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ASIAN INTERNATIONAL ARBITRATION CENTRE

KUALA LUMPUR, MALAYSIA

19TH LAWASIA INTERNATIONAL MOOT COMPETITION 2024

GOVERNMENT OF PALMENNA

V.

CANSTONE FLY LIMITED

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

Pursuant to Article 12 of the Palmenna-Kenweed Bilateral Investment Treaty ("PK-BIT"), the Government of Palmenna ("Palmenna") and Canstone Fly Limited ("Canstone") hereby submits the present dispute pertaining to Canstone's breach of the PK-BIT which had resulted in respiratory tract infections amongst the citizens of Palmenna to the Arbitral Tribunal ("Tribunal") of the Asian International Arbitration Centre ("AIAC"), with the seat of arbitration in Kuala Lumpur, Malaysia, in accordance with the AIAC Rules 2023.

On this basis, this Tribunal is requested to adjudge the matter in regards to the relevant international law which may be applicable.

QUESTIONS PRESENTED

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

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

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

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

STATEMENT OF FACTS

PARTIES

Parties to the arbitration are **Palmenna** and **Canstone**.

Palmenna is the Executive branch of the Federation of Palmenna ("the Federation"). The Federation is located in Southeast Asia, with a border along the Independent State of Kenweed ("Kenweed"). Its climate makes the Federation an optimal State for palm tree cultivation.

Canstone is a subsidiary company of Mehstone Star Limited ("Mehstone") and SZN Company Limited ("SZN") which was incorporated into the Federation on 26 October 2021. It began its operations in November 2021.

MEMORANDUM OF UNDERSTANDING

The Memorandum of Understanding ("MOU") between the Federation and Kenweed was signed on 27 August 2021. It represented the formalisation of the agreement between the States' Prime Ministers, Prime Minister Akbar and Prime Minister Gan, alongside with his co-owner of Mehstone, CEO Tara Sharma. The agreement was to establish a subsidiary of Mehstone, a biodiesel production corporation, in Appam, the Federation's capital city. This subsidiary had been orally agreed between both Prime Ministers that it would be **environmentally sound**.

PK-BIT

The PK-BIT between the Federation and Kenweed was signed on 3 October 2021 in Appam, after it was modified to include the coverage of potential environmental challenges. Its purpose was to **facilitate cooperation and utilisation of greater business opportunities** between the States.

CANSTONE'S INCORPORATION

Canstone was incorporated into the Federation on 26 October 2021, with its operations beginning in November 2021 after securing two (2) biodiesel plants in the Federation – one (1) in Appam, and another in Karheis, a city closer to the border between the Federation and Kenweed. Its owners are Mehstone and SZN, which was owned by Luke Nathan, with the former owning 70% and the latter owning 30%.

The PK-BIT had been instructed by Prime Minister Gan to be disclosed and communicated to Canstone's shareholders and Board of Directors upon its establishment.

KARHEIS INCIDENT

In February 2023, Canstone's Karheis facility received an unsigned note, detailing a **potential leak in one of their refined palm oil storage tanks**. Immediately, its in-house expert, Jakey Jake, phoned Alan Becky, the QC of Canstone, and requested for an urgent examination of the facility's equipment.

Two (2) days after, Alan Becky arrived at the Karheis facility. He began inspection, and concluded in a report that the **unsigned note was a mere hoax**, and **rejected Jakey Jake's request for a detailed investigation**.

On 6 September 2023, the Board of Directors had a meeting with the senior management of Canstone. It included an appraisal by Alan Becky pertaining to the **current status of the facilities**, as well as Luke Nathan and Alan Becky **requesting for additional provisions and resources** which would allow thorough examination of the facilities' equipment. Alan Becky had further **requested for an independent consulting firm** to be hired to conduct an EIA on

Canstone's behalf. As the men received assurance from CEO Tara Sharma that an answer will be produced by 15 December 2023, Alan Becky put further Reports on-hold until then.

APPAM INCIDENT: THE DISASTER

On 26 November 2023, Appam experienced its worst flash flood in history. While it receded quickly the next day, the areas surrounding Canstone's Appam facility took more than a day for floodwaters to fully subside.

Shortly after, nearby occupiers of the facility contracted respiratory tract injuries. The doctor found it could have been caused by inhalation of irritant gases or exposure to corrosive chemicals. Later, it was found in a sample of Appam's floodwaters that various toxic chemicals were present, including traces of biodiesel. This incident affected 129 citizens; 39 were hospitalised, of which 13 were Canstone's Appam facility employees.

This incident enraged the public, who were of the view that Canstone, as the only factory in operation at the time, was responsible.

PALMENNA HIGH COURT: PALMENNA ACTIVISTS V PALMENNA AND SZN

On 15 December 2023, Palmenna activists initiated legal actions against Palmenna and SZN on the grounds of negligence. On 14 February 2024, the Palmenna High Court ruled in favour of the activists, and ordered for compensation to be paid to the victims of the Appam incident. Palmenna and SZN appealed this decision, however there is currently no direction by the Court of Appeal.

On 1 March 2024, a heated video call ensued between Prime Minister Akbar, CEO Tara Sharma, Alan Becky and Luke Nathan to find a solution for Palmenna's political landscape. No solution was reached, and it ended sourly.

INITIATION OF AIAC PROCEEDINGS

On 6 March 2024, Palmenna commenced arbitration proceedings against Canstone pursuant to Article ("Art.") 12 of the PK-BIT, claiming Canstone had breached its obligations in the PK-BIT. Palmenna is seeking both declaratory reliefs and damages.

SUMMARY OF PLEADINGS

I.

Pre-arbitration steps must be complied with prior to the invocation of the arbitration as the PK-BIT has made it mandatory. First and foremost, in commencing arbitration, a notice of arbitration must be filed, accompanied with, *inter alia*, a confirmation of the fulfilment of all existing pre-conditions to arbitration. Next, the word "shall" in this PK-BIT indicates an obligatory nature of the clause. Furthermore, the PK-BIT's intent had been to reinforce the longstanding ties of friendship between the States, thus the dispute resolution article would be critical. Additionally, the negotiation clause is complete in its structure. Finally, the Respondent has not waived its right to the pre-arbitral steps prior to the invocation of the arbitration.

II.

Palmenna is precluded from initiating arbitration against Canstone as the matter to be litigated is barred by issue preclusion. Despite the subject matter differing, the matter brought forward to the Tribunal is essentially the same issue which has been answered in the Palmenna High Court: the party responsible for the respiratory tract infections.

III.

The Respondent did not violate its obligations under the PK-BIT, specifically under Art.5, on the grounds of act of God. The flood that Appam experienced was recognised as "one of the worst flash floods," and it is the Respondent's position that given the unforeseeability, Canstone did not fail to meet its environmental obligations. Should this Tribunal find otherwise, the Respondent alternatively submits that the presumption under Art.5(3) could be rebutted by

drawing inferences from the facts. The very existence of the possibility that there might be other sources being responsible for the leak, discharges the burden of proof.

It is also submitted to this Tribunal that the Respondent had not breached its sustainability obligations under Art.4 of the PK-BIT. The Respondent's stance is that, the oral promises made forth by Prime Minister Akbar rendered it reasonable for Canstone to delay submitting reports during its operation. Additionally, the Respondent submits that it was not "as soon as practically possible" for Canstone to submit any reports to the relevant ministry of Palmenna before obtaining approvals from Canstone's stakeholders due to the initiation of the legal proceedings.

IV.

Due to the lack of causal link between the alleged breaches and the harm, the Respondent submits that the Claimant is not entitled to the declaratory award and damages. The very existence that there might be other sources that caused the harm does not prove that it was the Respondent's liability than any other sources. For the same reason, the Respondent submits that the Claimant is not entitled to damages.

PLEADINGS

I. PRE-ARBITRATION STEPS MUST BE COMPLIED WITH BEFORE ARBITRATION PROCEEDINGS CAN BE COMMENCED BY PALMENNA AGAINST CANSTONE.

1. It is of an established general principle that whether pre-arbitration steps are mandatory and obligatory are dependent upon the **wordings of the clause**. The manner in which it has been worded demonstrates its intentions of being binding upon the parties.
2. There are two (2) pre-arbitration steps provided in the PK-BIT,[1] specifically under Art.12(1)(a), the negotiation clause, and Art.12(1)(b), the mediation clause. It is submitted to this Tribunal that **neither of these pre-arbitration steps have been complied** with. Based on the facts, there had been no initiation of negotiation nor mediation by either the Claimant nor the Respondent prior to the invocation of this arbitration by the Claimant, specifically in regards to the claim being brought forth to the Tribunal: the Respondent's breach of the PK-BIT.

A. REQUIREMENT UNDER THE AIAC ARBITRATION RULES 2023.

3. By virtue of Art.12(1)(c) of the PK-BIT, an invocation of arbitration is to be administered by AIAC in accordance with its prevailing arbitration rules at the time of dispute. Currently, such rules require the commencement of arbitration to include the submission of a notice of arbitration, inclusive of, *inter alia*, a **confirmation of the fulfilment of existing pre-conditions to arbitration.**[2]

[1] *PK-BIT*, p11, Art.12
[2] *AIAC Arbitration Rules 2023*, Rule 2(1)(b)

4. As aforementioned, no pre-arbitration steps have been fulfilled by the parties, and therefore, the notice of arbitration would be **incomplete**, effectively *prima facie* affecting the jurisdiction of this Tribunal.

B. THE USAGE OF "SHALL"

5. The general rule of interpretation of a treaty is that it shall be interpreted in good faith in accordance with its ordinary meaning in their context and in light of its object and purpose.[3] This PK-BIT uses **only** the word "shall",[4] which, in its ordinary signification, is a commanding and compulsory language.[5] There is an absence of the word "may" in the PK-BIT, which, in contrast to the word "shall", would indicate an optional choice to the parties.[6] To construe "shall" as "may" is allowed unless it were to cause some absurd or inconvenient interpretation of the law.[7]

6. It is submitted to this Tribunal that to construe "shall" as "may" in regards to the PK-BIT would cause an inconvenient interpretation due to its **exclusive usage** throughout, as well as, in specific regard to the Art.12(1) of the PK-BIT where it states *"Any dispute between the Parties arising from, relating to, or in connection with this BIT* ***shall*** *be referred…"*, would defeat its crucial importance to the **PK-BIT's intent** – which is to reinforce the longstanding ties of friendship between the States.[8]

[3] *Vienna Convention on the Law of Treaties 1989*, Art.31
[4] *PK-BIT*, p1-12, Art.1-15
[5] *Black's Law Dictionary* (10th edition, 2014)
[6] *Prime Mineral Exports v Emirates Trading Agency* [2016] EWHC 3003
[7] *Khub Chand & Ors vs State of Rajasthan & Ors* 1967 AIR 1074
[8] *Moot Problem*, p9, para.20

C. A COMPLETE NEGOTIATION CALUSE

7. An agreement to negotiate in good faith is complete unless it were to lack essential terms for the future bargain – the **furtherance of dispute**, and that the negotiation itself is capable of **covering the matter to be disputed**.[9]

8. It is submitted to this Tribunal that Art.12(1)(a), the negotiation clause of the PK-BIT, does not lack these essential terms, and thus is binding upon the parties to its fulfilment prior to the invocation of the arbitration. Clearly, in the event of an unsuccessful negotiation, the dispute is capable of being brought forth to mediation, and finally, to arbitration, pursuant to its subsequent clauses, Art.12(1)(b) and Art.12(1)(c), therefore the requirement of a **furtherance of dispute is fulfilled**. Additionally, Art.12(1) provides the scope of the dispute resolution methods, including the negotiation, which is *"Any dispute between the Parties arising from, relating to, or in connection with this BIT…"*. Thus, the negotiation would, indeed, be **capable of covering the matter to be disputed** – the breach of the PK-BIT.

D. COMMERCIALLY-SENSIBLE MEDIATION CLAUSE

9. Where a time-stipulation is included in a mediation clause, it is deemed to be commercially sensible,[10] and would be binding upon its parties.

10. It is submitted to this Tribunal that, indeed, the mediation clause of Art.12 is commercially-sensible, and would be more beneficial to the Claimant and Respondent to first resort to mediation. This mediation includes, in Art.12(1)(c), a **time-stipulation of ninety (90) days** prior to the invocation of arbitration. Mediation is, of common knowledge, **less time-consuming** and **more cost-effective**. Time-wise, international

[9] *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009)
[10] *Prime Mineral Exports v Emirates Trading Agency* [2016] EWHC 3003

arbitration may take an average of 15 months.[11] Mediation, on the other hand, could take as little as one (1) day.[12] Cost-wise, an international arbitration of an investment treaty may cost around US$1,000,000.[13] Meanwhile, mediation, inclusive of registration and 3 months of mediator and administrative costs would only cost around US$55,000.[14]

11. Furthermore, despite the mediation clause of the PK-BIT being silent on the matter of a specific mediation framework to be utilised, the Claimant and Respondent have **domestic options with high success rates** readily available; mediation frameworks in the Federation and Kenweed, invoked primarily between domestic parties, have a success rate of over 70%.[15] This further solidifies that it would be commercially-sensible for the parties to abide by the mediation clause.

E. NO WAIVER OF PRE-ARBITRATION STEPS

12. Where pre-arbitration steps had been deemed as non-mandatory,[16] it had been in the event of a party rejecting to proceed with a pre-arbitral step.
13. It is submitted to this Tribunal that the present case between the Claimant and the Respondent is absent on such a matter. There had simply been no initiation of negotiation and mediation prior to the invocation of the arbitration. The Respondent had **not waived its right to the pre-arbitral steps**, as such a right was never raised in the first place.
14. As such, it is submitted to this Tribunal that pre-arbitration steps must be complied with before arbitration proceedings can be commenced by Palmenna against Canstone due to

[11] *"What is the median length of an international arbitration? And how does that compare to litigation in the U.S. federal courts?"* MoloLamken LLP 2021, https://www.mololamken.com/knowledge-what-is-the-median-length-of-an
[12] *"FAQs,"* Malaysian International Mediation Centre, https://www.mimc.org.my/faqs/
[13] *"What is the average cost of an international arbitration?"* MoloLamken LLP 2021, https://www.mololamken.com/knowledge-what-is-the-average-cost-of-an
[14] *AIAC Mediation Rules 2023*, Part II Schedule Fees
[15] *Corrections and Clarifications to the Moot Problem*, p1, clarification 1
[16] *C v D* [2023] HKCFA 16

the **requirements of the AIAC Arbitration Rules 2023**, the **usage of "shall"** in the PK-BIT, the **completion of the negotiation clause**, the **commercially-sensible mediation clause**, and that there was **no waiver by the Respondent of its pre-arbitral rights**.

II. PALMENNA IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST CANSTONE.

15. A party to the proceedings may be precluded from initiating arbitration by way of issue preclusion. This doctrine "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgement, **even if the issue recurs in the context of a different claim**".[17] Thus, as opposed to *res judicata*, issue preclusion is determined on a much narrow scope – the specific issue to be litigated, rather than the subject matter of the claim, and would be still applicable despite the matter being litigated under a different subject matter.

16. On this basis, it is submitted to the Tribunal that Palmenna is precluded from initiating arbitration against Canstone as the specific issue – the **party responsible for the respiratory tract infections** amongst the citizens of Palmenna – to be litigated is barred by issue preclusion due to it having been litigated in the Palmenna High Court prior.

A. CRITERIAS OF ISSUE PRECLUSION.[18]

(a) The same issue that is now being raised must have been contested by the parties and submitted for judicial determination in the prior case.

17. It is submitted to the Tribunal that, indeed, the **same issue is being brought forward** to the Tribunal by the Claimant which has been judicially determined in the Palmenna High Court. The issue in question is regarding **the party responsible for the respiratory tract injuries amongst the citizens of Palmenna**.

18. This issue was raised and contested by the parties during the Palmenna High Court case. It had been a necessary determined issue, as, upon its conclusion, Palmenna and SZN had

[17] *Canonsburg General Hospital v. Sebelius* 989 F. Supp. 2d 8 (D.D.C. 2013)
[18] *Yamaha Corporation of America v. United States*, 961 F.2d 245

been ordered to **pay compensation to the victims of the "incident".**[19] The "incident" being referred to had been the respiratory tract injuries caused upon the citizens of Palmenna within the area nearby Canstone's Appam facility.

19. Meanwhile, in this proceeding before the Tribunal, the Claimant's seeking of an extended and specific declaratory statement provides evidence that the issue to be litigated is the same. The Claimant's sought declaratory statement is as follows: *"A declaration that the failure and/or omission of Canstone to abide by the terms of the BIT had* ***resulted in respiratory tract infections amongst the citizens of Palmenna****."*[20]
20. Therefore, it is submitted to this Tribunal that the Claimant is raising the same issue which has been decided in the Palmenna High Court between the activists, Palmenna, as well as SZN – Canstone's parent company to which it is a **privy** to.[21]
21. SZN and Canstone are privies to one another as their relationship is one which is capable of **giving rise to an imposition or assumption of responsibility** by SZN in regard to Canstone's actions.

(a)(i) Parent and subsidiary are in the same industry.

22. SZN is a start-up with high ambitions of venturing into the **sustainable energy sector,**[22] which they successfully did, through Canstone – a **sustainable biodiesel** plantation entity.[23]

[19] *Moot Problem*, p16, para. 45
[20] *Moot Problem*, p18, para. 55
[21] *Chandler v Cape plc* [2012] EWCA Civ 525
[22] *Moot Problem*, p5, para. 7
[23] *Moot Problem*, p9, para. 21

(a)(ii) Parent did/ought to know as much about health and safety as the subsidiary.

23. SZN is in the know regarding the health and safety of Canstone's facilities through the **Reports conducted every 4 months**.[24] as well as the fact that SZN handles Canstone's **daily operations**.[25]

(a)(iii) Parent did/ought to know subsidiary's operations were unsafe.

24. As stated in (23), SZN would be in the know regarding the safety of Canstone's operations as it handles Canstone's **daily operations**.

(a)(iv) Subsidiary/employee relying on parent to safeguard the employee's health and safety.

25. As (24).
26. Thus, it is submitted to this Tribunal that the **same issue** in regard to respiratory tract injuries amongst the citizens of Palmenna has been raised and contested by the parties in the Palmenna High Court case, and therefore, this criteria of issue preclusion is successfully established.

(b) The issue has been actually and necessarily determined by a court of competent jurisdiction in that prior case.

27. It is submitted to this Tribunal that the issue has been **actually and necessarily determined** by a court of competent jurisdiction in that prior case.
28. As aforementioned, the issue regarding the party responsible for the respiratory tract injuries formed the **crux of the matter** as the victims were paid compensation upon the conclusion of the Palmenna High Court case.

[24] *Moot Problem*, p10, para. 25
[25] *Moot Problem*, p9, para. 22

29. In regard to the Palmmena High Court's jurisdiction, it is submitted to this Tribunal that, indeed, it would have jurisdiction to decide on **matters which occur upon Palmenna soil**, and had affected Palmenna citizens. Furthermore, Prime Minister Akbar has **acknowledged this ruling** of the High Court himself.

(c) Preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

30. This criteria refers to a party having been **inadequately represented,**[26] such as having been represented by a party with **adverse intentions** in the prior case.[27]

31. It is submitted to this Tribunal that preclusion against Palmenna in this arbitration **will not work a basic unfairness** to Palmenna as it has **adequately represented** itself in the Palmenna High Court,[28] with a **consistent stance** with its current one now.

32. Therefore, as all **three (3) criterias of issue preclusion** has been fulfilled, it is submitted to this Tribunal that Palmenna is precluded from initiating arbitration against Canstone as this matter to be litigated, the party responsible for the respiratory tract injuries of the citizens, is barred by issue preclusion.

[26] *Entes v. Ministry of Transport and Communications of Kyrgyz* (2019), Memorandum Opinion of the United States District Court of Columbia, 18-2228 (RC)
[27] *Taylor v. Sturgell* 553 U.S. 880 (2008)
[28] *Moot Problem*, p16, para. 43

III. CANSTONE HAD NOT BREACHED ITS OBLIGATIONS UNDER THE PK-BIT.

33. In regards to the alleged breach of Art.4 and 5, the Respondent submits that Canstone had not breached its sustainability and environmental obligations.

A. ALLEGED BREACH OF ARTICLE 5.

34. On the ground of **act of God**, the Respondent submits to this Arbitral Tribunal that Canstone did not breach its environmental obligations under the PK-BIT.

(a) Act of God

35. *Aucoven v Venezuela* provides that, on the common grounds of international law, three (3) criterion have to be fulfilled in order to successfully raise the claim.[29]

(a)(i) Unforeseeability

36. The flash flood that happened during the heavy rainfall which led to the disaster was recognised as "one of the worst it has ever experienced,"[30] hence it is reasonable to conclude that the **extent** of the flood which caused the Appam disaster was unforeseeable;

(a)(ii) Impossibility to perform

37. The sudden flash flood had made it impossible for Canstone to ensure that there is no damage to its plants. The damages caused by the flood are simply beyond the Respondent's control, again, satisfying the second branch under the definition of act of God.

(a)(iii) Non-attributability

38. In our case, the flash flood was a natural disaster and was caused by no humans.

[29] *Aucoven v Venezuela* (2003), ARB/00/5, ICSID, para. 108
[30] *Moot Problem,* p14, para. 35

39. With the present circumstances satisfying the criteria for act of God, the Respondent submits that Canstone did not "cause" to enter into any river any polluting matter,[31] hence cannot be found liable for the alleged discharge.

(b) Rebuttal of presumption

40. In the event that this Arbitral Tribunal finds the above argument unsatisfactory, the Respondent submits that the presumption under Art.5(3) of the PK-BIT can be rebutted by drawing inferences from the facts.

41. Art.5(3) specifically places the burden to prove to the contrary to the occupier of the property that any discharges did not flow from the occupier of the property.[32]

42. Following the Commentary to the ICSID Convention, in international arbitration, the parties can discharge their respective burdens and standards of proof by relying upon inferences.[33]

43. Even though the nearby factories in the Appam facility were temporarily shut down due to the heavy flood, heavy tanks and machinery can be seen entering and leaving the said factories after the flood.[34] An inference can be derived from here that Canstone's Appam facility might not be **the** source, or **only** source for the leak, thus discharging the burden of proof under Art.5(3).

44. With that, in regards to the supposed breach of Art.5 of the PK-BIT, on the ground of act of God, or alternatively, the rebuttal of the presumption under Art.5(3), Canstone had not breached its environmental obligations.

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[31] *PK-BIT*, p8, Art. 5
[32] *PK-BIT*, p8, Art. 5, Clause 3
[33] Schreuer CH, Malintoppi L, Reinisch A, Sinclair A. *The ICSID Convention: A Commentary*. 2nd ed. Cambridge University Press; 2009.
[34] *Corrections and Clarifications to the Moot Problem*, p3, Clarification 10

B. ALLEGED BREACH OF ARTICLE 4.

45. Art.4 stipulates that, Canstone who is carrying out activities that may have significant environmental impact shall appoint a qualified person into conducting an EIA and produce a report thereof to be submitted to the relevant ministry.

(a) Oral promise by Prime Minister Akbar

46. However, the Respondent would like to rely on an oral promise by Prime Minister Akbar from the Federation whereby a delay to the submission was allowed.

47. From the very beginning of Canstone's creation and operation, Prime Minister Gan from Kenweed had expressed concerns over the short turnaround time in setting up the corporation and ensuring that the standard practice was being put in place. It was then that Prime Minister Akbar expressly provided reassurance in this regard, saying that he *"would not rush the timeline in submitting the necessary papers to the relevant Ministry."*[35]

48. Prime Minister Akbar's statement had made it reasonable for the Respondent's delay in submitting relevant reports due to reliance on the oral promise.

49. It is therefore unfair for the Claimant to turn onto its promise by claiming that Canstone had breached its obligations by not submitting the relevant reports when on the same note, Canstone had done nothing but to honour and kept to its promise of increasing the local employment rate in Palmenna by the setting up of its facilities on the said land by ensuring 70% of its employees are Palmenna citizens. Canstone even went out of their way by hiring locals without experience into achieving what was promised to the Claimant.

[35] *Moot Problem*, p8, para 19

50. It is also worth mentioning that, during the time, the two parties were in a good relationship, and the PK-BIT was in fact created to establish the long-standing friendship and ties between the two States. Thus, it is submitted to this Tribunal that the reliance on Prime Minister Akbar's oral promise is reasonable given the good climate between the two parties and that Canstone should not be found liable for the alleged breach under Art.4.

(b) "As soon as practically possible"

51. On top of that, it was never the intention of the Respondent to delay any submissions of reports to the relevant ministry of Palmenna.

52. During a board meeting in September 2023, the QC of Canstone, Alan Becky, had proposed the idea of hiring an external consulting firm to conduct an EIA to the board and had gotten the promise to get necessary approvals from the stakeholders before December 2023.[36] The Respondent's efforts are evident.

53. However, the Appam disaster happened in November 2023, before the proposed date by the higher management of Canstone to get approvals for the EIA to be conducted. Not long after, in December 2023, the High Court proceedings commenced. Hence, it is submitted to this Tribunal that it was not possible for the Respondent to submit the relevant reports "as soon as practically possible," before any legal proceedings had occurred.

54. With that, the Respondent submits that, regarding the alleged breach under Art.4, on the grounds of (1) the reliance on the oral promise of Prime Minister Akbar, and (2) that it was not possible to submit the relevant reports "as soon as practically possible" to the

[36] *Moot Problem*, p13, para 33

respective ministry of Palmenna, the Respondent had not breached its Art.4 obligations under the PK-BIT.

IV. IF THE ANSWER TO ISSUE III IS IN THE AFFIRMATIVE, THE GOVERNMENT OF PALMENNA IS NOT ENTITLED TO BOTH THE AWARD OF DECLARATION AND DAMAGES.

55. Due to the lack of causation between the breach and the harm, ie. the respiratory tract injuries, the Respondent submits that, even if the answer to Issue III is in the affirmative, the Government of Palmenna is not entitled to both the award of declaration and damages.

A. DECLARATION.

56. The declaration sought by the Claimant allocates the liability of the harm to the Respondent.[37] However, there is a break in the chain of causation between the breach and the harm.

57. The piece of fact that says that multiple heavy tanks and machinery can be seen coming in and out of the nearby factories that also had plastered signages of "under maintenance" following the flood, indicates that there might be a number of factors that could have caused the consequence.[38]

58. Besides, Dr. Ragu stated it was "inconclusive" whether the infection was caused by the broken relief valve.[39] There is hence insufficient evidence in suggesting that the harm was caused by the breach, as the Claimant claimed.

59. In the classic English House of Lords case of *Wilsher v Essex Area Health Authority* it provides that, in cases of multiple sources being the cause for an injury, the onus of proving causation would rest on the claimant. The fact that there might be different

[37] *Moot Problem*, p10, para 55
[38] *Corrections and Clarification to the Moot Problem*, p3, clarification 10
[39] *Moot Problem*, p15, para 40

sources that caused the harm **cannot** conclude that it was the Respondent rather than one of the other factors that had caused the consequence.[40]

60. In *Lauder v Czech Republic*, it was even provided that it requires a breach to be the "l*ast, direct act, the immediate cause 'of the aligned loss," through which it must be established that there was "no intervening or superseding cause to the claimed loss*."[41]

61. It is therefore the Respondent's position that the Claimant must demonstrate that, but for the Respondent's breach, "*it would 'in all probability' or 'with a sufficient degree of certainty' have suffered the losses that it claims.*"[42] The very existence of the possibility of other sources causing the injury means that this high standard of proving causation would not have been satisfied by the Claimant.

62. With this, the Respondent submits that due to the lack of causation linking the breach and the harm, the Claimant is not entitled to the declaratory award.

B. DAMAGES.

63. With the same reason as presented above, due to the lack of causation between the breach and the harm, the Respondent submits that the Claimant is not entitled to damages.

(a) Contributory negligence

64. In the event if the Claimant is entitled to any damages at all, possibly for the purpose of environmental restoration, the Respondent submits that the damages ought to be reduced on grounds of contributory negligence.

[40] *Wilsher v Essex Area Health* [1988] ac 1074
[41] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001
[42] *Clayton/Bilcon v. Canada*, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04

65. In international law, it is clear that simple negligence (showcasing a lack of due care for one's own property or rights[43]) that concurrently contributes to a loss is sufficient to establish contributory negligence.[44]

66. The very fact that the Claimant was found liable in the Palmenna High Court for negligence in taking preventative measures against the impending floods shows that the Claimant in fact did contribute to the loss it had suffered.

(b) Mitigating measures

67. In the event that causation can be proved and this Tribunal finds it satisfactory, the Respondent submits to the Tribunal to take into account the mitigating actions taken by Canstone after the disaster insofar as to reduce the damages quantum.[45]

68. With that, the Respondent submits that even if the answer to Issue III is in the affirmative, the Claimant is not entitled to damages due to the lack of causation between the breach and the harm. Alternatively, in light of the potential argument put forth by the Claimant in claiming damages for the reason of environmental restoration, the Respondent submits that on the ground of contributory negligence and/or mitigating measures taken by the Respondent, the damages should be reduced in quantum.

[43] *ILC, Articles on State Responsibility*, Art.39, comment 5.
[44] *Perenco v Ecuador*, ICSID Case No. ARB/08/6. p111, para 328
[45] *Moot Problem*, p14, para 39

PRAYERS OF RELIEF

Pursuant of the above consideration of law and fact, counsel for Respondent humbly prays that the Arbitral Tribunal finds that:

A. Pre-arbitration proceedings **are** required;

B. The Government of Palmenna **is** precluded from initiating arbitration proceedings;

C. Canstone had **not** breached its obligations under the PK-BIT; and

D. The Government of Palmenna is **not** entitled to both awards of declaration and damages.