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ASIAN INTERNATIONAL ARBITRATION CENTRE

BETWEEN:

GOVERNMENT OF PALMENNA ……CLAIMANT

AND

CANSTONE FLY LIMITED……RESPONDENT

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Federation of Palmenna ["**Palmenna**"] and Canstone Fly Limited ["**Canstone**"] have agreed to submit the dispute to this Honourable Tribunal in Kuala Lumpur, Malaysia, including deciding on the issue of jurisdiction, in consonance with Rule 1.1(a) of the Asian International Arbitration Centre Rules, 2021 ["**AIAC Rules**"].

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 Pre-Arbitral steps have been specifically intended by the parties through the PK-BIT?

B. Whether non-compliance of Article 12 of the PK-BIT would lead to breach of treaty obligations leading to consequences?

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

A. Whether the arbitration is precluded by the principle of res judicata?

B. Whether arbitration prevents expediency in enforcement of an award?

C. Whether the arbitration is precluded by the need for ELR?

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

A. Whether the actions of the Respondent resulted in any environmental damage or pose public health risks?

B. Whether the Claimant is liable for breach?

C. Whether the rights of the investor need to be prioritised?

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

A. Whether the acts of the Respondent form a chain of causation?

B. Whether mitigating factors should be considered by the Tribunal?

C. Whether Claimant is liable for contributory fault?

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 MUST BE COMPLIED BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE

Pre-arbitration steps must be complied with before the Government of Palmenna can commence arbitration against Canstone, as provided explicitly by Article 12 of the PK-BIT. This article mandates pre-arbitral procedures using imperative terms, reflecting the parties' intent for a diplomatic settlement before moving towards arbitration. Considering these measures to be jurisdictional in nature any non-compliance with these breaches' treaty obligations therefore, leading to the dismissal of arbitral proceedings and non-recognition of awards.

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

The government of Palmenna is precluded from initiating an arbitration against Canstone because first, the arbitration is precluded by the principle of res judicata, second, because it prevents expediency in the enforcement of an award, and third, because it is precluded by the need for Exhaustion of Local Remedies ["**ELR**"].

III. THE RESPONDENT HAS NOT BREACHED ITS OBLIGATIONS UNDER THE PK-BIT AGREEMENT.

The Respondent has not breached its obligations under the PK-BIT Agreement as **[A]** Actions of the Respondent did not result in any environmental damage or pose public health risks; **[B]** The Claimant is liable for the breach; and **[C]** The rights of the investor should be prioritised.

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

The Claimant is not entitled to an award of declaration and damages as the Respondent is not entirely state-owned and the ILC principles apply only to state entities. Imposing financial penalties would unfairly burden the company and exacerbate economic instability in Kenweed, undermining its development and essential public services. The BIT lacks provisions for declaratory awards and damages, further invalidating the Claimant's deman

PLEADINGS

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

1. The Respondent has breached the requirements of Article 12 of the PK-BIT considering that **[A]** Pre-arbitral steps have been specifically provided and intended by the parties in Article 12(1); and **[B]** The non-compliance of the same leads to consequences due to breach of definitive treaty obligations.

A. Pre- Arbitral steps have been specifically provided and intended by the parties in clause 1 of Article 12 of the PK-BIT.

2. Article 12 provides for a specific mechanism which is **[i]** An attempt to reach diplomatic settlement; and **[ii]** A mandatory obligation reflective through use of imperative terms.

i. Article 12 is a mandatory obligation reflective through use of imperative terms.

3. The use of terms such as "shall", is intended to portray the compulsory and binding nature of the dispute resolution techniques.[1]
4. Additionally, analysis of the validity of agreements to negotiate or conciliate, specific and detailed procedural requirements (for instance, obligations to mediate for a specified period before a named institution) are more likely to reflect mandatory requirements than is the case with generalised provisions (for instance, to attempt to resolve disputes amicably).[2] Thus, agreements requiring negotiations for a specific time

[1] *Philip Morris v Uruguay*, ICSID Case No ARB/10/7 [2013]
[2] *Re Jack Kent Cooke Inc & Saatchi & Saatchi N Am*, 635 NYS2d 611 [1995]

period or mediation before a specific mediator or institution have been more likely to be treated as mandatory obligations than general requirements to 'negotiate in good faith'.[3]

5. According to the Tribunal in *Daimler v. Argentina,* the ultimate goal while interpreting dispute resolution provisions in BITs is to determine what the contracting parties actually consented to, as to go beyond those bounds, would be ultra vires.[4] Thus, the general rules of interpretation of Articles 31[5] and 32[6] of the Vienna Convention of Law on Treaties ["**VCLT**"] apply to interpret the generic clause.
6. Therefore, a pre-arbitration negotiation provision should be considered a mandatory requirement, preventing parties from initiating or continuing arbitration proceedings, only when the language used in the provision is unequivocal and hence is reflective of the intention of the parties as expressed in the ordinary meaning of the terms, its context and purpose of the treaty.
7. *Here,* Article 12 of the PK- BIT specifically provides the phrase "any dispute between the parties...shall be referred", along with a limitation period of 90 days it is evidence enough that the requirements of Article 12 are of a mandatory nature.

ii. <u>Specific pre-requisites are an attempt to diplomatic settlement.</u>

8. The arbitration clause requires parties to attempt mediation and conciliation, often within a set timeframe and with specific representatives, before starting arbitration.[7]
9. The principal objective of pre-arbitration procedures is to enhance efficiency and avoid formal legal proceedings by encouraging amicable dispute resolution through informal

[3] ICC Case No 9812, Final Award [2009]
[4] *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1 [2012]
[5] Article 31(1), VCLT, 1969
[6] Article 32, VCLT
[7] ICC Case No 9977, Final Award [1999]; Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 2013

negotiations or conciliation, saving on costs, time, and contention.[8] As a result, by resolving disputes through diplomatic alternate dispute resolution processes rather than confrontational arbitration, the business relationship between the parties is preserved, avoiding the disruption and burden of litigation.[9]

10. If parties expressly agree to conciliate and not start arbitration or court proceedings for a set time or until a specific event occurs, then that will be upheld by the Tribunal or court until fulfilled, unless a party needs to act to preserve its rights.[10]
11. In investment arbitration disputes, courts have ruled that when agreements or treaties contain clearly mandatory language and are sufficiently certain to be valid, both cooling-off periods.[11] These decisions reason that particular pre-arbitration procedural requirements are mandatory obligations.
12. A limitation of the consent in compromissory clauses to disputes that 'cannot be settled by negotiation' implies that the court lacks jurisdiction unless negotiations have at least been attempted. More generally, International Court of Justice authority also supports the mandatory [and jurisdictional] character of at least some treaty requirements to negotiate the resolution of disputes before commencing judicial proceedings.[12]
13. In the present circumstance, since Article 12 of the PK-BIT explicitly mentioned the necessity of pre-arbitration steps in express and definitive manner promoting a diplomatic resolution procedure before initiating arbitration. Therefore, parties to this arbitration should adhere to those requirements set in the PK-BIT, reflective of the treaty-makers' intentions.

[8] Born, Gary, and Marija Šćekić, *'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'*, 2016
[9] Klaus Peter Berger, '*Law and Practice of Escalation Clauses'*, 2006
[10] Article 13, UNCITRAL Model Law on International Commercial Conciliation, 2002.
[11] *Ambiente Ufficio SpA v Argentine Repub*, ICSID Case No ARB/08/9, [2013]
[12] *Georgia v Russian Fed'n*, ICJ Rep 70, [2011]; *Argentina v. BG Group plc*, 665 F3d 1363, DC Cir, [2012]; *Supra note* 4

B. Non-compliance of Article 12 of the PK- BIT would lead to consequences due to breach of definitive treaty-obligations.

14. Pre- arbitration requirement, which is characterised as jurisdictional in nature, means that the arbitration agreement is not triggered and does not provide the Tribunal with any authority until pre-arbitration steps are completed, making the parties' consent to arbitration conditional on fulfilling these steps.[13]

15. In *Enron v. Argentina,* the Tribunal observed that a failure to comply with the six-month consultation period would lead to a lack of jurisdiction.[14]

16. In the more recent *Tulip Real Estate Investment v. Turkey,*[15] the Tribunal concluded that a "*compromissory*" provision such as Article 8(2) of the BIT serves four major functions which are, firstly, it notifies the respondent state about the existence and scope of the dispute. Secondly, it enables the parties to seek a settlement. Thirdly, it also clarifies the limits of consent provided by states by necessitating prior resort to negotiations or peaceful dispute settlement methods. Lastly, it serves a policy function by allowing the state to address the issue before resorting to an international arbitral procedure. The Tribunal affirmed the mandatory nature of the provisions outlined in Article 8(2) of the BIT.

17. *Here,* given that the requirements in Article 12 of the PK-BIT are of a compromissory nature, containing specific language similar to that identified in established precedents, their interpretation as jurisdictional in nature is supported by principles of international law. Consequently, a breach of these requirements could result in the annulment or non-recognition of the arbitral award on these grounds.

[13] *Supra note* 7
[14] *Enron Corpn & Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, [2004]
[15] *Tulip Real Estate Inv & Dev Netherlands BV v Repub of Turkey*, ICSID Case No ARB/11/28, [2013]

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

18. The Government of Palmenna is precluded from initiating an arbitration against Canstone because **[A]** The arbitration is precluded by the principle of res judicata, **[B]** it prevents expediency in the enforcement of an award, and **[C]** It is precluded by the need for Exhaustion of Local Remedies ["**ELR**"].

A. <u>The arbitration is precluded by the principle of Res Judicata.</u>

19. The principle of res judicata is laid down in article 59 of the statute of ICJ[16] and is deemed applicable to investment treaty arbitration matters. [17] It is held to affect the substance of the case and is not a formalistic requirement. [18] Violation of res judicata is an abuse of rights. [19]

20. *Gavazzi v. Romania* stipulates three elements for res judicata comprising of the same object, same cause of action and same parties. [20] While res judicata applies to common causes of actions, the doctrine of collateral estoppel flows as a corollary to the same, applying particularly to issues. [21] Collateral estoppel has been held to apply if the claim was distinctly put in issue, the court or Tribunal actually decides it, and resolution of the question was necessary for resolving claims before that court. [22] It has been affirmed similarly in case of *Aramco.* [23]

[16] Article 59, ICJ
[17] *Orascom TMT Investments v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, [2017].
[18] *Marco Gavazzi and Stephano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, [2015]
[19] Baumgartner, Jorun, '*Objections on Grounds of an Abuse of Rights or Abuse of Process*', 2016
[20] *Supra note* 17
[21] Jose Pereyo, *Avoiding Res Judicata- Collateral Estoppel Pitfalls in Multi- for a Disputes,* 2022
[22] *Rachel S. Grynberg, Stephen m. Grynberg, Miriam Z. Grynberg and RSM Production company v. Grenada*, ICSID Case No. ARB/10/6, [2010]
[23] *Saudi Arabia v. Arabian American Oil Company (Aramco)* 27 ILR 117 [1963]

21. Moreover, determinations made by local courts may constitute preliminary proceedings under res judicata and they infringe upon the true function of Tribunals by giving it the characteristic of a court of appeal. [24]

22. *Here*, the circumstances fulfill the test laid down in Gavazzi, as the alleged leak which purportedly led to respiratory tract infections to the Palmennian population is the common cause of action in both the proceedings, and the arguments revolve around the same incidents. The test laid down in the Grynberg case is fulfilled as the matter was actually heard by the local court and same question of law was considered.

B. <u>The arbitral prevents expediency in enforcement of an award.</u>

23. The arbitration prevents expediency in enforcement of an award because **[i]** the local courts are responsible for the final application of the award, and **[ii]** it delays the process of dispute resolution and prevents transparency.

i. <u>The local courts are responsible for the final application of the award.</u>

24. Despite arbitration, the enforcement of any award made by this Tribunal will be done by the local court. This creates three potential concerns; first, this may be refused by the latter on a ground of lack of notice given to the respondents. [25] Second, local courts may often refuse to enforce awards or may issue anti-arbitration injuctions.[26] Third, there may occur a clash between domestic and arbitral awards.[27] Most importantly, there is no provision for appeal in investment arbitral awards, and there are limited grounds for the annulment or setting aside of the award.

[24] *Supra Note* 18
[25] *Seller v. Buyer (Court of Appeal of Bavaria 2000)*, Yearbook Commercial Arbitration XXXVII, 2002
[26] Rajput, A., *National Courts as Actors in Investment Arbitration*, 2021
[27] *Sapphire International Petroleum Ltd. v. National Iranian Oil Co*., 35 I.L.R. 136, [1967]

25. Here, the arbitration has been initiated abruptly, without adequate notice to the respondents. Since public interest plays an important part in this dispute, the local court may not enforce the award in the desirable manner.

ii. It delays the process of dispute resolution and prevents transparency.

26. Proper judicial means are necessary for representing the public's stake in the matter. [28] Moreover, according to ICSID statistics from 2015, an average arbitration lasts for about 39 months, the longest one being about nineteen years, the case of El Clarin being an example of the same. [29]
27. Here, possible issues with enforcement in addition to the inherent nature of arbitration may lead to unprecedented delays for both the parties, along with deterioration of their relations. Moreover, since the case is one which includes the aspect of public welfare, arbitration may not be a readily accessible source of information for citizens who have a locus standi in the matter.

C. The Arbitration is precluded by the need for ELR.

28. The home state must abide by the principle of ELR is local proceedings have already been initiated. [30] From the perspective of domestic law, the Tribunal must await the final decision of pending local proceedings. [31]
29. Here, the proceedings in the local court are still in process. Hence, bringing an arbitration at this stage creates a clear violation of the principle of ELR by the claimants.

[28] *Witherspoon v. Illionois*, 391 U.S. 510, [1968]
[29] Fernando Cabrera Diaz, *ICSID Tribunal sides with Chile, rejects claimant's partial revision request in long running dispute over El Clarin newspaper*, 2010.
[30] Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD Best Practices Series, 2017
[31] *CME Czech Republic BV v. Czech Republic*, UNCITRAL Arbitration Proceedings, [2001]

III. THE RESPONDENT HAS NOT BREACHED ITS OBLIGATIONS UNDER THE PK-BIT.

30. The Respondent has not breached its obligations under the PK-BIT as **[A]** Actions of the Respondent did not result in any environmental damage or pose public health risks; **[B]** The Claimant is liable for the breach; and **[D]** The rights of the investor should be prioritised.

A. The actions of the Respondent did not result in any environmental damage or pose public health risks.

31. The actions of the Respondent did not result in any environmental damage or pose public health risks because **[i]** The flash floods were an Act of God; **[ii]** The Respondent did not breach Article IV of the PK-BIT; **[iii]** It did not breach Article 5of the BIT; **[iv]** It was not negligent in carrying out their operations; and **[v]** It has not violated its commitments in line with UNFCC, Paris Agreement and CBD.

i. The flash floods were an Act of God.

32. The flash floods in Palmenna constitute an "Act of God" and thus, absolve the Respondent of any liability.

33. According to the Black's Law Dictionary, an "Act of God" is an extraordinary, unavoidable event caused solely by natural forces, such as an earthquake, flood, or tornadoes.[32] In *Overseas Tankship Ltd. v. Morts Dock and Engineering Ltd.*,[33] the defendants leaked oil into Sydey harbour by negligence, causing a fire on the wharf. The oil got mixed with cotton wadding, which spread to two ships and damaged the wharf. The Court ruled that the defendents were not liable, as the fire was not reasonably foreseeable.

[32] *Act of God*, Black's Law Dictionary (11th ed. 2019)
[33] *Overseas Tankship v. Morts Dock & Engineering Co. Ltd*., Privy Council [1961]

34. *Conversely*, even if the Respondent were to be found liable for not fully complying with the provisions of the BIT, such liability would be excused due to flash floods, which constitute a force majeure event. According to Black's Law Dictionary,[34] force majeure refers to "*an event or effect that is beyond anticipation or control*", effectively relieving parties from their contractual obligations when performance is rendered impossible by such an unforeseen event. This principle is firmly established in customary international law [**"CIL"**].[35] To invoke force majeure as a valid defense, three critical conditions must be met:[36]

A. Unforeseeability: The event must have been unforeseeable at the time the obligations under the PK-BIT were agreed upon, which is clearly the case with the unexpected flash floods.

B. Impossibility: The event must make the fulfilment of the obligations objectively impossible, as was true here, where the floods devastated the area and made compliance unachievable.

C. Non-attributability: The event was entirely beyond the control of the parties. The flash floods were entirely beyond the control of Canstone, and thus, the Respondent cannot be held responsible for the consequences of this natural disaster.

35. *Here,* the unprecedented flash floods that struck were entirely unforeseeable at the time the PK-BIT was concluded, representing one of the most severe and unexpected natural disasters in Appam's history. These extraordinary floods could not have been anticipated, making any prediction or preparation impossible.[37] Despite the implementation of state-of-the-art technologies, the failure of the pressure relief valves on the storage tanks was a direct consequence of the flash floods, an unforeseen natural

[34] *Force majeure*, Black's Law Dictionary (11th ed. 2019)
[35] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 [2010]
[36] *Autopista Concesionada de Venezuela v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB/00/5 [2003]
[37] Paragraph 35, Proposition, p. 13

disaster that overwhelmed even the most advanced safety systems.[38] The floods in Palmenna constituted an "Act of God" due to the overwhelming rainfall. Hence, resulting floods were beyond human control and could not have been prevented by any party, including the Respondent. When environmental activists previously filed a case against the Claimant and SZN regarding similar flood incidents, the Claimants successfully defended itself by invoking the "Act of God" doctrine.[39] This defense acknowledged that the floods were a natural and uncontrollable event, absolving the Government of liability.

36. By shifting blame to the Respondent, the government ignores the very defense it previously utilised to absolve itself of similar responsibilities. This contradictory stance demonstrates a lack of good faith and fairness in the Claimant's actions. Therefore, the flash floods were an Act of God, and the Respondent cannot be held liable for any subsequent consequences that ensued.

ii. The Respondent did not breach Article 4 of the PK-BIT.

37. The Respondent has not breached Article 4 the PK-BIT[40] as they have fully met its obligation to conduct an Environmental Impact Assessment [“**EIA**”].

38. Article 4 of the PK-BIT mandates that investors must conduct an EIA for activities likely to have a significant environmental impact, submitting the report to the relevant ministry. This includes construction of oil and gas refineries[41] and petrochemicals production.[42]

39. Relevant case laws from international and domestic courts underscore the principle that the exact scope and method of conducting an EIA can vary based on context and the

[38] Paragraph 38, Proposition, p. 11
[39] Paragraph 43, Proposition, p. 16
[40] Article 4, BIT, Proposition, p. 5
[41] Article 4(2)(e), BIT, Proposition, p. 7
[42] Article 4(2)(f), BIT, Proposition, p. 7

discretion afforded to the States and investors under international law. The International Court of Justice [**"ICJ"**] in *Pulp Mills on the River Urugay* case,[43] opined that, under suitable conditions, an EIA must be conducted before initiating a project that could potentially cause significant transboundary damage and that the general international law does not define the precise scope and details of what constitutes an EIA. The ICJ determined that it is the responsibility of the State to determine, either through its own laws or the project's approval procedure, the particular requirements of an EIA.[44] This position was echoed by the Tribunal in *Pakistan v. India*,[45] which underscored that there is no singular correct method for conducting an EIA. In *Prineas v. Forestry Commission of New South Wales*,[46] emphasised that an EIA need not exhaustively cover every detail of a project as its primary function is to guide decision-makers and infrom the public, rather than to explore every conceivable scenario or provide detailed solutions for all identified issues. The US Supreme Court's ruling in *Robertson v. Methow Valley Citizens Council*, further supports this view, affirming that an EIA serves as a guiding tool and not an exhaustive analysis.[47]

40. *Here*, before initiating the project, Mr. Alan Becky proactively instructed the two in-house experts at the respective plants to prepare a thorough environmental assessment note and a detailed report on plant and machinery.[48] It is important to emphasise that the Claimants did not mandate any specific format for conducting an EIA, and Article 4 of the BIT equally lacks any prescribed format or method for such assessments. Consequently, any claim that the Respondent failed to conduct an EIA is baseless as the Respondent's approach was entirely consistent with the flexible requirements of the

[43] *Pulp Mills on the River Uruguay* [*Argentina v Uruguay*], 2010. I.C.J. [2010]
[44] *Id*
[45] *Indus Waters Kishenganga Arbitration [Pakistan v. India,* PCA Case No. 2011-01 [2013]
[46] *Prineas v. Forestry Commission of New South Wales.* 49 LGERA [1983]
[47] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 [1989]
[48] Paragraph 25, Proposition, p. 10

BIT, underscoring their commitment to environmental responsibility and the proper execution of the EIA process.

41. Mr. Becky promptly initiated EIA's and conducted reports thrice a year which were presented to the stakeholders to ensure transparency in decision-making process and to evaluate the potential environmental risks associated with their operations and to mitigate those risks.[49] While there were internal delays related to the Board's response to requests for EIA, these should not be viewed as negligence but rather a procedural delay that is a typical aspect of any democratic and transparent decision making framework. The assurance given by PM Akbar, which was highlighted by Luke Nathan's tweet and garnered substantial public support, further illustrates that such delays were acceptable and did not undermine the overall process.[50] The Claimant's insistence on environmental sustainability would not have permitted the Respondent to establish its operations without stringent environmental considerations.
42. The Respondent's use of transesterification,[51] a process known for its environmental benefits and conducted under mild conditions, demonstrates their commitment to sustainability.[52] The Respondent's actions were fully aligned with the principles of environmental sustainability, underscoring their diligent effort to meet and exceed environmental obligations.
43. Considering the proactive measures taken by the Respondent to conduct EIA, coupled with their adherence to environmentally friendly processes, Respondent did not breach Article 4 of the PK-BIT.

iii. <u>The Respondent did not breach Article 5 of the PK-BIT.</u>

[49] *Id*
[50] Point 7, Clarifications, p. 2
[51] *Supra note* 38
[52] G. Baskar, *Advances in Eco-Fuels for a Sustainable Environment*, 2019

44. The Respondent did not breach Article 5 of the PK-BIT because it neither released nor caused the release of any kind of harmful substances into any river.

45. Article 5[53] of the PK-BIT mandates strict environmental obligations for investors. It prohibits the release of harmful substances into rivers or water bodies unless authorised by authorities, emphasising the protection of public health, safety, welfare, and the environment.

46. Scientific studies have established that respiratory infections can be caused by the aftermath of floods.[54] A study conducted by World Health Organisation [**"WHO"**][55] reveals that flooding can lead to chemical release in various ways. In rural areas, runoff can carry eroded soil with fertilizers, herbicides, and insecticides. Runoff from roads may contain heavy metals. Floodwaters can overturn chemical tanks, rupture pipelines, and carry away drums, causing chemical spills. Released chemicals can mix with water, potentially creating toxic products or posing fire and explosion hazards.[56] Floods can displace containers of chemicals from their usual storage locations.[57]

47. *Here,* there has been no evidence of harmful substances, such as chemicals, oils, or waste products, being released into the environment from the Respondent's operations. Samples conducted of the floodwaters on the basis of Doctor Ragu's medical report indicated traces of biodiesel in the floodwaters[58] but did not conclusively identify the Respondent as the source. Given that other nearby factories were also affected by the floods and were seen moving heavy machinery post-flood,[59] it is plausible that the contaminants originated from those sources. The Respondent's automated monitoring

[53] Article 5, BIT, Proposition, p. 8
[54] Howard MJ, Brillman MD & Burkle FM, *Infectious disease emergencies in disasters*, 1996
[55] *Chemical Releases Associated with Floods*, WHO, WHO/CED/PHE/EPE/18.02
[56] Krausmann E & Mushtaq F, *A qualitative Natech damage scale for the impact of floods on selected industrial facilities*, 2008
[57] *Flood Waters or Standing Waters*, Centers for Disease Control and Prevention, 2024
[58] Point 13, Clarifications, p. 3
[59] Point 10, Clarifications, p. 3

systems,[60] designed to detect significant leaks or discharges, reported no such incidents, reinforcing that the Respondent did not discharge harmful substances.

48. The flooding in Palmenna, which impacted the capital city of Appam, covered a vast area. The pollutants in the floodwaters likely originated from diverse sources including agricultural runoff, adjacent roads, and various industrial sites. Palmenna, a hub for palm oil production, hosts numerous industries involved in processing, not solely Canstone. The intense rainfall and subsequent flooding could have led to chemical containers from various sources, including nearby industries, releasing their contents into the water. The intense rainfall in Appam led to water accumulation on streets and in low-lying areas. The intense rainfall exacerbated the flood by increasing runoff from impervious surfaces such as roads and buildings.[61] Therefore, the flooding and resultant contamination were more likely due to these widespread conditions rather than the specific operations of the Respondent.
49. Based on the absence of conclusive evidence linking the Respondent to harmful substance releases, the Respondent, thus, did not breach Article 5 of the BIT.

*iv. **The Respondent was not negligent in carrying out its operations.***

50. The Respondent was not negligent in carrying out its responsibilities under the PK-BIT.
51. 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.[62]
52. In *Burlington Resources v. Ecuador*,[63] the Tribunal established two key conditions for an investor to be held liable: " [i] *The action or omission must either be intentional or negligent; and [ii] It must have had a substantial impact on the damage incurred."*

[60] Paragraph 34, Proposition, p. 13
[61] *Supra note* 37
[62] *Blythe v Birmingham Waterworks*, 11 Exch 781 [1856]
[63] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 [2017]

53. The Respondent was not negligent in carrying out its operations as it exercised due diligence, employed highly qualified personnel, and implemented robust operational procedures to ensure the safety and efficiency of its activities. Mr. Becky, with 13 years of experience in the industry, was entrusted with significant responsibilities at Canstone due to his loyalty and trustworthiness.[64] His extensive experience and dedication were crucial to the company's success, ensuring that operations were managed effectively and safely. The workforce of the Respondent was highly dedicated, contributing to 20% of the total production capacity of 2,722,000 tonnes per year in Palmenna. Due to the perseverance and the dedication of workforce of the Respondent, the company achieved profitability by the end of 2022 and announced bonuses of up to USD 10,000 each for its employees.[65] The note received about a gas leak was unsigned,[66] and initiating a detailed investigation based on such an unverified source would not have been cost-effective and would have posed an undue burden. The hospitalisation incident due to suspected contamination, after the unsigned note was received, was just a suspicion and there is no conclusive proof for the same.[67] Following a suspected fight between Alan Becky and Jakey Jake, Alan travelled to the Karheis facility and returned only a month later, indicating his commitment to resolving internal issues.[68] Regarding environmental compliance, Alan Becky personally updated stakeholders about conducting the EIA and hiring a local professional, demonstrating Canstone's commitment to regulatory adherence.[69] During a period of heavy rainfall in Palmenna, Alan proactively travelled to Karheis to supervise the monitoring and control systems of the storage tanks, showcasing his vigilance and dedication to safety. These

[64] Paragraph 24, Proposition, p. 10
[65] Paragraph 27, Proposition, p. 11
[66] Paragraph 28, Proposition, p. 11
[67] Paragraph 30, Proposition, p. 12
[68] Paragraph 32, Proposition, p. 12
[69] Paragraph 33, Proposition, p. 13

automated systems were designed to track inventory levels, monitor temperature and pressure, and detect any abnormalities or leaks, allowing operators to maintain optimal conditions and respond quickly to any issues.[70] Mr. Becky promptly took action upon discovering that relief valves on its storage tanks had been compromised by floods and repaired the same to mitigate the incident's impact and prevent future risks.[71] The internal doctor of Respondent, after the flood incident, had examined the matter and found the results inconclusive.[72] Lastly, allegations of bribery to cover up cases were merely allegations without any conclusive proof.[73]

54. Based on the evidence and the proactive measures undertaken by the Respondent, it is clear that it did not engage in any intentional or negligent actions that materially contributed to any alleged damage.

v. The Respondents have not violated their commitments in line with UNFCCC, Paris Agreemen and CBD.

55. The Respondent has not violated the UNFCCC, and Paris Agreement, through their biofuel production process.

56. The ultimate objective of UNFCCC, as outlined in its preamble and reiterated in Paris Agreement[74], is to stabilise greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system, and to promote economic development to proceed in a sustainable manner.[75] Scientific research has established that production and utilization of biofuels has less adverse impact on the environment compared to fuels derived from fossil fuels. Biodiesel is both non-toxic

[70] *Supra note* 49
[71] Paragraph 39, Proposition, p. 14
[72] Paragraph 40, Proposition, p. 15
[73] Paragraph 47, Proposition, p. 17
[74] Preamble, United Nations Framework Convention on Climate Change [‘**UNFCCC’**], 1992
[75] Article 2, UNFCCC, 1992

and biodegradable, and in the event of a spill, it degrades into harmless compounds.[76] Transesterification is an environmentally friendly process conducted under mild conditions.[77]

57. The CBD has three primary goals, enshrined in Article 1,[78] including conserving biological diversity and sustainable use of its components. Article 2 of the CBD defines biological diversity as the variety of living organisms from all sources, incorporating humans as well.[79]

58. *Here*, the Respondent have utilised transesterification to produce biodiesel,[80] which is an environmentally friendly process. In line with the commitments under the UNFCCC, and Paris Agreement, the Respondent has implemented sustainable practices in its biofuel production which includes the use of automated monitoring and control systems installed in storage tanks to detect any abnormalities or leaks [81] and measures to reduce the environmental footprint of its operations.

59. The Respondent conducts regular EIAs and reports on the condition of plant and machinery every four months to evaluate the potential environmental risks,[82] ensuring that any negative effects are promptly addressed. The employment of professionals like Mr. Becky, who ensures that operations are safe and environmentally sound, underscores Respondent's commitment to maintaining high environmental standards. his independent oversight ensures that the activities of the Respondent do not adversely affect biodiversity or public health. Since it has not been conclusively proven that the dispersion of toxic substances is caused by the Respondent, it cannot be held liable for

[76] https://www.eia.gov/energyexplained/biofuels/biofuels-and-the-environment.php
[77] *Supra note* 41
[78] Article 1, CBD, 1993
[79] Article 2, CBD, 1993
[80] *Supra note* 66
[81] *Supra note* 49

affecting the public health and for damaging the environment. Thus, it has not breached its obligations under the UNFCCC as well as CBD.

60. Given the alignment of the biofuel production processes conducted by the Respondent and absence of any evidence regarding causing harm to public health, these agreements have not been violated.

B. <u>The Claimant is liable for the breach.</u>

61. The Claimant, in the present case, is liable because **[i]** It is the primary responsibility of the State to protect human rights; **[ii]** It acted in bad faith; and **[iii]** It violated the transparency obligation under the BIT.

i. <u>It is the primary responsibility of the State to protect human rights.</u>

62. The Claimant cannot hold the Respondent liable for human rights violations arising from the flash floods in Palmenna.

63. The international law does not impose direct obligations on investors to uphold human rights as this responsibility primarily lies with the State.

64. The duty to uphold human rights mandates that both the state and its representatives refrain from violating human rights in any manner, whether through actions or omissions.[83] The duty to ensure human rights entails that the State must take appropriate measures to enable all individuals within its jurisdiction to effectively exercise and enjoy those rights.[84] By virtue of Article 2 of Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms,[85] each state bears the primary responsibility to safeguard, advance, and enforce human rights by taking

[83] Gros Espiell, Hector, *La Convencion Americana y la Convencion Europea de Derechos Humanos*, 1991
[84] *Id*
[85] Article 2, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 1998

necessary measures across social, economic, political, and legal domains to ensure that all individuals within its jurisdiction can effectively enjoy these rights and freedoms, both individually and collectively. By virtue of its membership to UNFCCC,[86] Palmenna is automatically a member of the UN because of the fact that, as of 2024, all 198 countries that have ratified the Convention are also a UN member state.[87] As a member of the UN, Palmenna is obligated to adhere to UN declarations, which signify a collective commitment to specific directions and principles. During the flash floods in Palmenna, the responsibility to issue directives halting operations by companies rested with the Claimant. The absence of such a directive precludes holding the Respondent liable, primarily because the flood was beyond their control. The state bears the primary duty to safeguard its citizens and issue necessary directives in such circumstances.

65. Investment Tribunals have held that international law does not impose direct human rights obligations on investors. In *Bear Creek v. Peru*,[88] the majority opinion held that the international law does not impose obligations on investors. International law, supports the position that foreign investors or corporations are not directly accountable for international human rights obligations. Instead, these responsibilities are firmly placed on States, reaffirming that the onus of upholding human rights within a jurisdiction primarily rests with the State.[89]

66. The Claimant cannot reasonably assert liability against the Respondent for human rights issues arising from the flash floods. Despite being aware of the severe risks associated with flooding and the operations of companies during such periods, the

[86] *Supra note* 48
[87] UN Climate Change, *What is the United Nations Framework Convention on Climate Change?*
[88] *Beer Creek v. Peru*, ICSID Case No. ARB/14/2 [2017]
[89] Human Rights Committee, General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004*

Claimant failed to enact any legal prohibitions on industrial activities during flood events. This negligence is particularly stark given the historical context: in 2020, under similar circumstances, proactive evacuation measures were taken, and commitments were made to implement preventive actions by PM Akbar who was did not hold the cabinet at that point of time.[90] However, when the time came to fulfil these commitments, PM Akbar did not take any action.

67. Thus, the failure of the Claimant to issue directives during the flash floods absolves the Respondent of liability for any resulting human rights violations, aligning with the State's primary duty to protect its citizens.

ii. <u>The Claimant, in the present case, acted in bad faith.</u>

68. The Claimant acted in bad faith in its dealings related to the establishment and operation of the Respondent Company.

69. The principle of "good faith" is an internationally recognised principle in international law.

70. In *Inceysa vallisoletana v. el Salvador*, the Tribunal invoked the principle of good faith as a 'supreme principle', which in the contractual field means '*absence of deceit and artifice during the 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.*' The Tribunal determined the rule that no one should profit from their own misconduct.[91] In the *Nuclear Tests Case,* the International Court of Justice ["**ICJ**"] opined that good faith is a fundamental principle in the creation and fulfilment of legal obligations. Trust and confidence are crucial for international

[90] Paragraph 11, Proposition, p. 6
[91] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 [2006]

cooperation, especially as such cooperation becomes more necessary in various areas.[92] The principle of good faith was also affirmed in *Phoenix Action v. Czech Republic.*[93]

71. *Here,* Prime Minister Akbar ["**PM Akbar**"], under pressure to appease his cabinet and address public criticism, expedited the establishment of the Respondent, disregarding PM Gan's reservations about situating the company in Palmenna that in such a less period of time, they may not be able to make sure that the company would be environmentally sustainable.[94] This decision was driven by political expediency rather than a thorough consideration of potential risks. PM Akbar's expressed willingness to "tweak certain things" in favour of the Respondent[95] reflects a blatant disregard for the nation's laws and regulatory framework, demonstrating bad faith by intending to manipulate legal provisions to facilitate the company's setup.
72. Despite knowing the severe flood risks, the Claimant did not prohibit industrial activities during such periods. In 2020, proactive evacuation measures were promised by PM Akbar, who was not in the cabinet then, but he failed to act on these commitments when the time came.[96] This demonstrates that he undertook the evacuation of people in 2020 with the primary intention of discrediting Prime Minister Elsie. His objective was to have her removed from her position, thereby enabling him to assume control of the cabinet.
73. In 2024, during a call with Tara Sharma and Luke Nathan to address the situation, PM Akbar suggested that the Respondent should admit to all allegations, despite the fact that the Respondent had not committed the alleged actions.[97] This further illustrates the Claimant's lack of good faith and responsibility in handling the crisis.

[92] *Nuclear Tests (Australia v. France),* 1974 ICJ 457
[93] *Phoenix Action Ltd. v. Czech Republic,* ICSID Case No. ARB/06/5 [2009]
[94] Paragraph 19, Proposition, p. 8
[95] *Id,* p. 9
[96] *Supra note* 30
[97] Paragraph 51, Proposition, p. 17

74. By shifting blame to Canstone, the Claimant ignores the very defense it previously utilised to absolve itself of similar responsibilities. This contradictory stance demonstrates a lack of good faith and fairness in the Claimant's actions. [98]

75. The Claimant acted in bad faith by expediting the Respondent Company's establishment for political reasons, expressing willingness to manipulate legal provisions, failing to enact necessary legal prohibitions during floods, and attempting to shift blame onto Canstone. These actions, taken together, demonstrate a clear lack of good faith and fairness in the Claimant's conduct.

iii. Violation of transparency obligations by the Claimant.

76. The Claimant has violated the transparency obligations under the PK-BIT.

77. Article 1.1(b) of the PK-BIT[99] outlines the expansion of trade under conditions of transparency, indicating that all agreements and actions should be conducted openly. Article 2.1[100] mandates that all laws, regulations, judicial decisions, policies, procedures, and administrative rulings related to matters covered by the PK-BIT must be promptly published or made available in a manner that enables interested persons and the other party to become acquainted with them through the internet ensuring accessibility. Article 2.2[101] requires that these provisions be implemented in a fair, reasonable, transparent, and just manner, while Article 2.3[102] calls for periodic consultations to improve transparency. Article 3.1[103] reinforces the principles of good administrative behaviour, including consistency, impartiality, independence, openness, and transparency. These principles are essential for ensuring that all actions taken under the BIT are transparent and accountable.

[98] *Supra note* 78
[99] Article 1.1(b), BIT, Proposition, p. 3
[100] Article 2.1, BIT, Proposition, p. 4
[101] Article 2.2, BIT, Proposition, p. 4
[102] Article 2.3, BIT, Proposition, p. 5
[103] Article 3.1, BIT, Proposition, p. 5

78. The Claimants, represented by M. Akbar, violated the transparency obligations[104] stipulated in the BIT by keeping the terms of the agreement confidential, depriving Palmenna's population of their right to be informed, as an interested party, about the agreements affecting the environment and economy in which they are living in.
79. By keeping the terms confidential, the Claimant has breached its duty to inform interested parties, depriving the population of their rights and contravening principles of good administrative behaviour.

C. <u>The rights of the investor should be prioritised.</u>

80. The rights of the investors should be prioritised in light of the floods, which was an unforeseeable event.
81. The primary focus of BITs remains on protecting investor rights, often without requiring a balance between public interest and investor rights.[105] The WTO's Trade-Related Investment Measures directly address foreign investment and provide investor protection.[106]
82. *Here*, the main aim for the Respondent of setting up a subsidiary in Palmenna was to secure investments and the subsequent funds for Kenweed, aligning with the BIT's core objective of investment protection as a means to foster enhanced economic cooperation between parties, as highlighted in the Preamble.[107] The occurrence of an Act of God, such as the flash floods, poses a challenge to balancing investor rights and public interests. However, given the primary focus of the BIT on investor protection, the rights of the Respondent as an investor should be prioritised.

[104] *Supra note* 94
[105] Aikaterini Titi, *The Right to Regulate in International Investment Law*, *in* 10 Studies in International Investment Law, 2014
[106] TRIMS, 1995
[107] Preamble, BIT, Proposition, p. 3

83. Article 11 of the PK-BIT,[108] which outlines security exceptions, does not expressly exclude investor protection in cases of natural disasters or other unforeseen events. If the contracting parties had intended to exclude protection under such circumstances, they could have explicitly provided for it within the security exceptions. The absence of such provisions indicates that the Respondent's investments should still be protected despite the occurrence of an Act of God.

84. Thus, if the investments of Canstone are not protected due to an Act of God, it would result in significant injustice to both the Respondent as well as the State of Kenweed. Hence, in this context, the rights of the investor should be prioritised.

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

85. The Claimant is not entitled to an award of declaration and damages as the Respondent has not breached its obligations under the PK-BIT, as elucidated in Pleading III. **[A]** The acts of the Respondent do not form a chain of causation; and **[B]** Mitigating damages should be considered by the Tribunal; and **[C]** Contributory fault by the Claimants.

A. <u>The acts of the Respondent do not form a chain of causation.</u>

86. The actions of the Respondent did not give rise to the damages caused to the Claimant as mentioned in Pleading III in detail.

87. In legal terminology, causation refers to the connection between an event or actions and its resulting effect.[109] Causation has two aspects: the wrongful act must directly cause the loss, and the connection must be close enough to warrant compensation.[110]

[108] Article 11, BIT, p. 11
[109] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 [2011]
[110] Ilias Plaokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 2015

88. "But for" test, which inquires whether the damage would have occurred in the absence of the wrongful act.[111] Investment Tribunals in various number of cases have utilised this test to pass judgments, including *Chevron v. Ecuador*,[112] *Bilcon v. Canada*,[113] *Micula v. Romania*,[114] including others. An independent act that intervenes between the conduct and the damage, thereby breaking the chain of causation, can absolve the author of the wrongful conduct. The intervening act must be sufficient to cause the damage on its own and must have been unforeseeable.[115]

89. Proof of causation between the conduct and injury is necessary for a compensation order as held in *S.D Myers v. Canada.* [116] The simple fact that damage has happened does not give the claimant the right to seek compensation right away; if the injury is too far removed from the claimed illegal conduct, recompense is unfair. [117]

90. *Here,* the flash floods constituted an Act of God, an unforeseeable event for the Respondent. As a foreign investor unfamiliar with the conditions in Palmenna, the Respondent could not have anticipated such a natural occurrence. This unforeseeable natural disaster intervened between the Respondent's actions and the resultant damage. The flash floods meet the criterion of an unforeseeable intervening act, sufficient to cause the damage independently. The Claimant's failure to impose a complete ban on the functioning of industries during flash floods contributed to the damage, serving as another intervening factor.

91. The injuries that the farmers suffered in Karheis is too remote to be attributed to the Respondent. The injury to the farmers occurred two weeks after the alleged leak in the

[111] Tory A. Weigand, *Tort Law- The Wrongful Demise of But For Causation*, 2019
[112] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2007-02/AA277 [2010]
[113] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04 [2019]
[114] *Micula v. Romania*, Case No. ICSID Cse No. ARB/05/20 [2013]
[115] John Sherman Myers, *Causation and Common Sense*, 1951
[116] *S.D. Myers Inc. v. Government of Canada*, Partial Award (Merits) [2000]
[117] *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8 [2016]

facility due to suspected contamination.[118] In Appam, the situation exacerbated due to impervious roads and surfaces and not because of the operations of the Respondent. [119]

92. Therefore, the Respondent should be absolved of liability and of any kind of damages, as the chain of causation was effectively broken by an unforeseeable and independent natural event, compounded by the lack of preventive action from Claimant.

B. Mitigating factors should be considered by the Tribunal.

93. When assessing damages, a Tribunal must consider all pertinent facts, including mitigating considerations.[120] Tribunals encompass the jurisdiction to ascertain the degree of compensation reduction resulting from mitigating considerations.***[121]***

94. The origin of the exception to full compensation in investor-state disputes, as seen in the *Himpurna v. Indonesia* case, underscores the principle that awards should not result in economic oppression of the country.[122] This approach was reinforced in subsequent cases, such as *CME v. Czech Republic*, where arbitrator Ian Brownlie argued that states should not be subjected to punitive economic penalties that could ruin them, highlighting the state's responsibility to its citizens.[123]

95. *Here,* the Respondent is owned 30% by SZN, a private limited company, and 70% by Mehstone, which in turn is 40% owned by KLT, another private company.

96. The political instability in Kenweed, characterised by frequent military coups and street protests, has already undermined investor confidence and disrupted economic activities. Imposing additional financial penalties would further destabilize the region,

[118] *Supra note* 67
[119] *Supre note* 57
[120] *Compania Del Desarrollo de Santa Elena v. Costa Rica*, ICSID Case nO. arb/96/1 [2000]
[121] *Romak v. The Republic of Uzbeikstan*, PCA Case no. 2007-07/AA280 [2009]
[122] *Himpurna California Energy Ltd. v. PT (Persero) Perushaan Listruik Negara,* 1999
[123] *Supra note* 31, Case Separate Opinion on the Issues at the Quantum Phase by Ian Brownlie, 2003

hindering long-term development and exacerbating existing issues such as labour exploitation, low wages, and poor working conditions. PM Gan's commitment to revitalising the economy of Kenweed underscores the critical need for stability and investment. Large-scale compensation to Palmenna would divert essential resources away from vital areas such as education, healthcare, and infrastructure, ultimately punishing the population of Kenweed for the alleged actions of a partially state-owned enterprise.

97. In addition to this, the Respondent did everything in their capacity to prevent the harm caused to environment and public health in Palmenna including installation of state-of-the-art technologies and instant repairing of the pressure relief valves, hindered due to the impact of floodwaters.

98. Hence, while awarding the damages, the Tribunal should take these mitigating factors into consideration.

C. Contributory fault by the claimants.

99. Contributory fault is a well-established principle in the realm of international law,[124] requiring the consideration of two key elements: a determining factor and/or a triggering factor.[125]

100. In *Copper Mesa v. Ecuador*[126], the Tribunal opted to decrease compensation by 30%. In *Occidental Petroleum* case,[127] the Tribunal applied a 25% reduction in the damages to be paid.

[124] S. Ripinsky & K. Williams, *Damages in International Investment Law*, 2008
[125] *Supra note* 63
[126] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-02 [2016]
[127] *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL Arbitration Proceedings, [2004]

101. *Here*, the flood's severity was significantly exacerbated by Appam City's poor infrastructural planning. The high percentage of impervious surfaces such as roads, highways, and buildings served as a clear triggering factor, intensifying runoff and heightening the risk of flash flooding.[128] The Claimant's failure to address these infrastructural deficiencies was a decisive factor that directly contributed to the flood, worsening the situation and ultimately leading to the failure of the pressure relief valves.

102. Hence, the Respondent cannot be held solely liable for the damages sustained by Palmenna.

[128] *Supra note* 37

PRAYER FOR RELIEF

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

I. **DECLARING,** the commencement of arbitral proceeding by the Government of Palmenna as invalid and in breach of Article 12 of the PK-BIT.

II. **DECLARING,** that the Respondent did not breach its obligations under the PK-BIT.

III. **DECLARING,** that the Claimant is not entitled to an award of declaration as well as damages.