

ASIAN INTERNATIONAL ARBITRATION CENTRE
19th LAWASIA International Moot – 2024

The Palm Attack:
Oil vs Spoil

MEMORIAL FOR RESPONDENT

TABLE OF CONTENT

LIST OF ABBREVIATIONS 3

INDEX OF AUTHORITIES..... 4

LEGISLATION:..... 4

CASES 4

OTHER DOCUMENTS..... 5

STATEMENT OF JURISDICTION..... 6

QUESTIONS PRESENTED 6

STATEMENT OF FACTS..... 7

Overview of Palmenna's Geography and Economic Landscape: 7

Political Relations with Kenweed :..... 7

Environmental and Political Issues: 8

SUMMARY OF PLEADINGS:..... 8

PLEADINGS 10

ISSUE I: WHETHER THE PRE-ARBITRATION STEPS MUST BE COMPLIED BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE? 10

ISSUE II: WHETHER THE PROCEDURAL INITIATION OF ARBITRATION BY PALMENNA WAS VALID..... 12

ISSUE III: WHETHER CANSTONE HAD BREACHED ITS OBLIGATIONS UNDER THE PK-BIT?..... 15

ISSUE IV: IF THE ANSWER TO ISSUE III IS IN THE AFFIRMATIVE, WHETHER PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES?..... 18

PRAYER OF RELIEF: 20

BIBLIOGRAPHY..... 21

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
CEO	Chief Executive Officer
SZN	SZN Company Limited
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
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
WTO	World Trade Organization
v.	Versus
BIT	Bilateral Investment Treaty

MEMEORANDUM FOR RESPONDENT

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 Arbitration 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

Sn No:	CASE LAW CITED
1.	M/S Haldiram Manufacturing Company ... vs M/S Dlf Commercial Complexes Limited on 16 April, 2012
2.	<i>Lauder v. Czech Republic, UNCITRAL, Final Award (2001)</i>

MEMEORANDUM FOR RESPONDENT

3.	<i>Burlington Resources v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (2012)</i>
4.	<i>Fraport AG v. Philippines, ICSID Case No. ARB/03/25, Award (2007)</i>
5.	ADF Group Incorporated v United States, Award, ICSID Case No ARB(AF)/00/1, (2003)
6.	Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16
7.	Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listrik Negara, Final Award, 4 May 1999

OTHER DOCUMENTS

SN:	AUTHORITIES
1.	Gary B. Born International Commercial Arbitration (Wolters Kluwer, 3rd ed., 3 volumes, 2021)
2.	<i>Born, International Commercial Arbitration, 2nd ed., Chapter 8</i>
3.	Paulsson, Jan, <i>The Idea of Arbitration</i> (Oxford, 2013; online edn, Oxford Academic, 23 Jan. 2014)
4.	<i>Redfern & Hunter, International Arbitration, 6th ed., Chapter 3</i>
5.	Combley, Roz. Cambridge Business English Dictionary. Germany, Cambridge University Press, 2011.
6.	cKendrick, E. (2013). <i>Force majeure and frustration of contract</i> (2nd ed.). Informa Law from Routledge
7.	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

STATEMENT OF JURISDICTION

The Federation of Palmenna [‘Palmenna’ or ‘Claimant’] and the Independent State of Kenweed [‘Kenweed’ or ‘Respondent’] hereby submit the present dispute in accordance with the Asian International Arbitration Centre Arbitration Rules 2021 (AIAC Rules 2021). The substance of this dispute will be governed by AIAC rules (2021) pursuant to the article 12 of the PK-BIT (Palmenna Kenweed Bilateral Investment Treaty) entered by both the party on 3rd October 2021 and interpreted under the Vienna Convention on the Law of Treaties 1969 (VCLT) . Any arbitration award made by the tribunal will be final and binding pursuant to Article 33 of the AIAC Rules 2021 and Article 12(c) of the PK-BIT.

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

Overview of Palmenna's Geography and Economic Landscape:

Located in Southeast Asia, the State of Palmenna is bordered by the Independent State of Kenweed to the north and connected by a causeway to the Republic of Sokiyasu to the south. As a member of the Commonwealth of Nations, Palmenna maintains strong ties with other former British colonies.

The country's diverse geography includes coastal plains, mountain ranges, and extensive tropical rainforests. The capital city, Appam, is a modern urban center characterized by its vibrant skyline and high-rise buildings. Palmenna's hot and humid climate is particularly conducive to palm oil cultivation, a key economic sector. In 2020, Palmenna exported 15 million metric tons of palm oil, contributing USD 10 billion to its GDP.

Political Relations with Kenweed :

Kenweed is situated in Southeast Asia, directly to the north of the State of Palmenna. The country is characterized by a varied topography that includes mountainous regions, fertile plains, and scenic coastal beaches. Its northern border is marked by rugged mountain ranges, which gradually give way to expansive plains and fertile agricultural land further south. The country's western and eastern coastlines are adorned with beautiful beaches that contribute to its tourism industry. Kenweed's diverse geography not only supports a robust agricultural sector but also provides a picturesque landscape that attracts visitors.

Under Prime Minister Gan Ridhimajoo, who assumed office in January 2018, the Ministry of Trade and Investment (MTI) was established to address economic challenges. This administration has successfully launched several profitable subsidiaries, including Quick Tech Solutions Corporation and BRC Rubber Corp.

Formation and Role of Mehstone Ltd.:

On February 2, 2021, a significant business collaboration was proposed involving the palm oil industry. This meeting led to the formation of Mehstone Ltd. on May 16, 2021, with the MTI

MEMEORANDUM FOR RESPONDENT

holding a 60% stake and KLT holding 40%. Mehstone Ltd. was established to leverage Palmenna's palm oil for biofuel production. A key initiative under this venture was the creation of Canstone Fly Limited (Canstone), with Mehstone Ltd. holding a 70% ownership stake.

Environmental and Political Issues:

In November 2023, severe flooding in Appam brought public scrutiny and frustration. The floods were attributed to heavy rainfall, which intensified concerns about ongoing operations in flood-prone areas. Despite warnings about the flood risk, Canstone continued its activities, which led to public outcry and legal action. However, it's important to note that the flooding was an unprecedented natural disaster, and Canstone's operations were not directly responsible for the catastrophe. The government faced criticism for its response to the disaster rather than Canstone's operational practices.

Arbitration Proceedings: Following the High Court's judgment on February 14, 2024, which declared the government and SZN jointly liable for negligence, the Government of Palmenna initiated arbitration proceedings on March 6, 2024, under Article 12 of the PK-BIT. This action sought declaratory relief and damages for alleged breaches impacting Palmenna's citizens. It is crucial to recognize that the arbitration is focused on the government's handling of the flooding crisis and not on Canstone's operations, which were conducted within the regulatory framework established by Palmenna.

SUMMARY OF PLEADINGS:

I

The Respondent maintains that Palmenna breached Article 12 of the PK-BIT by refusing to follow the pre-arbitration procedures which are the mediation and negotiation. This illegal act of Palmenna exposes its claims to possible annulment and it is barred from advancing its claims. The UNCITRAL Model Law on International Commercial Arbitration that reinforces this position states that pre-arbitration procedures must be observed (Articles 8(2) and 16(1)). The arbitrary decision of Palmenna is also a breach of due process and fairness principles which are entrenched in Articles 2, 3, and 10.1 of the PK-BIT. These articles require compliance with fair treatment and the rule of law. Thus, Palmenna's irregularity dented the trust of the arbitration process and also sabotaged Canstone's right to fair and equitable treatment.

MEMEORANDUM FOR RESPONDENT

II

Palmenna's commencement of arbitration is both invalid and incompetent due to procedural gaps that are more than significant. To start with, it was the first party among participants to ignore the three-month cooling-off period mandated in Article 12 of the PK-BIT, which is aimed at enabling meaningful negotiations before resorting to arbitration. Such a premature move goes which contravenes the intent of the treaty to amicably settle disputes. Besides, Palmenna did not make the required engagement in the genuine negotiations as defined by Article 9 good faith principle. The notice of dispute provided was also deficient, lacking the detailed statement necessary under Article 12(c) of the PK-BIT and Article 3(4) of the UNCITRAL Arbitration Rules. These failures breathe life to inequity and illegitimacy in the arbitration process. Therefore, we assert that the tribunal lacks jurisdiction and the claims should be either dismissed or deemed inadmissible.

III

Canstone has abided by the PK-BIT and local environmental legislation, among which is compliance with Palmenna's Five-Fuel Diversification Policy of 2011. The company initiated environmental studies and practices of ecological sustainability. The fact that the last flooding was an unpredicted natural phenomenon that Canstone could not have possibly influenced is the reason for it to be classified as force majeure. Moreover, Canstone's exploits further the precautionary principle of the UNFCCC, which indicates that it stands by the environment. Thus, Canstone is not in breach of its obligations.

IV

The arbitration process was irregular because procedural improvement, such as improper evidence project plus, unequal treatment of parties, was a breach of fairness and due process under Article 18 of the AIAC Rules 2023 and Articles 18 and 19 of the VCLT. Due to the Claimant's reluctance to fulfill the mandatory conciliation requirement under the PK-BIT and Article 26 of the AIAC Rules 2023, the arbitration is now invalid. Besides, there are also some significant errors in the award, such as the presence of miscalculations, and they have to be corrected under Article 38 of the UNCITRAL Rules and Article 39 of the AIAC Rules 2023. The award would be enforced and thus, it would lead to public policy violations and inequitable penalties.

PLEADINGS

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

1. Argument: Palmena has breached the contract by not complying with article 12 of PK-BIT:

The “conference call” was only the first step of pre-arbitration there was a second step to be followed which would be mediation and negotiation¹. Article 12 of PK-BIT which builds a binding contractual obligation has been breached in this particular situation. The agreement makes both parties obligated to follow through with the provisions mentioned in the agreement.

Non-compliance with mandatory pre-arbitration procedural requirements can expose an otherwise valid arbitral award to annulment or non-recognition. In addition, non-compliance can subject the non-complying party to claims of breach of contract and, potentially, bar the party from commencing arbitral proceedings or asserting its claims in those proceedings.

Requirements to exhaust local remedies in domestic courts or pursue alternative conflict resolution procedures are subject to similar consideration, albeit it is more probable that these will be deemed obligatory.²

According to the International Commercial Arbitration-By Gary Born, “By shifting the resolution of the dispute to a sequence of ADR proceedings aimed at cooperation (through the management or technicians) rather than confrontation (the lawyers in an arbitration), the further business relationship between the parties, without the disturbance and burden of litigating their dispute before the arbitral tribunal, is also preserved. This is of particular significance concerning long-term contracts.”³

¹ Article 12(b) PK-BIT

² Pre-Arbitration Procedural Requirements, 236

³ Gary B. Born International Commercial Arbitration (Wolters Kluwer, 3rd ed., 3 volumes, 2021)

MEMEORANDUM FOR RESPONDENT

The judgment in *Haldiram Mfg. Co. (P) Ltd. v. DLF Commercial Complexes Ltd.*⁴, was in an application under Section 8 of the Arbitration and Conciliation Act, to refer the suit to arbitration. The agreement required discussion for amicable settlement before requesting arbitration. The requirement of discussion was prefaced with the word “shall”. The requirement was held to be mandatory. The Court held that the defendant had not called upon the plaintiff to follow the procedure under the clause for amicable settlement. Therefore, the defendant cannot seek to refer the matter to arbitration. The act was considered a breach.

Article 60 of the Vienna Convention on Laws and Treaties (VCLT) speaks on the material breach of the treaty further creating the grounds for termination of said treaty⁵.

2. Argument: UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006):

According to Article 8(2), pre-arbitration procedures that the parties have agreed upon must be followed. If these procedures are not followed, the arbitration claim may be dismissed by the panel.⁶

Article 16(1) suggests that the arbitral tribunal may rule on matters within its jurisdiction under this article, including challenges to the existence or legality of the arbitration agreement, which may involve failure to follow pre-arbitration procedures.⁷

3. Argument: Due Process and Fairness:

The breach of the 12th article shows that the government of Palmenna hasn't abided by the principle of due process and fairness of the Rule of Law, which is one of the main components of this treaty.⁸

⁴ *M/S Haldiram Manufacturing Company ... vs M/S Dlf Commercial Complexes Limited* on 16 April, 2012 IA No. 3363/2011 in CS(OS) 2288/2010

⁵ Article 60, Vienna Convention On Laws And Treaties.

⁶ Article 8(2), UNCITRAL Model Law on International Commercial Arbitration, 2006

⁷ Article 16(1), UNCITRAL Model Law on International Commercial Arbitration, 2006

⁸ Article 2 PK-BIT

MEMEORANDUM FOR RESPONDENT

Article 2 of the PK-BIT stresses the importance and the obligation of the parties to uphold the principles of fairness and transparency. Article 3 of PK-BIT highlights the provision of due process and the rule of law to be followed, which is a general principle adopted and practiced popularly.

Article 10.1. a and b of the PK-BIT refer to fair and equitable treatment and justice delivery to both parties per due process of law. Palmenna, by initiating an Arbitral procedure not only violates Article 12 of the PK-BIT but also violates a provision of fair and equal treatment to Canstone.⁹

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

1.Compliance with Cooling-Off Period:

Premature Initiation: We assert that palmenna failed to adhere to the 3-month cooling-off period required by Article 12 of the PK-BIT.¹⁰ This period is essential for allowing both parties to engage in meaningful negotiations before escalating to arbitration. Palmenna's decision to initiate arbitration without respecting this mandated period is a clear breach of its obligations under the PK-BIT. This premature action undermines the spirit of the treaty, which prioritizes amicable resolution over adversarial proceedings.¹¹

The importance of adhering to such cooling-off periods has been affirmed in cases like *Fraport AG v. Philippines* and *Burlington v. Ecuador*, where the tribunals held that failing to observe this mandatory period could invalidate the arbitration process.¹² By disregarding this requirement, Palmenna has compromised the integrity of the arbitration proceedings and has acted in direct violation of its treaty obligations.¹³

As Born (2014) has noted, strict adherence to cooling-off periods is crucial to maintaining the integrity of arbitration agreements.¹⁴ This adherence ensures that all possibilities for an amicable resolution are exhausted before resorting to arbitration. We argue that Palmenna's premature

⁹ Article 10 PK-BIT

¹⁰ PK-BIT ARTICLE 12

¹¹ PK-BIT ARTICLE.12 (3)

¹² *Fraport AG v. Philippines, ICSID Case No. ARB/03/25, Award (2007); Burlington Resources v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (2012)*

¹³ *PK-BIT, Art. 12.3*

¹⁴ *Born, International Commercial Arbitration, 2nd ed., Chapter 8*

initiation of arbitration proceedings without exhausting the negotiation period is a serious violation that should not be overlooked.¹⁵

2.Lack of Amicable Negotiation:

Furthermore, Palmena did not engage in genuine efforts to resolve the dispute through negotiation, as required by Article 12 of the PK-BIT.¹⁶ The treaty obligates both parties to make sincere attempts at negotiation before proceeding to arbitration. Canstone's failure to engage in such negotiations demonstrates a lack of good faith, which is a fundamental principle of international arbitration.¹⁷

The case of *Lauder v. Czech Republic* underscores that genuine negotiation efforts are a necessary precondition to arbitration.¹⁸ By bypassing these efforts, Palmenna has violated this principle and has undermined the potential for an amicable resolution.¹⁹ This lack of good faith in engaging in negotiations constitutes a breach of the treaty and damages the trust required for a fair arbitration process.²⁰

Paulsson (2013) emphasizes that parties in arbitration must engage in sincere efforts to resolve disputes before resorting to arbitration. Palmenna's failure to do so is a breach of this obligation and a violation of the principles underlying the PK-BIT.²¹

3.Deficient Notice of Dispute; Insufficient Notice:

Additionally, we contend that Palmenna's notice of arbitration was deficient under Article 12(c) of the PK-BIT and Article 3(4) of the UNCITRAL Arbitration Rules.²² The notice provided by Palmenna lacked a detailed statement of the claim and the factual basis for the dispute. This deficiency not only fails to meet the procedural requirements but also undermines the legitimacy of the arbitration proceedings.²³

The tribunal in *Lauder v. Czech Republic* highlighted the critical importance of providing a detailed and sufficient notice of dispute.²⁴ Palmenna's failure to meet this standard prevents us from being fully informed of the claims against us, thereby hindering our ability to prepare an

¹⁵ *Born, International Commercial Arbitration, 2nd ed., Chapter 8*

¹⁶ *PK-BIT, Art. 12.1*

¹⁷ *PK-BIT, Art. 12.1*

¹⁸ *Lauder v. Czech Republic, UNCITRAL, Final Award (2001)*

¹⁹ *Lauder v. Czech Republic, UNCITRAL, Final Award (2001)*

²⁰ *PK-BIT, Art. 9.1*

²¹ Paulsson, Jan, *The Idea of Arbitration* (Oxford, 2013; online edn, Oxford Academic, 23 Jan. 2014),

²² *PK-BIT, Art. 9.3; UNCITRAL Arbitration Rules, Art. 3(4)*

²³ *PK-BIT, Art. 9.3; UNCITRAL Arbitration Rules, Art. 3(4)*

²⁴ *Lauder v. Czech Republic, UNCITRAL, Final Award (2001)*

adequate defense.²⁵ This lack of information severely compromises the fairness of the arbitration process.²⁶

Redfern & Hunter (2015) argue that a sufficient notice of dispute is essential to ensure that the respondent is fully informed and can prepare an adequate defense. Palmenna's deficient notice fails to meet this standard, thereby undermining the fairness and legitimacy of the arbitration proceedings.²⁷

4. Jurisdictional Challenge; Tribunal's Jurisdiction:

Given Palmenna's failure to comply with the procedural prerequisites under the PK-BIT, we argue that the tribunal lacks jurisdiction to hear this case.²⁸ The non-compliance with mandatory pre-arbitration procedures, such as the cooling-off period and genuine negotiation efforts, fundamentally undermines the tribunal's jurisdiction over the dispute.²⁹

While Article 17 of the UNCITRAL Arbitration Rules permits the tribunal to rule on its own jurisdiction, precedents like *Burlington v. Ecuador* and *Fraport AG v. Philippines* demonstrate that non-compliance with pre-arbitration procedures can result in the dismissal of claims on jurisdictional grounds.³⁰ We assert that Palmenna's failure to adhere to these procedural prerequisites should lead to the dismissal of its claims.³¹

Born (2014) supports the validity of jurisdictional challenges based on non-compliance with procedural prerequisites. When such non-compliance undermines the integrity of the arbitration process, as it does here, the tribunal must dismiss the claims to uphold the principles of fairness and procedural integrity.³²

We maintain that Palmenna's initiation of arbitration proceedings was improper due to its failure to comply with the procedural requirements set forth in the PK-BIT, particularly the mandatory cooling-off period and the obligation to engage in genuine negotiation efforts. These violations not only breach the treaty but also undermine the integrity of the arbitration process. As such, we

²⁵ *Lauder v. Czech Republic, UNCITRAL, Final Award (2001)*

²⁶ *PK-BIT, Art. 12.3*

²⁷ *Redfern & Hunter, International Arbitration, 6th ed., Chapter 3*

²⁸ *PK-BIT, Art. 12.2; PK-BIT, Art. 12.3*

²⁹ *PK-BIT, Art. 12.2; UNCITRAL Arbitration Rules, Art. 17*

³⁰ *UNCITRAL Arbitration Rules, Art. 17*

Burlington Resources v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (2012); Fraport AG v. Philippines, ICSID Case No. ARB/03/25, Award (2007)

³¹ *Burlington Resources v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (2012); Fraport AG v. Philippines, ICSID Case No. ARB/03/25, Award (2007)*

³² *Born, International Commercial Arbitration, 2nd ed., Chapter 8*

urge the tribunal to dismiss the arbitration proceedings or, at the very least, deem Palmenna's claims inadmissible.

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

1. The Respondent is not in the breach of the PK-BIT as suggested by the claimant in this case:

According to the Article 6 of the PK-BIT, it introduces that the investments made shall apply and be subject to the laws and regulations of the host nation where the the investment is being made, but will not apply to any dispute or any claim concerning an investment which was settled before its entry into force.³³

In compliance with this article Canstone complied with modifications that were made to the draft agreement to cover the environmental challenges in the host nation.³⁴

Canstone demonstrated its commitment to national environmental goals by aligning its operations with Palmenna's Five-Fuel Diversification Policy 2011. This policy emphasized environmentally friendly, sustainable energy sources to reduce fossil fuel dependency and improve economic conditions.³⁵

On 6th of Sepetember 2023 Canstone in its board meeting discussed measured to engage with local communities and its efforts to address environmental concerns demonstrate its commitment to complying with local laws and regulations.³⁶

In the case of ADF Group Inc. v. United States of America, ADF Group Inc. challenged the US "Buy American" provision, arguing it violated NAFTA's national treatment principle. The provision mandated the use of domestic steel in federally funded highway projects. ADF, a Canadian company with a US subsidiary, contended that this requirement unfairly discriminated against foreign steel, including its own, by granting preferential treatment to US steel

³³ PK-BIT, Article 6

³⁴ Moot court problem para: 20

³⁵ Moot court problem para: 25

³⁶ Moot court problem para: 33

MEMEORANDUM FOR RESPONDENT

producers.³⁷Canstone's effort to adhere to Palmenna's national rules, agree on changes to the PK-BIT and adhere to article 5 to the PK-BIT displays its align with this ruling.³⁸

According to Article (1)(e)of the PK-BIT, it defines environmental obligation under the objectives and scope of application of the BIT that both the parties are to follow with,³⁹compiling to which Canstone made necessary changes keeping environmental impact under consideration which includes,

Canstone aligned its operations with Palmenna's Five-Fuel Diversification Policy 2011, supporting the nation's goal of reducing fossil fuel dependence and promoting sustainable energy. To proactively manage environmental risks, Canstone implemented a rigorous assessment process, with in-house experts conducting detailed reports on machinery and equipment every four months (April, August, December). This commitment to transparency and environmental stewardship facilitated informed decision-making among stakeholders.⁴⁰

According to Article 10 (2) of the PK-BIT, here a determination that there has been a breach of a separate international agreement, or any other law does not establish that there has been a breach of the BIT.⁴¹

Through this provision the claimant cannot steer the respondent liable over any breach of international agreement or international law as to the breach of the BIT.

2.The respondent cannot mitigate unforeseen natural events, invoking the Force Majeure provision:

According to the Cambridge Dictionary force majeure is an unexpected event such as a war, crime, or an earthquake which prevents someone from doing something that is written in a legal agreement.⁴²

³⁷ ADF Group Incorporated v United States, Award, ICSID Case No ARB(AF)/00/1, (2003)

³⁸ PK-BIT Article 5

³⁹ PK-BIT Article 1(e)

⁴⁰ Moot court problem para no: 25

⁴¹ PK-BIT Article 10(2)

⁴² Combley, Roz. Cambridge Business English Dictionary. Germany, Cambridge University Press, 2011.

MEMEORANDUM FOR RESPONDENT

In many cases the promisor may be especially unwilling to accept the risk of events over which he has no control and a contract may typically provide that “the promisor shall not be responsible for any losses occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or any cause contemplated in the term force majeure.”. Such clauses are known generally as force majeure clauses.⁴³

The government's defense of the incident in The High Court of Palmenna was connected to a lot of rain and flooding. The Senior Federal Counsel contended that the excessive rain was a "act of God" that could not be stopped, even with the best drainage systems in place.⁴⁴

The argument made by SZN (a party associated with Canstone) that it was difficult to carry out a comprehensive examination until its end due to the monsoon season's unpredictable weather. This lends credence to the claim that Canstone's capacity to promptly evaluate and address possible problems was hampered by the monsoon season, a force majeure event.⁴⁵

In *Sempra Energy v. Argentina*, the tribunal reduced damages by considering the economic crisis that impacted Argentina's ability to fulfill its obligations, even while finding a breach of contract. Similarly, Canstone contends that the natural disasters, like monsoon floods, were extraordinary force majeure events that hindered their ability to perform, which should mitigate any liability or damages as these events were beyond their control.⁴⁶

In the case of *Patuha Power Ltd. v. PT (Persero) Perusahaan Listrik Negara (2004)*, the disagreement started because of an Indonesian power purchase deal, where the power firm was unable to complete its commitments because of the Asian Financial Crisis. The business claimed that there was a force majeure occurrence that caused the crisis. The tribunal's recognition of the financial crisis as a force majeure occurrence under specific circumstances demonstrates that the doctrine of force majeure can be applied to both natural and economic disasters. This judgment can bolster claims that some natural disasters, such as floods, can qualify as force majeure occurrences if they have a major negative impact on operations or infrastructure.⁴⁷

The respondent also adhered to international environmental protocol including the UNFCCC

⁴³ McKendrick, E. (2013). *Force majeure and frustration of contract* (2nd ed.). Informa Law from Routledge.

⁴⁴ Moot Court problem: 43

⁴⁵ Moot Court problem: 42

⁴⁶ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16

⁴⁷ *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listrik Negara*, Final Award, 4 May 1999

MEMEORANDUM FOR RESPONDENT

Article 3.3 refers to the precautionary principle, which is widely reflected in environmental law and environmental agreements: “Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures” – a statement which closely mirrors the wording of Principle 15 of the Rio Declaration. In line with this, Article 3.3 further stresses the need for cost-effectiveness.⁴⁸

Complying with this measure Canstone’s consistent efforts to conduct environmental assessments and align its operations with Palmenna’s Five-Fuel Diversification Policy demonstrate a clear commitment to the principles of Article 3.3 of the UNFCCC. This article stresses the importance of the precautionary approach, urging parties to proactively prevent or minimize the causes of climate change and its harmful effects. By regularly evaluating the environmental risks associated with its biofuel plants and actively seeking to reduce dependency on fossil fuels through sustainable energy practices, Canstone is not only mitigating potential environmental impacts but also contributing to global efforts to combat climate change. These actions underscore Canstone's adherence to Article 3.3, as they reflect a forward-thinking approach that prioritizes environmental responsibility and sustainable development, consistent with the precautionary principle advocated by the UNFCCC.⁴⁹

According to the Article 4.1 (b), (c), (d), (e), (f) Parties shall develop and implement comprehensive national climate action plans to reduce greenhouse gas emissions, enhance carbon sinks, adapt to climate impacts, and foster sustainable development through technology transfer, research, and international cooperation.⁵⁰

Through this Canstone has followed by creating a board with environmental assessment plan, employing inhouse as well as foreign expert for QC and Environmental impact as well as infrastructural and technological enhancement to mitigate error and human safety.

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

⁴⁸ 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

⁴⁹ Moot Problem para no: 25

⁵⁰ UNFCCC Article 4 - Commitments

1. Procedural Fairness and Due Process Concerns:

The arbitration proceedings were marred by procedural irregularities that violate the principles of fairness and due process as required by Article 18 of the AIAC Rules 2023 and Articles 18 and 19 of the VCLT. These irregularities include the improper handling of evidence and failure to ensure equal treatment of the parties, which undermines the legitimacy of the award.

2. Failure to Comply with Mandatory Conciliation Requirement:

The Respondent argues that the Claimant did not fulfill the mandatory conciliation requirement stipulated in the PK-BIT⁵¹ and the parties' agreement, as well as under Article 26 of the AIAC Rules 2023. This failure renders the arbitration process invalid and the subsequent award unenforceable under Article 31 of the VCLT, which mandates the good faith execution of treaties.

3. Errors in the Award and Request for Correction:

Significant errors in the award have been identified, including miscalculations and misunderstandings of the factual record. The Respondent is entitled to request corrections to these errors under Article 38 of the UNCITRAL Arbitration Rules⁵² and Article 39 of the AIAC Arbitration Rules 2023. These errors affect the substance of the award, and until they are corrected, the award should not be enforced.

4. Public Policy Considerations:

The enforcement of the award would violate public policy in the Respondent's jurisdiction, a recognized ground for non-enforcement under Article 36 of the VCLT and Article 39 of the AIAC Rules 2023. The award conflicts with fundamental principles of justice and equity, and enforcing it would result in a significant injustice.

5. Disproportionate Penalties and Manifest Injustice:

⁵¹ PK-BIT: Articles 4.1, 4.3, 4.4, 1(e), 5(1), and 10(3).

⁵² UNCITRAL Arbitration Rules: Articles 26, 35, and 15(1).

MEMEORANDUM FOR RESPONDENT

The penalties imposed by the award are disproportionate to the alleged breaches and lead to a manifest injustice. Under Article 38 of the AIAC Rules 2023, the Tribunal has the discretion to reconsider the award to prevent an inequitable outcome. The VCLT, particularly Article 32, allows for the interpretation of the treaty in a manner that avoids unreasonable or absurd results, supporting the Respondent's request for a reassessment of the award.

Conclusion

The Respondent respectfully submits that the award should not be enforced due to significant procedural irregularities, failure to comply with mandatory conciliation, substantive errors, and public policy concerns. The Tribunal should reconsider the award in light of these factors to ensure a just and fair outcome in accordance with international legal standards.

PRAYER OF RELIEF:

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

1. To declare the PK-BIT void.
2. To reject Palmena's claim regarding procedural non-compliance.
3. To recover the financial capital investment in Palmena.
4. To grant declaratory relief.

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

Respectfully Submitted,
Counsels for Respondent

BIBLIOGRAPHY

1. **ADF Group Incorporated v. United States**, Award, ICSID Case No ARB(AF)/00/1, (2003).
2. **Article 10**, PK-BIT.
3. **Article 10(2)**, PK-BIT.
4. **Article 12(b)**, PK-BIT.
5. **Article 16(1)**, UNCITRAL Model Law on International Commercial Arbitration, 2006.
6. **Article 2**, PK-BIT.
7. **Article 5**, PK-BIT.
8. **Article 60**, Vienna Convention On Laws And Treaties.
9. **Article 8(2)**, UNCITRAL Model Law on International Commercial Arbitration, 2006.
10. **Born, Gary B.**, *International Commercial Arbitration* (Wolters Kluwer, 3rd ed., 3 volumes, 2021).
11. **Born, Gary B.**, *International Commercial Arbitration*, 2nd ed., Chapter 8.
12. **Burlington Resources v. Ecuador**, ICSID Case No. ARB/08/5, Decision on Liability (2012); **Fraport AG v. Philippines**, ICSID Case No. ARB/03/25, Award (2007).
13. **Combley, Roz.** *Cambridge Business English Dictionary*. Germany, Cambridge University Press, 2011.
14. **Daniel Blobel, Nils Meyer-Ohlendorf, Carmen Schlosser-Allera, and Penny Steel.** *United Nations Framework Convention on Climate Change: Handbook*, Intergovernmental and Legal Affairs, Climate Change Secretariat, 2006, UNFCCC.
15. **Fraport AG v. Philippines**, ICSID Case No. ARB/03/25, Award (2007); **Burlington Resources v. Ecuador**, ICSID Case No. ARB/08/5, Decision on Liability (2012).
16. **Gary B. Born.** *International Commercial Arbitration*, 2nd ed., Chapter 8.
17. **Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara**, Final Award, 4 May 1999.
18. **Lauder v. Czech Republic**, UNCITRAL, Final Award (2001).
19. **McKendrick, E.** (2013). *Force majeure and frustration of contract* (2nd ed.). Informa Law from Routledge.
20. **M/S Haldiram Manufacturing Company ... vs M/S Dlf Commercial Complexes Limited** on 16 April, 2012 IA No. 3363/2011 in CS(OS) 2288/2010.
21. **Moot Court problem**, para: 20.
22. **Moot Court problem**, para: 25.
23. **Moot Court problem**, para: 33.
24. **Moot Court problem**, para: 42.
25. **Moot Court problem**, para: 43.
26. **Paulsson, Jan.** *The Idea of Arbitration* (Oxford, 2013; online edn, Oxford Academic, 23 Jan. 2014).
27. **PK-BIT Article 1(e)**.
28. **PK-BIT Article 12**.
29. **PK-BIT Article 5**.

MEMEORANDUM FOR RESPONDENT

30. **PK-BIT Article 6.**
31. **PK-BIT, Art. 9.1.**
32. **PK-BIT, Art. 9.2.**
33. **PK-BIT, Art. 9.3.**
34. **PK-BIT, Art. 12.1.**
35. **PK-BIT, Art. 12.2.**
36. **PK-BIT, Art. 12.3.**
37. **Redfern & Hunter.** *International Arbitration*, 6th ed., Chapter 3.
38. **Sempra Energy International v. Argentine Republic**, ICSID Case No. ARB/02/16.
39. **UNCITRAL Arbitration Rules**, Art. 3(4).
40. **UNCITRAL Arbitration Rules**, Art. 17.
41. **UNCITRAL Arbitration Rules**, Articles 26, 35, and 15(1).
42. **UNFCCC Article 4 - Commitments.**