petrochemical industry with production capacity of 50 tonnes or more per day was considered to have significant environmental impact.[67] Canstone produced 54,440 tonnes of palm oil in Palmenna in 2022.[68] Hence, as per Article 4.1, Canstone was bound to conduct an EIA report.

67. According to UN Environment Programme's [**"UNEP"**] Goals and Principles,[69] the environmental effects in an EIA should be evaluated with level of detail that matches their potential environmental significance. The report should assess the potential for future harm,[70] with the requirement of due diligence.[71] Public participation is considered an essential pillar of environmental decision making. [72] Conducting an EIA is a requirement as per the UNFCCC,[73] and CBD.[74]

68. The obligation to conduct an EIA is considered a duty under international law, as affirmed in the *Pulp Mills,*[75] wherein Court held that EIA is an obligation under general international law [**"GIL**"] which extends to activities likely to cause adverse impacts in a transboundary context and that an EIA should be maintained throughout the lifecycle of a project, regardless of how small and uncertain the actual risk may be. In Advisory Opinion *of Seabed Disputes Chamber,* EIA was characterised as a 'general obligation under international law.'[76] Court's mention of GIL should be understood as referring to CIL.[77] Judge ad hoc Dugard opined that obligation to conduct an EIA stands

[67] Article 4 (2)(e), PK-BIT, p. 7
[68] Paragraph 27, Proposition, p. 11
[69] Principle 5, UNEP Goals and Principles of EIA, 1987
[70] *Argentina v Uruguay,* 2010. I.C.J. [2010]
[71] *Id*
[72] Advisory Opinion on Climate Emergency and Human Rights, Inter-American Court of Human Rights, 2017
[73] Article 4(1)(f), UNFCCC, 1992
[74] Article 14(1)(a), CBD, 1992
[75] *Supra note* 72
[76] Advisory Opinion, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No. 17 [2011]
[77] *Chemtura Corp. v. Gov't of Canada,* NAFTA/UNCITRAL, [2010]; Separate Opinion Judge Donoghue Judge ad hoc Dugard.

independently as part of CIL.[78] In *Cambodia Power Company v. Cambodia*,[79] Tribunal noted that CIL plays a crucial role in investment arbitration and is regarded as a set of principles that define fundamental standards of protection. It is a settled principle that CIL cannot be violated.[80] In *Maffezini v. Spain,*[81] Tribunal declared that EIA is fundamental to ensuring proper environmental protection and it is increasingly acknowledged in international law, and investor-state disputes.

69. *Here,* the Respondent engaged in activities likely to have a significant environmental impact, including construction of biodiesel plants, which necessitated an EIA. Despite this requirement, the Respondent failed to submit the EIA report to the relevant ministry. Although a report was created that includes a brief assessment note,[82] it primarily focused on condition of the machinery. It did not evaluate the risk of future harm and there was no form of public participation in the process.

70. In September 2023, Mr. Becky, responsible for overseeing the operations, requested to hire a consulting firm to conduct the EIA. These requests were directed to the Board of Directors of Canstone, which did not respond to or address these requests.[83] This indicates that an EIA was not considered up until this point. If the reports were sufficient, an EIA would not have been required. It was only in September 2023, seven months after the incident, that Becky mentioned to Board for conducting the same. This highlights the lack of due diligence by the Respondent.[84]

71. Hence, the Respondent is responsible for the breach of Article 4 as well as for the breach of CIL.

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[78] *Id.*
[79] *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge,* ICSID Case No. ARB/09/18 [2011]
[80] Article 38, ICJ
[81] *Supra note* 23
[82] Paragraph 25, Proposition, p. 10
[83] Paragraph 33, Proposition, p. 13
[84] *Id*

*iv. **The Respondents violated Article 5 of the BIT.***

72. The Respondent violated Article 5 of the PK-BIT[85] by failing to prevent the release of harmful substances into water bodies during heavy rainfall and flooding.

73. The oil industry generates various types of wastewaters, resulting in the creation of wastewater at work sites and living quarters.[86] This contains harmful pollutants that pose risks to human health. Stormwater runoff carries toxic substances like plastics, heavy metals which threaten the environment.[87] All land forms an essential part of inland waters, with fresh water, from rainfall, flowing into rivers, and wetlands.[88] Thus, the water from rain forms part of the inland water system.

74. Article 5 mandates strict environmental obligations for investors. It prohibits the release of harmful substances into rivers, emphasising the protection of public health, safety, and environment. It forbids discharge of oil or waste into rivers, which include inland waters, subterranean, and coastal waters. The owner or occupier of property where harmful substances originate is presumed responsible unless they can prove otherwise.

75. *Here*, the Respondent's continued operations during the flash floods,[89] led to the release of harmful pollutants into the inland waters, exacerbating the situation, proving harmful to environment and human life, affecting more than 129 individuals.[90] These pollutants, carried by stormwater runoff, caused widespread harm to environment and local communities. An investigation conducted by Canstone found that the pressure relief valves on its storage tanks were compromised which play a vital role to maintain a safe operational environment.[91]

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[85] Article 5, BIT, Proposition, p. 8
[86] Dennis Kronborg & Ors., *Sustainable Treatment of Wasterwater Generated by Oil & Gas Drilling Rig Camps,* OnePetro, 2022
[87] R. Bani, *Wastewater Management,* Waste Water: Evaluation and Management, 2011
[88] CBD, *Inland Waters Biodiversity- What is it,* 2008
[89] *Supra Note* 51
[90] *Supra note* 52
[91] *Supra note* 53

76. Smple analysis based on Doctor Ragu's medical report revealed that floodwaters in Appam contained traces of biodiesel,[92] and considering that the Respondent was the only company functioning during the floods and the fact that nearby occupiers surrounding the company suffered,[93] this interconnectedness reflects the harm caused due to the Respondent's operations.

77. The failure of the Respondent to implement adequate preventive measures during flooding, leading to the contamination of inland water ecosystems, constitutes a violation of Article 5 of the PK-BIT.

B. <u>The Respondent is responsible for human rights abuse.</u>

78. The Respondent has violated Human Rights by virtue of the environmental damage and public health concerns caused by its operations.

79. According to VCLT, Tribunal should take into account, together with the context, *"any relevant rules of international law applicable*".[94]

80. Right to healthy and clean environment is recognised in various treaties,[95] and protected by the constitutions of various states.[96] The UN Human Rights Council adopted a resolution recognising the right to a clean and healthy environment as a fundamental human right.[97] A number of international instruments recognise the right to health as a human right including Universal Declaration on Human Rights [**"UDHR"**],[98] and World Health Organisation [**"WHO"**]. [99]

81. In *Urbaser v Argentina*,[100] Tribunal determined that, an investor bears a duty to refrain from certain actions, particularly those that involve violating human rights. In *Aven v.*

[92] Point 13, Clarifications, p. 3
[93] *Supra Note* 52
[94] Article 31(3)(c), VCLT
[95] Rio Declaration, 1992; Stockholm Declaration, 1972
[96] Boyd, D., *The Right to a Healthy and Sustainable Environment*, University of Cambridge, 2019
[97] Resolution 48/31 of October 8, 2021
[98] Article 25(1), UDHR, 1948
[99] Constitution, WHO, 1946
[100] *Urbaser v The Argentine Republic*, ICSID Case No. ARB/07/26 [2016]

Costa Rica,[101] Tribunal determined that the importance of environmental protection within the treaty subjected investors to environmental claims.

82. During severe floods, while other facilities were shut down, the Respondent continued operations, prioritising profits over public health. This resulted in the hospitalisation of nearby residents. The Respondent's employees were stationed at workplace for a quick response during an emergency.[102] This endangered both the employees and the population of Palmenna, resulting in human rights violations.

83. Given that right to a healthy environment and right to health are internationally recognised human rights, the Respondent is accountable for violating these rights.

C. <u>The Respondent has violated the main purpose and object i.e., the Preamble of the Agreement which resulted in the breach of international law.</u>

84. The Respondent has violated the main purpose and object of the PK-BIT as **[i]** The Preamble of a treaty cannot be violated. **[ii]** Objectives of the UN Framework Convention on Climate Change [**"UNFCCC"**], and Paris Agreement were breached; and **[iii]** The object of Convention on Biological Diversity [**"CBD"**], is violated.

i. <u>Preamble of a treaty must be followed in its truest sense.</u>

85. The Preamble of a treaty cannot be violated under any circumstance, specifically under the provisions of VCLT.

86. According to Article 31 of VCLT,[103] the preamble provides essential context for understanding the agreement and plays a critical role in its interpretation.[104] This interpretative role is crucial as the Preamble not only outlines the 'object and purpose' of a BIT but also furnishes a 'context' for interpreting specific treaty clauses.

[101] *David Aven v. Costa Rica*, ICSID Case No. UNCT/15/3 [2018]
[102] *Supra note* 51
[103] *Supra note* 10
[104] M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 2010

87. A UN Conference on Trade and Development [**"UNCTAD"**] shows that a growing number of nations are including language in their Preambles to ensure that investment protection is consistent with public policy goals like health, safety, environmental preservation.[105] Investment Tribunals in a number of cases have used the language of the preamble in support of their findings.[106] In *SA v. Argentina Republic*,[107] Tribunal's analysis and application were guided by the Preamble.

88. *Here,* Preamble of the PK-BIT explicitly mandates environmental protection, in line with the UNFCCC, Paris Agreement and CBD, which the Respondent failed to uphold, thereby violating the treaty's foundational objectives.

ii. Breach of the objectives of the UNFCCC, and the Paris Agreement.

89. The Respondent has breached its obligations under the PK-BIT by failing to adhere to the objectives of UNFCCC and Paris Agreement, in relation to environmental protection.

90. The UNFCCC and Paris Agreement aim to combat climate change,[108] outlined in the Preamble of the said conventions.[109] Article 3(3) of the UNFCCC[110] emphasises the importance of taking precautionary actions to foresee, avoid, or reduce the root causes of the risks of severe harm. Article 3(4)[111] promotes adopting of strategies to safeguard climate system from changes caused by human activities. Paris Agreement is a legally binding international treaty, purpose of which is to promote sustainable development.[112]

[105] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rule Making*, 2007
[106] *Supra note* 8
[107] *Supra note* 26
[108] Article 2, UNFCCC, 1992
[109] Preamble, UNFCCC, 1992
[110] Article 3(3), UNFCCC**,** 1992
[111] Article 3(4), UNFCCC, 1992
[112] Article 2, Paris Agreement, 2015

91. Studies have established the negative environmental effects of palm oil production, including pollution, and environmental destruction[113], which have caused several issues including floods, and the aggravation of diseases. [114]

92. In the *David Aven v. Costa Rica*,[115] Tribunal ruled that the investor had to adhere to both domestic and international environmental obligations. In cases of *Perenco Ecuador Ltd. v. Ecuador*[116] and *Burlington Resources Inc. v. Ecuador*,[117] Tribunals determined that Perenco and Burlington were responsible for compensating Ecuador for environmental damage they caused which arose from violating Ecuador's domestic laws. Thus, the investors are required to adhere to the relevant domestic environmental regulations when undertaking projects in host States. In *Chemtura v. Canada*, the Tribunal upheld environmental regulations of Canada, which was based on scientific evidence demonstrating environmental harm.[118]

93. *Here,* the Respondent's failure to protect the environment, as mandated by the PK-BIT Agreement,[119] and repeatedly underscored by PM Akbar that the most critical aspect for Palmenna was sustainability,[120] constitutes a breach of its obligations. Despite heavy rainfall leading neighbouring factories to shut down and evacuate, the Respondent continued operations,[121] prioritising profits over environmental and public health which demonstrates a blatant disregard for public health and environmental protection, focusing solely on profits and bonuses.

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[113] Bijay Singh, Yadvinder Singh and GS Sekhon, *Fertilizer-N use efficiency and nitrate pollution of groundwater in developing countries*, 1995
[114] IEA. *Energy and Air Pollution, World Energy Outlook Special Report*, 2016
[115] *Supra note* 104
[116] *Supra note* 89
[117] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 [2017]
[118] *Supra note* 79
[119] Preamble, PK-BIT, Proposition, p. 3
[120] *Supra note* 92
[121] *Supra note* 51

94. Palmenna had introduced a Five-Fuel Diversification Policy, 2011, in furtherance of the UNFCCC, which mandates the use of environmentally friendly, sustainable and viable energy sources.[122] The Respondent here, caused environmental damage and health issues, falling to comply with the Claimant's domestic environmental policies.[123]

95. The Respondent's actions constitute a clear breach of its obligations under the PK-BIT by failing to adhere to the environmental objectives of the UNFCCC and Paris Agreement. The non-compliance with the national policies of the Claimant, demonstrates a failure to adhere to domestic environmental obligations, which suggests a lack of adherence to the policy's spirit.

iii. Violation of the main purpose and object of the CBD.

96. The Respondent's involvement in biofuel production and its continued operations during severe flash floods in Palmenna demonstrate a lack of concern for public health, along with environmental protection, breaching the main purpose of CBD.

97. The CBD has three primary goals, enshrined in Article 1,[124] including conserving biological diversity and sustainability. Article 2 defines biological diversity as the variety of living organisms from all sources, including terrestrial, incorporating humans as well.[125] Studies have established that biofuel production leads to several adverse effects include increase in greenhouse gas emissions, and pollution of air and water. Biofuels emit more GHGs than certain fossil fuels[126] and expansion of biofuel significantly affects public health by causing air and water pollution.[127]

[122] *Supra note* 84
[123] *Supra note* 89
[124] Article 1, CBD, 1993
[125] Article 2, CBD, 1993
[126] United States' EPA, *Economics of Biofuel*, 2024
[127] Angela Scafidi & Haley Leslie-Bole, *Increased Biofuel Production in the US Midwest May Harm Farmers and the Climate*, World Resources Institute, 2024

98. In *Methanex Corporation v. USA, and Chemtura Corp. v. Gov't of Canada*, the Tribunal held that the regulations imposed by the host state are a legitimate policy aimed at safeguarding public health and preventing environmental contamination. [128]

99. *Here,* the Respondent's biofuel production, combined with its continued operations during severe flash floods, demonstrates lack of concern for public health, evidenced by the hospitalisation of nearby residents,[129] which is corroborated by a sample analysis based on Doctor Ragu's medical report, which revealed that floodwaters in Appam contained various toxic chemicals, including traces of biodiesel.[130] Since the Respondent was the sole biodiesel producer in the area, this directly implicates them as the cause of these consequences.

100. The Respondent's actions during the floods, prioritising biofuel production over environmental and public health, violate the objective of CBD.

IV. GOVERNMENT OF PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES

101. The Claimant is entitled to an award of declaration and damages pursuant to CIL, Articles on the Responsibility of States for Internationally Wrongful Acts [**"ARSIWA"**], and proof of causation.

A. <u>The Respondent's actions establish a chain of causation leading to the damage.</u>

102. The actions of the Respondent establish a clear chain of causation between actions of the Respondent and the harm caused.

[128] *Methanex Corporation v. United States*, UNCITRAL, 2005
[129] *Supra note* 52
[130] *Supra note* 95

103. Causation refers to the connection between an event and its resulting effect.[131] Causation has two aspects: the wrongful act must directly cause the loss, and the connection must be close enough to warrant compensation.[132] The Necessary Element of Sufficient Set test suggests that a specific condition contributes to a result if it was necessary within a sufficient set of preceding conditions that collectively led to the result. It emphasises identifying whether the wrongful act was one of the causes rather than the sole cause of the damage.[133] Investment Tribunals have applied this test in several cases, including *Karkey v. Pakistan* [134] and *Blusun v. Italy*.[135]

104. *Here*, the spread of infections among local populations appears to be linked to the flooding of toxic chemicals, which directly impacted public health and caused environmental pollution near the area where the Respondent was located. The flooding carried these chemicals into local waterways, increasing the likelihood of their spread and impact on human health. The fact that the Respondent was the only company operating during the floods further suggests a highly probable causal link between its actions and the resulting damage.

105. Thus, the Respondent's actions likely contributed to the damage suffered by the Claimants, warranting further consideration of the causal connection.

B. <u>The Claimant is entitled to an award of compensation and moral damages.</u>

106. Claimant is entitled to compensation and moral damages for the internationally wrongful conduct of Respondent. Mehstone Ltd. holds a 70% ownership stake in the

[131] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 [2011]
[132] Ilias Plaokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 2015
[133] *Id*
[134] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 [2017]
[135] *Blusun S.A., Jean-Pierre Locorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3 [2016]

Respondent.[136] MTI, a fully operational entity under the State of Kenweed, owns 60% of the shares in Mehstone.[137]

107. State-owned enterprises [**"SOE"**] are enterprises owned or controlled by states, aimed at achieving financial goals through commercial activities.

108. Article 8 of the ILC Articles[138] that

"*The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under direction or control of, state in carrying out the conduct"*

Thus, any activity carried out under state instructions can be attributed to the state.

109. The duty of a state to provide a reparation for breaching its obligations is affirmed under ARSIWA, in Article 31, stating that the responsible State is mandated to provide complete reparation for harm resulting from its internationally wrongful conduct extending to all types of damage, caused by its actions, which are in violation of international law.[139] Article 36 stipulates that a state held responsible for an internationally wrongful act is obligated to provide compensation for any ensuing damage.[140] Proof of causation between the conduct and injury is necessary for a compensation order.[141]

110. When a state violates an international obligation, it is obligated to provide compensation for breach. This fundamental principle, widely recognised as CIL, was articulated by the Permanent Court of International Justice [**"PCIJ"**] in *Factory at Chorzów* case wherein it held that:

[136] Paragraph 21, Proposition, p. 9
[137] Paragraph 10, Proposition, p. 6
[138] Article 8, ILC Articles, 2001
[139] *Supra note* 10
[140] Article 36, ARSIWA, 2001.
[141] *S.D. Myers Inc. v. Canada*, Partial Award (Merits) [2000]

"*Reparation is an indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."*[142]

111. In *Maffezini v. Spain,*[143] the case involved an SOE, SODIGA, which was 30% owned by the Spanish Government. The Tribunal held that its actions were attributed to Spain under the international law, as the entity was found to be exercising governmental authority.

112. In *Greentech and NovEnergia v. Italy*, a Tribunal must take every requisite measure to provide full compensation to the aggrieved.[144] This principle is upheld in investor-state disputes, including *CMS v Argentina*[145] and *ADC v Hungary.*[146] In the *Burlington v. Ecuador* case,[147] Tribunal ordered the investor to pay Ecuador $39.2 million for environmental damage resulting from violations of Ecuador's environmental regulations. In *Vestey v. Venezuela*,[148] Tribunal noted that Article 31(1) of ILC is widely accepted in investor-State disputes and ordered for full reparation by Venezuela. In *Activities Carried out by Nicaragua in the Border Area*,[149] the Tribunal concluded that international law principles include the requirement for full reparation and implementing active restoration measures to restore the environment to its original state, as much as possible.

113. The Respondent was held 70% by Mehstone which in turn was held 60% by MTI which was a SOE. Since the Respondent is SOE, the state of Kenweed, who partially owns this entity is responsible for the environmental damage and public health

[142] *Germany v. Poland*, PCIJ Series A No. 9 [1927].
[143] *Supra note* 23
[144] *Greentech Energy Systems A/S, NovEnergia II Energy & Environment, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095 [2018]
[145] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 [2005]
[146] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 [2006]
[147] *Supra note* 120
[148] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4 [2016]
[149] *Supra note* 69

concerns resulting from the actions of Respondent, considering the principle under Article 31 and Article 36 of ARSIWA, and internationally set precedents. As causation between the Respondent's actions and the resultant damage has been demonstrated, the Claimant is entitled to provide compensation.

114. The Claimant, aggrieved by the Respondent's internationally wrongful conduct, is entitled to compensation and moral damages under International Law, as this Hon'ble Tribunal deems fit.

C. <u>The Claimant is entitled to a declaratory award.</u>

115. The Claimant is entitled to declaratory award regarding the actions of the Respondent.

116. Article 37 of ARSIWA[150] talks about satisfaction which can be in the form of an acknowledgment of the breach or through some other appropriate mode, which includes declaration as well.

117. Arbitrators have the authority to issue declaratory awards, as established in legal precedents. In *Enron v. Argentina*, the Tribunal has affirmed that, it possesses the authority to pass declaratory relief.[151] In *Cementownia v. Turkey*,[152] Tribunal had accepted the request to pass a declaratory relief. The Tribunal in *Quilborax v. Bolivia*[153] affirmed that it has the authority to issue declaratory judgment as a form of satisfaction under Article 37 of the ILC Articles.

118. Considering the authority granted to arbitrators to issue declaratory awards, the Claimant is entitled to a declaratory award for the environmental damage and public

[150] Article 37, ARSIWA, 2001
[151] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 [2007]
[152] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case no. ARB(AF)/06/2 [2009]
[153] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 [2015]

health concerns caused by the actions of the Respondent, elucidated in detail in Pleading III.

PRAYER FOR RELIEF

For the reasons outlined above, the Claimant respectfully requests the Tribunal to issue an award:

I. **DECLARING,** the commencement of arbitral proceeding by the Government of Palmenna as per Article 12 of the PK- BIT as valid.

II. **DECLARING,** that the failure and omission of the Respondent to abide by the terms of the PK- BIT resulted in respiratory tract infections amongst citizens of Palmenna.

III. **DECLARING** that the Claimant is entitled to an award of damages and declaration, as the Tribunal deems fit.