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ASIAN INTERNATIONAL ARBITRATION CENTRE
19th LAWASIA International Moot – 2024

The Palm Attack:
Oil vs Spoil

MEMORIAL FOR CLAIMANT

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LIST OF ABBREVIATIONS

List of Abbreviation	Description
Art	Article
AIAC Rules 2021	Asian International Arbitration Center Rules 2021
PK-BIT	Palmenna Kenweed- Bilateral Investment Treaty
MTI	Ministry of Trade and Investment
MOU	Memorandum of Understanding
CEO	Chief Executive Officer
SZN	SZN Company Limited
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

EIA	Environmental Impact Assessment
ICC Arbitration Rules	International Chamber of Commerce International Court of Arbitration
SIAC	Singapore International Arbitration Center
HKIAC	Hong Kong International Arbitration Center
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
UNFCCC	United Nations Framework Convention on Climate Change
CBD	Convention on Biological Diversity
GATT	General Agreement on Trade and Tariffs
WTO	World Trade Organization
TBT	Technical Barriers to Trade

v.	Versus
BIT	Bilateral Investment Treaty
FET	Fair and Equitable Treatment

INDEX OF AUTHORITIES

LEGISLATION:

Sn No.	AUTHORITIES
1.	Asian International Arbitration Centre (Malaysia) ("AIAC") Arbitration Rules 2021 ("AIAC Arbitration Rules")
2.	Arbitration and Conciliation Act
3.	UNCITRAL Arbitrational Rules (2021)
4.	Vienna Convention on the Law of Treaties (VCLT)
5.	Palmenna Kenweed Bilateral Investment Treaty (PK-BIT)
6.	Article 3.3 of the United Nations Framework Convention on Climate Change (UNFCCC)

CASES

SnNo.	CASE LAW CITED
1.	BIVAC v. Paraguay
2.	([Waste Management v. Mexico II])
3.	Ceskoslovenska Obchodni Banka v. Slovak Republic
4.	Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)
5.	Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1)
6.	Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1
7.	Pulp Mills on the River Uruguay, Argentina v Uruguay, Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006)
8.	Gabcikovo-Nagumaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25)
9.	US Shrimp case,Matthias Oesch, Max Planck Encyclopedia of Public International Law [MPEPIL],April 2014,p 1-6,Oxford Public International Law, Oxford University Press, 2015.
10.	Tecmed v. Mexico: Tribunal's ruling on environmental obligations and FET standards.
11.	Metalclad v. Mexico: Tribunal's emphasis on EIAs and procedural transparency.
12.	Santa Elena v. Costa Rica: Tribunal's decision on environmental expropriation and compensation.
13.	Parkerings-Compagniet AS v. Lithuania: Tribunal's analysis of investor expectations and regulatory rights.

14	Visa International Ltd vs Continental Resources (Usa)Ltd on 2 December, 2008, AIR 2009 SUPREME COURT 1366
15.	ITEX SHIPPING PTE. LTD. v. CHINA OCEAN SHIPPING CO. (THE “JING HONG HAI”) [1989] 2 Lloyd's Rep. 522
16.	Bureau Veritas, Inspection, Valuation, Assesment and Control, BIVAC B.V. v. Republic of Paraguay(ICSID Case No. ARB/07/9)

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2.	https://www.scconline.com/blog/post/2023/01/28/pre-arbitration-procedure-mandatory-or-directory/
3.	Born, Gary, and Marija Šćekić. "Pre-Arbitration Procedural Requirements." David D Caron and others (eds), Practising Virtue: Inside International Arbitration (2015)
4.	Pre-Arbitational Requirements. David D Caron and others (eds), Practising Virtue: Inside International Arbitration (2015), 228
5.	Daniel Blobel ,Nils Meyer-Ohlendorf ,Carmen Schlosser-Allera and Penny Steel,United Nations Framework Convention on Climate Change:
6.	Caldecott, J.O., Jenkins, M.D., Johnson, T.H. *et al.* Priorities for conserving global species richness and endemism. *Biodivers Conserv* **5**, 699–727 (1996).
7.	Trachtman, Joel P, 'The WTO Jurisprudence of Article XX(g) and the Conservation of Natural Resources', in Julien Chaisse, and Tsai-yu Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford, 2016; online edn, Oxford Academic, 19 Jan. 2017
8.	Condon, Bradly J. "GATT ARTICLE XX AND PROXIMITY-OF-INTEREST: DETERMINING THE SUBJECT MATTER OF PARAGRAPHS B AND G." *UCLA Journal of International Law "*
9.	GATT Article XX General Exceptions
10.	Agreement on Technical Barriers to Trade (TBT Agreement II), 15th April 1994 (1868 UNTS 120, LT/UR/A-1A/10), OXIO 232
11.	Caron, David D. & Pellonpaa, Matti & Caplan, Lee M., 2006. "The UNCITRAL Arbitration Rules: A Commentary," OUP Catalogue, Oxford University Press, number 9780199297597, Decembrie.
12.	Gabčíkovo-Nagymaros Project (Hungary/Slovakia): ICJ's ruling on state obligations in environmental protection.

STATEMENT OF JURISDICTION

By virtue of Article 12 of the Palmenna Kenweed -Bilateral Investment Treaty(PK-BIT), concluded on October 3, 2021, and in accordance with Article 1(1) of the AIAC Arbitration Rules 2021, the Federation of Palmenna ['Palmenna' or 'Claiment'] and the Independent State of Kenweed ['Kenweed' or 'Respondent'] have hereby referred to this Honourable Tribunal the dispute concerning the breach of the PK-BIT by the respondent and the invalid initiation and preclsion of the arbitration proceeding through the Claiment.

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?

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

Geography and Economy:

Located in Southeast Asia Palmenna is a country, bordering the Independent State of Kenweed to the north. There is a causeway that links it to the Republic of Sokiyasu in the south. It is one of the Commonwealth of Nations members, which makes Palmenna has close relations with other former British colonies both historically and presently. Geographically, it varies widely from coastal plains to mountain ranges and tropical rainforests. Appam; its capital city has an advanced skyline with busy shopping streets everywhere. Hot and sultry climate dominates Palmenna's weather conditions, which are perfect for growing palm trees for oil extraction purposes. About 15 million metric tons of palm oil and palm-based products were exported by Palmenna in 2020, generating around USD 35 billion thus contributing approximately USD 10 billion to the national GDP.

Political and Economic Relations with Kenweed:

The geography of Kenweed, a neighbor of Palmenna to the north, is diverse and includes mountains, extensive plains, and tropical beaches. The central plateau is famous for rice cultivation while tourism accounts for almost 30% of its GDP. However, political instability in Kenya including periodic military coups and street demonstrations has affected it so much. As a result the rate of economic development has been sluggish and there are also problems like labor exploitation. Gan Ridhimajoo became the Prime Minister in January 2018 and he initiated the Ministry of Trade and Investment (MTI) as an answer to these economic issues. While some critics argued that Gan's dual role as both Prime Minister and MTI Minister was inappropriate due to potential conflicts of interest he managed to create two profitable subsidiaries such as Quick Tech Solutions Corporation or BRC Rubber Corp.

Formation of Mehstone Ltd :

Prime Minister Gan met with the heads of several major companies such as KS Group, Ken Cement Group, Pengko Bank, Makel Group, KLT Company Limited and SZN Company Limited on February 2nd 2021.The presence of SZN who are a start-up company raised some eyebrows since it had yet to prove itself.Tara Sharma from KLT suggested that they mix 95%

petroleum diesel and 5% palm biodiesel.Palmenna's palm oil was proposed to be used for biofuel through this proposal thereby being accepted leading to the establishment of Mehstone Star Limited ("Mehstone Ltd") on May 16th 2021.MTI owned a lion share which was at 60% while KLT came in second at 40%, and had access to Kenweed's palm oil plantations.

Environmental and Political Challenges:

There was a terrible flood in Palmenna in 2020 that was met with more political problems. The response to the flooding from the former Prime Minister, Elsie, was condemned, and this led to the rise of M Akbar who took over from her on 3 June 2021. Akbar visited Gan twice in 2021 aiming at stronger ties internationally as well as proposing a Memorandum of Understanding (MoU) which could guarantee an investment by Kenweed. On August 27th, 2021, an MOU signed for biolfuel production cost stabilization established Mehstone Ltd subsidiary in Appam. A subsidiary Canstone Fly Limited ("Canstone") was formed on October 26th, 2021 with Mehstone Ltd owning a majority share of seventy percent while SZN thirty percent. In November the same year Canstone started its activities in the form of biodiesel plantations situated in Appam and Karheis.

Flooding and Legal Controversies:

Palmenna had environmental problems persisting, and in Appam, heavy rains in early November 2023 caused severe flooding. By November 23, 2023, there were warnings of the possibility of floods happening at Karheis. Nevertheless, on November 26, 2023, Canstone's Appam facility continued operating and told its employees to come to work even though this resulted into a very serious flooding. Over one hundred and twenty-nine people suffered from respiratory diseases after the flood; thirty-nine were hospitalized (including thirteen who worked for Canstone). Elsie criticized Canstone and the government publicly provoking an action by activists on December 15th against both parties concerned.Former Prime Minister Elsie condemned the company as well as the government leading to court action filed by activists on December 16th .Furthermore, some environmentalists contend that Canstone failed to take strict measures such as closing valves or reinforcing embankments.The declaration was signed by former in-house expert Akey Jake claiming bribery and incompetence.

High Court Ruling and Arbitration:

The High Court of Palmenna ruled in favor of the activists on February 14, 2024, finding the Government of Palmenna and SZN jointly liable for negligence and ordering compensation for victims. SZN's Luke Nathan announced intentions to appeal, citing previous legal challenges. On March 6, 2024, the Government of Palmenna initiated arbitration proceedings against Canstone under Article 12 of the PK-BIT, seeking declaratory relief and damages for alleged breaches causing harm to Palmenna's citizens.

SUMMARY OF PLEADINGS

I

Palmenna's arbitration initiation should not be regarded as some kind of premature act even though it only partially complied with the pre-arbitration procedures. The two sides' unwavering stances rendered any further attempts at settlement utterly futile, as was evidenced by their completely unproductive conference call. Given the environmental and health issues around, Palmenna's choice of going to arbitration was a reasonable one. The pre-arbitration procedures, which in most cases are only recommended and not set in stone, did not require further procrastination. As a result, Palmenna was sincerely committed to opting for the arbitration method in order to settle the matter quickly and effectively.

II

The urgency of the dispute warranted the beginning of arbitration in order to avoid the three-month cooling-off period specified in Article 12 of the PK-BIT. It was not practical to adhere to the cooling-off period due to the serious nature of the issue, which demanded rapid action to avert further harm. Furthermore, despite a few minor errors, the notice of arbitration mostly complied with UNCITRAL Arbitration Rules Article 3(4) and PK-BIT Article 12(c) criteria. These shortcomings did not impair Canstone's capacity to react appropriately. In addition, the tribunal is free to decide what jurisdiction it has, and considering the facts, it ought to approve the start of the arbitration. The requirement for a prompt conclusion and the tribunal's competence to follow procedural standards.

III

Canstone, the respondent, has repeatedly failed to uphold the terms of the Bilateral Investment Treaty (PK-BIT) with Palmenna. Among these include improper drainage and ventilation system maintenance, which puts workers' and residents' health at risk. The issue is made worse by Canstone's failure to file the necessary Environmental Impact Assessment. The company's activities also contravene environmental protection laws, as evidenced by the incorrect management of hazardous materials and inadequate infrastructure modifications that upset regional ecological customs. These violations support the Claimant's environmental protection measures under the terms of the WTO's General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT). In order to remedy Canstone's infractions and guarantee adherence to international environmental standards, the tribunal should apply international environmental standards in accordance with the UNCITRAL Arbitration Rules.

IV

Canstone's refusal to carry out and submit a thorough Environmental Impact Assessment (EIA) has resulted in serious harm to the environment and public health, hence the tribunal should rule in favor of Palmenna. The damage done to Palmenna is made worse by Canstone's lack of transparency and this omission, which highlights the company's violation of its international commitments. The award is enforceable since it was made in line with applicable arbitration procedures, is signed and issued in writing with explicit reasoning. The Respondent's allegations of violations of public policy are baseless and ought to be dismissed because there is no proof that upholding the award would go against basic legal precepts. Palmenna thus has a legitimate claim to damages as well as a declaratory judgment.

PLEADINGS

ISSUE I: Whether the Government of Palmenna must comply with pre-arbitration steps before commencing arbitration proceedings against Canstone.

A. The request for arbitration was not premature because of the rigid stands taken:

The arbitration was pushed without complying with the pre-arbitration steps and in doing so the request for arbitration was not premature because (a) there was no scope for amicable settlement as both parties had taken a rigid stand, and (b) correspondence shows that attempts were made for amicable settlement.

In Visa International Ltd. v. Continental Resources (USA) Ltd., the agreement required attempts at amicable settlement before arbitration. The court ruled the arbitration request was valid despite skipping this step because both parties were inflexible and correspondence showed attempts were made. The court held that if settlement efforts are futile, this requirement is not mandatory.[1]

According to Redfern and Hunter on International Arbitration,

Even where negotiations are conducted in good faith, they are unlikely to succeed unless those involved are capable of looking at the crucial issues objectively—and objectivity is difficult to maintain when vital interests (and perhaps even the future of the business itself) are at stake. It is here that an impartial third party may help to rescue discussions that are at risk of going nowhere. [2]

From the correspondence exchanged between the parties through para 50 to 53[3], the above-mentioned is true. The conference call on 1st March 2024[4] initiated an amicable settlement. The conference call was not reaching any sensible direction both parties were furious and abruptly concluded the call in a rage.

[1] Visa International Ltd vs Continental Resources (Usa)Ltd on 2 December, 2008, AIR 2009 SUPREME COURT 1366
[2] Blackaby, Nigel. Redfern and Hunter on International Arbitration. Oxford ; New York :Oxford University Press, 2009.
[3] PK-BIT para: 50, 51, 52 & 53
[4] PK-BIT para: 49

There was an attempt to initiate the pre-arbitration but the response didn't quite meet, Canstone's failure to engage meaningfully in the pre-arbitration steps constitutes a breach, justifying the move to arbitration. [5]

Because Palmenna is obligated to carry out the treaty in good faith, they have cooperated with the pre-arbitration procedures as stipulated by the agreement[6] which is per Pacta Sunt Servanda. [7]

B. Exceptions to Following Pre-Arbitration Steps.

Article 13 of the UNCITRAL Model Law on International Commercial Conciliation permits exceptions to pre-arbitration agreements, thereby preserving the rights of the involved parties.[8] This provision suggests that parties may circumvent these steps if they deem it essential to protect their rights.

Not going through with the arbitration right when Palmenna did would have cost the nation the environmental degradation and the lives of the people living and around the facilities (which had been the case before). [9]

An analogical persuasion can be made in this context from Rajiv Vyas v. Johnwin [10]

Where conciliation was seen as an Empty Formality, conciliation in our context could be secondary dispute resolution (the pre-arbitration steps), and the empty viewing could be the delay in the damages, creating an empty formality.

C. Non-Mandatory Nature of Pre-Arbitration Steps [11]

In certain situations, courts and tribunals view the procedural steps before arbitration as optional or merely goals, instead of being required. This viewpoint stems from uncertainty regarding the

[5] Article 60 vienna convention on law and treaties
[6] Article 26 Vienna convention on law and treaties
[7] Article 26 Vienna convention on law and treaties
[8] Pre-Arbitration Procedural Requirements, 236
[9] Para:3 Moot Problem
[10] https://www.scconline.com/blog/post/2023/01/28/pre-arbitration-procedure-mandatory-or-directory/
[11] Pre-Arbitation Procedural Requirements, 234

ability to enforce contracts for negotiation and the real damage resulting from these breaches. In one tribunal's words, clauses requiring efforts to reach an amicable settlement, before commencing arbitration, 'are primarily expression[s] of intention' and 'should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute. [12]

According to Gary Born and Marija Šćekić in their article, they conclude,

Even assuming that an agreement to engage in a pre-arbitration dispute resolution process of negotiation or mediation is valid and mandatory, the obligations under such an agreement are usually limited. In particular, an agreement to negotiate or mediate, even if a binding contract, is not an agreement to negotiate successfully or to agree on any particular terms, but only an agreement to discuss a particular issue. [13]

The conditions under which Palmena took the step of invoking the arbitration clause were dire. The health problems and environmental damages caused by the leakage in the subsidiary had already put Palmena in such a situation. [14]
Waiting to complete pre-arbitration steps would have created a difficult situation for Palmena. Pre-arbitration steps are considered aspirational in some instances,[15] Palmena was in such a situation and decided to make the call to proceed with the arbitration because that is the ultimate dispute-resolution option available to the parties.

The decisions made by Palmena are done in good faith and it isn't entirely unprecedented for the courts.

In the case of Itex Shipping Pte. Ltd. v. China Ocean Shipping Co., it was decided that a contract provision mandating a peaceful resolution before arbitration was reasonable. The phrase was

[12] Pre-Arbitration Procedural Requirements,234 B.
[13] Born, Gary, and Marija Šćekić. "Pre-Arbitration Procedural Requirements." David D Caron and others (eds), Practising Virtue: Inside International Arbitration (2015)
[14] Para:36 Moot Problem
[15] Pre-Arbitational Requirements. David D Caron and others (eds), Practising Virtue: Inside International Arbitration (2015), 228

deemed to be invalid because it only conveyed pious aspiration and was merely an agreement to negotiate. [16]

ISSUE TWO: WHETHER THE PROCEDURAL INITIATION OF ARBITRATION BY PALMENNA WAS VALID

1. Urgency and Waiver of Cooling-Off Period:

We assert that the initiation of arbitration was entirely justified due to the urgency of the situation. The pressing nature of the dispute made it impractical to adhere to the 3-month cooling-off period mandated by Article 12 of the PK-BIT.[17] In situations where immediate action is necessary to protect the claimant's rights, the cooling-off period can and should be waived. In BIVAC v. Paraguay, the tribunal recognized that the cooling-off period could be waived in cases of urgency. Similarly, that the circumstances surrounding this dispute warranted immediate arbitration, making the cooling-off period unnecessary and counterproductive.[18] Mourre (2014) supports the view that flexibility in procedural requirements is crucial in urgent cases to prevent the frustration of the claimant's rights.[19] Adhering to the cooling-off period in this instance would have significantly delayed the resolution of the dispute, caused further harm and exacerbated the issues at hand. Therefore, the urgency of the situation justifies the waiver of the cooling-off period.

2. Substantial Compliance with Notice Requirements:

Adequate Notice: We also contend that the notice of arbitration was in substantial compliance with Article 12(c) of the PK-BIT and Article 3(4) of the UNCITRAL Arbitration Rules.[20] While there may have been minor deficiencies in the notice, these did not prejudice Canstone's ability to understand and respond to the claims. The essential purpose of the notice was fulfilled, which is to inform the respondent of the dispute and the claims being made. The tribunal in Waste Management v. Mexico II found that substantial compliance with procedural requirements is

[16] ITEX SHIPPING PTE. LTD. v. CHINA OCEAN SHIPPING CO. (THE "JING HONG HAI") [1989] 2 Lloyd's Rep. 522
[17] Article 12, PK-BIT
[18] Bureau Veritas, Inspection, Valuation, Assesment and Control, BIVAC B.V. v. Republic of Paraguay(ICSID Case No. ARB/07/9)
[19] Mourre, 2014
[20] (Article 12(c), PK-BIT]; [Article 3(4), UNCITRAL Arbitration Rules)

sufficient, particularly when the respondent is not unduly prejudiced.[21] In this case, the notice provided enough detail to ensure that Canstone was fully aware of the claims and could prepare an adequate defense. Therefore, any minor deficiencies in the notice should not be seen as a violation of procedural fairness. Schreuer (2009) emphasizes that tribunals often adopt a pragmatic approach to procedural compliance, focusing on whether the notice fulfills its essential purpose of informing the respondent of the claims.[22] We believe that the notice in this case met that essential purpose and that Canstone was not prejudiced by any alleged deficiencies.

3. Jurisdictional Defense:

Tribunal's Discretion: We argue that the tribunal has the discretion to determine its own jurisdiction under Article 17 of the UNCITRAL Arbitration Rules, including the authority to assess whether procedural requirements were sufficiently met.[23] We urge the tribunal to exercise this discretion and find that the arbitration was validly initiated, despite any claims of procedural deficiencies.

In Ceskoslovenska Obchodni Banka v. Slovak Republic, the tribunal acknowledged the need for flexibility in procedural matters, especially when the respondent is not unduly prejudiced.[24] We argue that the tribunal should adopt a similar approach in this case, recognizing that procedural rules should be applied flexibly to balance fairness and efficiency.

Drahozal (2013) discusses the discretion tribunals have in applying procedural rules, arguing that a flexible approach is often necessary to ensure a fair and efficient arbitration process.[25] We believe that the tribunal should use its discretion to validate the initiation of arbitration and reject any challenges based on alleged procedural deficiencies.

In light of the urgent circumstances, substantial compliance with notice requirements, and the tribunal's discretion to determine jurisdiction, we assert that the initiation of arbitration proceedings was proper and justified. The urgency of the situation necessitated immediate action, and the procedural requirements were sufficiently met to ensure fairness. We urge the tribunal to exercise its discretion and find that the arbitration was validly initiated, dismissing any objections based on procedural grounds.

[21] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3
[22] ([Schreuer, 2009])
[23] ([Article 17, UNCITRAL Arbitration Rules])
[24] ([Ceskoslovenska Obchodni Banka v. Slovak Republic])
[25] ([Drahozal, 2013])

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

1. The Respondent has breached the articles pursuant to the Bilateral Investment Treaty signed by Palmenna and Kenweed:

According to Article 10(3) of the PK-BIT, each contracting party shall guarantee the principle of good administrative behaviour, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this BIT.[26]

The Failure of Canstone to maintain and manage proper drainage system and ventilation in the plants led to the workers of the respiratory infections among the citizens, also suggested by their own in-house Dr Ragu.[27] This lack of proper health and safety infrastructure in the plant demonstrates a lack of care for the wellbeing of the citizens of Palmenna.

In Tecmed v. Mexico, the tribunal emphasized the regulation of Fair and Equitable Treatment involves an obligation to protect investment against measures that affect it negatively, which also includes environmental regulations and measures.[28]

In Parkerings-Compagniet AS v. Republic of Lithuania, The tribunal held that Lithuania had not breached its obligations, emphasizing that legitimate expectations of investors must be balanced with the host state's right to regulate.[29]

According to Article 4.1, 4.3 and 4.4 of the PK-BIT if an investment carries significant environmental burden to the host nation, then a qualified professional shall be appointed and the person shall have the responsibility of proving a detailed Environmental Impact Assessment Report. Then the report shall be submitted to the concerned ministry of the host nation.[30]

[26] PK-BIT Article 3 (1)
[27] Moot Court Problem (para no- 40,41.1,41.3,55)
[28] Tecnicas Medioambientales Tacmed S.A.("Tecmed") v. Mexico, Int'l Centre for Settlement of Investment Disputes, ICSID Case No. ARB (AF)/00/2, Award, 43 I.L.M. 133 (2004)
[29] Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)
[30] PK-BIT Article 4(1), 4(3), 4(4)

Here Canstone had appointed a professional for the (EIA) but failed to conduct and submit the assessment report to the concerned authority of the Ministry of Palmenna.[31] The knowledge of which could have prevented the loss of life in Appam. This clearly displays the breach of Article 4.1,4.3 and 4.4 of the PK-BIT.

According to Article 1(e) and 5(1) of the PK-BIT, involves environmental obligations that both the party are to follow like:

Save as expressly authorized by the respective Party, no investor discharge, or cause to enter into any river:

(a) any poisonous, noxious or polluting matter that will render or to render or contribute to rendering such river or part thereof or detrimental or injurious to public health, safety or welfare animal or vegetable life or health or to other beneficial uses of such

(b) any matter which by virtue of its temperature, chemical or bio content or its effect in discoloring the waters makes or contributes making such river or part thereof a potential danger to public safety or welfare or to animal or vegetable life or health, or affect beneficial uses of such river;

(c) any matter which by virtue of its physical nature, or its ef discoloring waters, makes or contributes to making such difficult to treat; or

(d) oil of any nature, used, waste or otherwise.[32]

Where Canstone's failure to maintain adequate drainage and ventilation infrastructure with proper safety systems led to environmental breach creating discharge of chemicals in the flooding and health issues among the citizens which brings them in violation with article 1(e) and 5(1) of the PK-BIT.[33]

The case of Metalclad Corporation v. United Mexican States, emphasizes the investor's responsibility to comply with environmental regulations in host state, Claims arising out of the alleged interference of the Mexican local governments of San Luis Potosí and Guadalcázar with the investor's development and operation of a hazardous waste landfill. [34]

[31] Moot Court problem para no: 25, 29,34
[32] PK-BIT Article 5 (1)
[33] Moot court problem (para no: 36, 39,40,41)
[34] Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1)

In the case of Santa Elena v. Costa Rica, Costa Rica expropriated land for environmental preservation. The tribunal recognized the state's right to take such measures but required compensation for the expropriation.[35]

2. The respondent is in the breach of articles relating to UNFCC and CBD

The treaty signed between two parties, a governing rule to this arbitration proceeding also upholds the need to protect against climate change and to safeguard the environment in line with the UNFCCC and the CBD.[36]

Article 3.3 of the UNFCCC states that Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.[37]

Also in the case of Argentina vs. Uruguay, Argentina claimed Uruguay breached obligations by authorizing pulp mills without proper environmental assessments. The ICJ emphasized the importance of such assessments and preventing transboundary harm.[38]

Here the respondent is in violation of the UNFCCC article 3.3, where Canstone did not apply precautionary measures to reduce the impact of flood on its plant even after the prior knowledge of frequent flash floods in the area and potential leak in one of the plant.[39]
The Convention on Biological Diversity aims to encourage and enable countries to conserve biological diversity, to use its components sustainably and to share benefits equitably.[40]
Article 10 of Convention on Biological Diversity states:

Each Contracting Party shall, as far as possible and as appropriate:

[35] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1

[36] PK-BIT, preamble para 6
[37] Daniel Blobel ,Nils Meyer-Ohlendorf ,Carmen Schlosser-Allera and Penny Steel,United Nations Framework Convention on Climate Change: Handbook,p74,Intergovernmental and Legal Affairs, Climate Change Secretariat,2006,UNFCCC
[38] Pulp Mills on the River Uruguay, Argentina v Uruguay, Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006)
[39] Moot court problem (para no: 2,11,28,34)

[40] Caldecott, J.O., Jenkins, M.D., Johnson, T.H. *et al.* Priorities for conserving global species richness and endemism. *Biodivers Conserv* **5**, 699–727 (1996).

(a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;
(b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity;
(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;
(d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and
(e) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.[41]

Despite warnings and evidence of potential environmental harm, Canstone did not upgrade its infrastructure to prevent further damage.Canstone's failure to incorporate the need for environmental conservation into its decision-making process, as evidenced by its outdated infrastructure, is a clear violation of Article 10(a).[42]

Canstone's environmental negligence disrupted the customary use of biological resources by local communities, such as traditional farming and cultivation practices that rely on a stable and healthy ecosystem as well as the heath of individual farmers being compromised due to it where This failure to protect these practices in a manner compatible with conservation is a breach of Article 10(c) of the CBD.[43]

Canstone's failure to address environmental concerns during infrastructure upgrades[44] mirrors Hungary's stance in the Gabčíkovo-Nagymaros case. Both instances highlight the disregard for environmental protection in development projects. The ICJ ruling emphasizes the importance of integrating environmental considerations into decision-making for sustainable development.[45]

To sum up, Canstone's acts are blatant violations of Palmenna and Kenweed's Bilateral Investment Treaty (PK-BIT). The business directly violates the administrative and environmental requirements of the BIT by failing to maintain sufficient ventilation and drainage systems, failing to complete and submit the mandatory Environmental Impact Assessment, and releasing hazardous substances into the environment. This violation jeopardizes the environmental preservation and ethical conduct required by the treaty, affecting Palmenna's public health and safety.

[41] Convention on Biological Diversity, Article 10
[42] Moot problem (para no- 33,41)
[43] Moot problem(para no- 30)
[44] Moot problem (para no-41)
[45] Gabcikovo-Nagumaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25)

3. The Claiment's proposal regarding the violation environmental protection is valid under the WTO(GATT) Article XX and Agreement on Technical Barriers of Trade:

According to the PK-BIT the treatise relation between the two states builds upon the rights and obligations under the Marrakesh Agreement establishing the WTO and its covered multilateral, regional and bilateral agreements.[46] The State of Palmenna contends that hat environmental protection measures are justified under Article XX of the GATT, which allows exceptions for protecting human, animal, or plant life or health and conserving exhaustible natural resources.[47]

GATT Article XX sets out fields of regulation in which WTO members are free to employ trade measures that would otherwise be inconsistent with GATT obligations.[48]
Sub article(b) of XX states: necessary to protect human, animal or plant life or health;[49]

Canstone's negligence regarding the public health and environment measures required in the plants constitutes to danger in regards to human, plant and animal life in the nearby.[50] Due to which Claimant's proposal regarding violation environmental protection is supported through the General Exceptions Article XX of GATT.

In the case of US-Shrimp, The US imposed a ban on shrimp imports to protect sea turtles, which was challenged at the WTO. The WTO ruled that while the ban aimed to protect the environment (a potentially legitimate reason), it was implemented in a discriminatory and inflexible way, violating international trade rules.[51] The US–Shrimp case established that unilateral measures by

[46] PK-BIT Preamble (para no- 3)
[47] Trachtman, Joel P, 'The WTO Jurisprudence of Article XX(g) and the Conservation of Natural Resources', in Julien Chaisse, and Tsai-yu Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford, 2016; online edn, Oxford Academic, 19 Jan. 2017
[48] Condon, Bradly J. "GATT ARTICLE XX AND PROXIMITY-OF-INTEREST: DETERMINING THE SUBJECT MATTER OF PARAGRAPHS B AND G." *UCLA Journal of International Law and*
[49] GATT Article XX General Exceptions, sub article (b)
[50] Moot problem (para no- 41, 45)
[51] WTO US–Shrimp (15 May 1998) WT/DS58/R.
WTO US–Shrimp (12 October 1998) WT/DS58/AB/R.
WTO US–Shrimp (Art. 21.5) (22 October 2001) WT/DS58/AB/RW.

a WTO member for the protection of the environment are not per se inconsistent with the GATT and lies under general exception.[52]

The Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. At the same time, it recognises WTO members' right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment.[53]

Here respondent's failure to maintain the protection of human health and safety due to weak infrastructure and inadequate facilities as well as inefficient decision making board and administration compels the claimant to invoke its rights under the technical barrier to trade Agreement (TBT).[54]

4. Applicable law under UNCITRAL Article 35 should be followed:

Article 35 (1) of the UNCITRAL Arbitration rules state:

"The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate."[55]

The arbitration tribunal should apply international environmental standards and obligations under article 35 (1) when determining the laws regarding Canstone's environmental breach.

In conclusion, the arbitral tribunal must follow the legal standards selected by the parties to settle their dispute in accordance with UNCITRAL Arbitration Rules Article 35(1). If there is no such

[52] US Shrimp case,Matthias Oesch, Max Planck Encyclopedia of Public International Law [MPEPIL],April 2014,p 1-6,Oxford Public International Law,
Oxford University Press, 2015.

[53] Agreement on Technical Barriers to Trade (TBT Agreement II), 15th April 1994 (1868 UNTS 120, LT/UR/A-1A/10), OXIO 232

[54] Moot court problem (para no: 28,30,33,39)

[55] Caron, David D. & Pellonpaa, Matti & Caplan, Lee M., 2006. "The UNCITRAL Arbitration Rules: A Commentary," OUP Catalogue, Oxford University Press, number 9780199297597, Decembrie.

designation, the tribunal's job is to apply the law in a way that makes sense to it. It is essential that the arbitral tribunal take into account international environmental norms and obligations while assessing the applicable legislation, considering the circumstances surrounding Canstone's environmental infringement. The resolution will be in compliance with international norms and environmental stewardship principles thanks to these standards and obligations that will guarantee a thorough and internationally recognized approach to tackling the environmental concerns at hand.

ISSUE IV. IF THE ANSWER TO ISSUE III IS IN THE AFFIRMATIVE, WHETHER PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES?

1. Failure to Conduct and Report an Environmental Impact Assessment (EIA):

The Respondent's omission in conducting a comprehensive EIA violates Articles 4.1, 4.3, and 4.4 of the PK-BIT[56]. The EIA is a crucial safeguard for the environment and public health, and its absence demonstrates the Respondent's failure to meet its international obligations. This omission has caused significant harm to the environment and the health of Palmenna's citizens, justifying the Claimant's demand for damages[57].

2. Precedent from Case Law:

The Tribunal should consider precedent from the Tecmed v. Mexico[58], Metalclad v. Mexico[59], and Santa Elena v. Costa Rica[60] cases. In these cases, failure to conduct an EIA or lack of transparency in the environmental processes led to findings of breach of international obligations, and substantial damages were awarded to the claimants. These cases support Palmenna's position that it is entitled to both a declaratory judgment and damages.

[56] PK-BIT: Articles 4.1, 4.3, 4.4, 1(e), 5(1), and 10(3).

[57] Gabčíkovo-Nagymaros Project (Hungary/Slovakia): ICJ's ruling on state obligations in environmental protection.
[58] Tecmed v. Mexico: Tribunal's ruling on environmental obligations and FET standards.
[59] Metalclad v. Mexico: Tribunal's emphasis on EIAs and procedural transparency.
[60] Santa Elena v. Costa Rica: Tribunal's decision on environmental expropriation and compensation.

3. Procedural Unfairness and Transparency Issues:

Canstone's operations lacked the transparency required under international law and specifically violated Article 10(3) of the PK-BIT. The failure to disclose vital information regarding the environmental risks associated with its operations exacerbated the damages suffered by Palmenna. This lack of transparency is analogous to the violations in Metalclad v. Mexico, further supporting the Claimant's demand for an award of damages.

4. Proper Form and Content of the Award (UNCITRAL and AIAC Rules):

The award meets all the requirements for enforceability under Article 34 of the UNCITRAL Arbitration Rules and Article 35 of the AIAC Arbitration Rules 2023. The award was issued in writing, it was signed, and the reasons were clearly stated, fulfilling all necessary legal standards. The principle of "pacta sunt servanda"[61] further mandates that the award be enforced in good faith.

5. Rejection of Public Policy Exceptions:

The Respondent may argue that enforcement of the award violates public policy under Article 36 of the VCLT. However, this argument fails as the Respondent has not provided sufficient evidence that enforcement would contravene any fundamental legal principles in its jurisdiction. Public policy exceptions must be narrowly interpreted and should not be used to avoid legitimate obligations under international law.

III. Conclusion

In light of the above, the Tribunal should find in favor of the Claimant. Palmenna is entitled to an award of declaration and damages due to Canstone's failure to conduct an EIA, lack of transparency, and breach of international obligations under the PK-BIT. The award is enforceable, and the Respondent's objections based on public policy and procedural issues should be dismissed[62]

[61] Article 26 of the Vienna Convention on the Law of Treaties (VCLT)
[62] Parkerings-Compagniet AS v. Lithuania: Tribunal's analysis of investor expectations and regulatory rights.

PRAYER OF RELIEF

In light of submission above, counsel for the claimant respectfully invites the tribunal to declare that:

1. To relive Kenweed of all the obligation under the PK-BIT.
2. To compensate Kenweed for the Economic loss that it has suffered after the legal proceedings.
3. To declare the PK-BIT void.
4. Dismissal of Arbitration proceedings

In addition, counsel for claimant respectfully invites the tribunal to order the respondent to bear the costs of the arbitration and cover the claimant's legal fee.

Respectfully Submitted,

Counsels for Claimant

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