

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE
AT KUALA LUMPUR, MALAYSIA

THE 19TH LAWASIA INTERNATIONAL MOOT COMPETITION 2024

GOVERNMENT OF PALMENNA

(CLAIMANT)

V

CANSTONE FLY LIMITED

(RESPONDENT)

MEMORIAL FOR CLAIMANT

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STATEMENT OF JURISDICTION

The Government of Palmenna (“Palmenna” or “Claimant”) and Cantone Fly Limited (“Cantone” or “Respondent”) hereby submit this dispute, arising from alleged breaches under the Palmenna-Kenweed Bilateral Investment Treaty (“PK-BIT”), to the Asian International Arbitration Centre (“AIAC”). This submission is made pursuant to the AIAC Rules 2023 and Article 12 of the PK-BIT, as agreed by the parties in the Statement of Agreed Facts, including any Corrections and Clarifications.

The parties have accepted the jurisdiction of this Tribunal under Article 12 of the PK-BIT and agree that the Tribunal's decision shall be final and binding. Accordingly, the Tribunal is requested to adjudicate the dispute in accordance with the AIAC Rules 2023.

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

PARTIES

The Federation of Palmenna ("Claimant") is currently led by Prime Minister Akhbar. Palmenna is characterized by its tropical rainforests and mountain ranges. The country experiences two monsoon seasons: the southwest monsoon from May to September and the northeast monsoon from November to February. These climatic conditions are optimal for palm oil cultivation, which requires consistent warmth, high humidity, sufficient rainfall, and well-drained soil. Palmenna is currently one of the world's leading producers of palm oil.

Canstone Fly Limited ("Respondent") is a company incorporated in Palmenna. It was established by Mehstone Ltd., which holds 70% of the shares. Mehstone Ltd. is a state-owned enterprise controlled by the Ministry of Trade and Investment (60%) and KLT Company Limited (40%), Kenweed's largest energy company involved in oil and gas exploration and distribution. SZN Company Limited, a startup with ambitions in the sustainable energy sector, holds the remaining 30% of shares.

RELEVANT FACTS

(1) Pre-Arbitration Steps

The parties signed the Palmenna-Kenweed Bilateral Investment Treaty ("PK-BIT"). Under Clause 12 of the PK-BIT, the parties agreed to engage in negotiation, followed by mediation, and finally arbitration. Two years after the Respondent commenced operations, a flash flood occurred, raising concerns that biodiesel from the Respondent's factory had leaked into the river. To address the ongoing challenges, Prime Minister Akhbar of the Claimant initiated a conference call with Tara

Sharma (CEO of KLT, who determines the general policies related to Canstone), Alan (appointed Quality Control Officer), and Luke Nathan (owner of SZN and the face of Canstone). The discussions were heated and ultimately reached an impasse, with tensions escalating. Before abruptly ending the call, Tara Sharma stated, "*There is no point in talking with the Claimants any longer.*"

(2) Preclusion from Initiating Arbitration

On 15 December 2023, a group of activists initiated legal actions against the Government of Palmenna and SZN, alleging negligence related to the flood incident in late November. The activists cited inadequacies in Canstone's drainage and ventilation systems, as well as a failure to take proactive measures to mitigate risks during the flood. On 14 February 2024, the High Court ruled in favor of the activists, finding the Government of Palmenna and SZN jointly liable for negligence and ordering compensation to the victims. The Government is currently appealing the High Court's decision, and the Court of Appeal has not yet provided directions regarding the appeal. SZN contends that it was wrongly named in the lawsuit, arguing that the action should have been solely against the Government of Palmenna. SZN has reserved the right to strike out the lawsuit brought against it.

(3) Breaches under the PK-BIT

The Respondent established two factories in Palmenna: one in Karheis (a rural area) and another in Appam (a city). These factories were set up without the necessary environmental quality controls and were rushed into operation. Due to a lack of relevant experts in the country, the company compromised by hiring young talents with no prior experience to act as in-house experts.

These in-house experts were responsible for ensuring the machinery was in good working order and that the plants operated in accordance with industry standards. As a second line of defense, the company hired Alan Becky as the Quality Control Officer to confirm and validate the findings of the in-house experts.

In mid-February 2023, the Karheis factory received an unsigned note detailing a potential leak in one of the tanks used to store refined palm oil. Alan Becky merely read the report without conducting further checks and left the factory three hours after his arrival.

Since early November, Palmenna has experienced heavy rainfall, leading to rising water levels, particularly in low-lying areas such as Appam. The high percentage of impervious surfaces in Appam, such as roads, highways, and buildings, exacerbated runoff and increased the risk of flash floods. As a result, the pressure relief valves on the Respondent's storage tanks were compromised due to the floodwaters. Canstone quickly repaired and enhanced its ventilation systems to minimize the impact of the incident and safeguard against future risks.

(4) Damages

As a result of the flooding incident, 129 people suffered from respiratory tract infections. Thirty-nine of them were hospitalized, including 13 of the Respondent's employees. According to Dr. Ragu's medical report, the cause of the infections is inconclusive. However, he indicated that the infections were likely caused by one of the various toxic chemicals found in the floodwaters, including traces of biodiesel.

SUMMARY OF PLEADINGS

I

The pre-arbitral steps pertain to admissibility rather than jurisdiction. Therefore, as a matter of judicial discretion, the tribunal should proceed with the trial, particularly given the urgency of the situation in Palmenna. Furthermore, Article 11 of the PK-BIT provides for a waiver in circumstances where there is a justifiable essential security purpose. Alternatively, it is submitted that the negotiation requirement under Article 12(1)(a) has been satisfied.

II

The Doctrine of Identical Factual Predicates, is inapplicable here, as the factual circumstances differ between the High Court proceedings and the current arbitration. The High Court case addresses issues arising from the flash floods in both Appam and Karheis, whereas the arbitration concerns only the breach of the BIT related to the Appam flood. Moreover, there is no risk that the arbitration will void the High Court proceedings, as the claims in question are distinct and are being adjudicated in separate forums.

III

Respondent breached Article 1, 2, 3, 4, 5, 10 and 11 of the PK-BIT. Article 1(d) and (e) is breached due to overall adverse performance of the PK-BIT by the Respondent which includes bribery (Article 2,3) , failure to submit the EIA report (Article 4), discharging harmful substances in Karheis and Appam facility (Article 5), unfair treatment in post-flood discussion (Article 10) and impeding access to clean water as well as causing political turmoil (Article 11).

IV

Declaratory relief is warranted in this case because there is sufficient causation between the Respondent's breach of the PK-BIT and the respiratory tract infections suffered by the Claimant's citizens. The Claimant is seeking various heads of damages, including medical expenses, environmental damage, expectation loss, and loss of reputation. These heads of damages are not too remote, as they directly result from the Respondent's breach of the PK-BIT.

PLEADINGS

I. THE PRE-ARBITRAL STEPS IN ARTICLE 12 OF THE PK-BIT DO NOT NEED TO BE ADHERED TO AND THE PROCEEDINGS CAN COMMENCE.

It should be noted that the present claim involves a preliminary objection raised by the Respondent. In response, the Claimant posits that the pre-arbitration steps need not be complied with. We advance the following arguments in support of this position:

First, we submit that Malaysian law should be the applicable law to guide the Tribunal on this matter. Under Malaysian law, pre-arbitration steps may be bypassed in situations where there is urgency. This is in line with the broader notion of commercial practicality and ensures that parties' access to justice is not impeded by mere technicalities.

A. The Applicable Law is Malaysian Law

The rule of thumb is that the tribunal should apply the law expressly agreed upon by the parties. In the absence of an express choice of law, the tribunal should endeavor to discern the implied intentions of the parties. This may be done by applying the "closest and most real connection" test.

In the case of *Sulamérica*, the English Court of Appeal held that if the parties have not expressly chosen a governing law for their arbitration agreement, the law chosen for the main contract serves as a strong indication of their intention to apply the same law to the arbitration agreement.¹

In the present case, given that the PK-BIT does not contain a governing law clause, the tribunal should consider the choice of the seat to determine the law with the "closest and most real connection" to the arbitration agreement. Here, the parties have agreed that the seat of arbitration is Kuala Lumpur. While the choice of seat traditionally serves to establish the procedural framework of the arbitration, the absence of any reference to other municipal laws necessitates that the tribunal determine the applicable law to be the law of the seat, which is Malaysian law.²

B. Pre-Arbitral Steps may be Bypassed due to Urgency

a. Pre-Arbitral Steps Concerns Admissibility and Not Jurisdiction

The difference between jurisdiction and admissibility is that the former considers whether the arbitral tribunal has the power to hear the dispute while the other considers whether the arbitral tribunal, despite having the power, does not consider it appropriate to exercise it to hear the case. The difference in effect is that admissibility then becomes an issue of *discretion* of the tribunal — making the determination dependent on the special circumstances of the case.

¹ *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638.

² Section 3 of the Civil Law Act.

In *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*, non-compliance with an escalation clause was found to be an issue of admissibility and not jurisdiction.³ Similarly, this was affirmed in *NWA & FSA v NVF & Others* in the English High Court and *C v D* in the Hong Kong High Courts.⁴ Hence it is therefore submitted that pre-arbitral steps concern the admissibility of a claim and not jurisdiction.

b. There is Urgency and therefore the pre-arbitral steps should be bypassed

Currently, the political situation in Palmenna is volatile due to Canstone's failure to adhere to its obligations.⁵ Considering the current issues, there would be no recourse should the tribunal not assume its responsibility to adjudicate on the matter. Hence, considering the *discretionary* nature of admissibility, the tribunal should proceed to adjudicate on the matter.

C. Pre-arbitral Steps Should Not Bar the Commencement of Claims Pursuant to Article 11 of the PK-BIT.

Reading Article 11, it is therefore interpreted that nothing in the BIT shall be construed to prevent the parties from taking actions that are necessary to protect its essential security interest.⁶ An essential security interest includes the peace and security within the country. Hence, the pre-arbitral steps within the BIT should not be interpreted in a way that makes it mandatory for the steps to be fulfilled before the commencement of the claim, if the claim is necessary to protect peace and security.

³ [2014] EWHC 2104.

⁴ [2021] EWHC 2666 (Comm); [2023] HKCFA 16.

⁵ Moot Problem, [45].

⁶ Article 11, PK-BIT.

D. In any case, Negotiation under Article 12(1)(a) of the PK-BIT was fulfilled.

Referring to the facts from paragraph 49 to 53, there has been a negotiation between PM Akbar and Tara Sharma, Luke Nathan and Alan Becky. The facts clearly state that there has been a discussion where both parties discussed the best way forward. However, the discussions reached an impasse. Pre-arbitral steps are an issue of means and not result. It is therefore submitted that negotiation has been fulfilled.

II. THE CLAIMANTS ARE NOT PRECLUDED FROM INITIATING THIS CLAIM

It is important to note that the second issue involves a counterclaim by the Respondent. As we have not had the opportunity to review the Respondent's claims in detail, we are presently unable to fully discern the specific arguments or issues they may assert. However, we expressly reserve the right to submit a supplemental response to address any claims made by the Respondent as necessary. At this juncture, we will proceed to address the potential contentions that the Respondent is likely to raise.

A. The Doctrine of Identical Factual Predicates Does Not Apply

The Respondent may assert that the claims arise from a similar factual matrix and may attempt to invoke the Doctrine of Identical Factual Predicates. This doctrine posits that a claimant cannot bring the same claim based on an identical factual matrix. However, we contend that this doctrine is inapplicable in the present case, as multiple claims can indeed arise from the same material facts.

In any event, the doctrine does not apply here because the factual matrices in question are not identical. While the High Court proceedings involve the factual circumstances surrounding the flash flood in both Appam and Karheis, the present breach of the BIT pertains solely to the flash flood in Appam. Upon closer inspection, it is evident that the grounds of the High Court judgment pertain to the maintenance of *both* factories, whereas the BIT breach concerns only one. Therefore, the facts underlying the two breaches are not the same.

B. There is no issue of ‘voiding’ the High Court Proceedings

With reference to the moot problem, there may be a concern that the current arbitration proceedings could somehow void the ongoing High Court ruling, which is currently under appeal. However, it is crucial to recognize that the arbitration and High Court proceedings are conducted in different forums and, as such, cannot impact one another.

In the present arbitration, the issue at hand is a breach of the BIT, which constitutes a contractual claim. In contrast, the High Court proceedings deal with a tortious claim of negligence. These matters are distinct and do not overlap. Consequently, a determination in one forum cannot affect the proceedings in the other, especially considering that arbitration is conducted confidentially.

III. THE RESPONDENT HAD BREACHED THE PK-BIT

The PK-BIT should be interpreted according to its plain and ordinary meaning in light of its object and purpose, as mandated by the Vienna Convention on the Law of Treaties. Consequently, the Respondent's inaction has resulted in several breaches of the PK-BIT:

A. Article 1(d) and (e)

As an investor under the PK-BIT, the Respondent is obligated to uphold the objectives outlined in Article 1. Specifically, Article 1(d) emphasizes the promotion of clear and mutually beneficial investments between the Parties, while Article 1(e) underscores the necessity of protecting against environmental degradation.⁷

The Respondent breached Articles 1(d) and (e) through the following actions:

- a. Failure to investigate and address acts of bribery.
- b. Failure to submit the Environmental Impact Assessment Report.
- c. Discharge of toxic substances into the air and/or river.
- d. Causing respiratory infections among the citizens of the Claimant.

The actions have caused the Claimant the following losses:

- a. Medical Expenses
- b. Pure Economic Loss
- c. Loss of reputation
- d. Exposure to litigation

These breaches of the PK-BIT are material, as they have deprived the Claimant of substantially the entire benefit of the agreement, as articulated by Lord Diplock in *Hongkong Fir Shipping Co*

⁷ PK-BIT, pg 4.

Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26. Therefore, these breaches inevitably undermine the objectives of the BIT as a whole.

B. Article 2

Under Article 2(2) of the PK-BIT, the Respondent is obligated to ensure fairness and transparency in its policies and procedures concerning all matters related to the PK-BIT.

In this case, the Respondent breached Articles 2(2) by engaging in bribery during the administration of company procedures. This is evidenced by the aftermath of the leakage of refined palm oil at the Karheis plant, where an undisclosed sum of compensation was paid to victims in exchange for withdrawing their reports. The Respondent was under a duty to disclose such leakages to the state authorities, regardless of any intent to disclaim liability. This duty exists because notifying the authorities of oil leakages is critical, given the potential for widespread environmental devastation to nearby flora and fauna. Instead, the Respondent attempted to cover up the incident.

The finding of bribery is further supported by the statutory declaration affirmed by Jakey, indicating that Alan offered bribes to conceal unethical practices. Moreover, the compensation sum and the investigation findings related to the leakage at the Karheis facility remain undisclosed. This lack of disclosure constitutes a breach of the Respondent's obligation to maintain openness and transparency in the implementation of procedures. As a result, the Respondent has failed to fulfill its duty of transparency by not disclosing relevant misconduct to the appropriate authorities.

C. Article 3

By covering up the leakage at the Karheis plant, the Respondent has caused a violation of human rights, specifically the right to life and access to clean water as provided under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Consequently, the Respondent has also breached Article 3(3) of the PK-BIT, which obligates the parties to refrain from business practices that infringe upon human rights and to ensure that victims have access to an effective remedy. The Respondent's engagement in corrupt practices, including the concealment of the leakage and the payment of bribes, constitutes a violation of both Article 2 and Article 3 of the PK-BIT.

In *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor* [2015] **MLJU 477**, Mary Lim J (now a retired Federal Court Judge) held that instances of bribery, fraud, or corruption are contrary to public policy and can lead to the setting aside of any award. The Respondent's breach in committing bribery not only contravenes Article 2 and Article 3 but also potentially exposes the Claimant to allegations of denying the Respondent effective dispute resolution under Article 3(2).

C. Article 4

Under Article 4(1) of the PK-BIT, the Respondent is required to conduct and submit an Environmental Impact Assessment (EIA) report when engaging in activities that have a significant environmental impact. Despite acknowledging the necessity of an EIA, the Respondent has failed to conduct or submit any EIA report to the Ministry of Natural Resources and Environmental

Sustainability in the Claimant State. Consequently, the Respondent is in breach of both Article 4(1) and Article 4(4) of the PK-BIT.

D. Article 5

Under Article 5(1) of the PK-BIT, the Respondent is expressly prohibited from discharging any harmful substances into the river. However, the Respondent has breached Article 5(1) on two separate occasions: first at the Karheis facility in mid-February 2023, and subsequently at the Appam facility in November 2023.

a. Karheis Incident

The breach at the Karheis facility is supported by multiple facts. Initially, an unsigned note was received detailing a potential leakage in a tank containing refined palm oil. The subsequent investigation was conducted in an unsatisfactory manner; Alan, the inspector, spent only three hours on-site and relied on a report prepared three months earlier to confirm his findings. When asked to conduct a more detailed investigation, Alan swiftly rejected the request without proper consideration. Crucially, nearby farmers were hospitalized due to the Respondent's discharge of harmful substances into the river. This discharge was further corroborated by a statutory declaration from Jackey, which stated that Alan performed his duties in a lackadaisical manner and attempted to cover up the incident. Therefore, a breach of Article 5(1) occurred at the Karheis facility.

b. Appam Incident

Similarly, the Respondent breached Article 5(1) at the Appam facility by discharging harmful substances into the river. This breach is likely a result of poor maintenance practices following the Karheis incident, demonstrating a pattern of negligence that the Respondent has failed to rectify from the outset. These repeated violations points to Respondent's failure to adhere to its obligations under Article 5(1) of the PK-BIT, resulting in significant environmental harm and endangering public health.

E. Article 10

The Respondent's conduct post-flood has also breached Article 10(1) of the PK-BIT. The said provision requires the party to give a fair and equitable treatment to the investment. During discussions between the Respondent's representatives and the Claimant, Tara Sharma, a representative of the Respondent, abruptly and unreasonably halted the negotiations aimed at finding an amicable solution. Such conduct constitutes a breach of the obligation to treat the parties in a fair and equitable manner, as required by Article 10(1).

F. Article 11

The Respondent's conduct has also breached Article 11 of the PK-BIT, which guarantees each party the ability to protect its own essential security interests. The Respondent's actions have jeopardized the essential security interests of the Claimant by impeding access to clean water and inciting political turmoil.

As previously detailed, the Respondent's discharge of harmful substances into the river rendered the water unsafe for consumption, thereby endangering the health of the Claimant's citizens. Additionally, the aftermath of the flood led to significant political instability, as former Prime Minister Elsie sought to overthrow the current government due to the damage caused by the Respondent's breaches under the PK-BIT. These actions constitute a direct threat to the national security interests of the Claimant. As a result, the Respondent's conduct has significantly impeded the Claimant's ability to safeguard its essential security interests, in clear violation of Article 11 of the PK-BIT.

IV. THE CLAIMANT IS ENTITLED TO BOTH DECLARATORY RELIEF AND DAMAGES

A. Declaration and Damages Are Important Remedies

Under Sections 4 and 41 of the Specific Relief Act 1950, a declaration can be granted to affirm the specific rights of the parties involved. Such a declaration is binding upon the parties to the suit, as stipulated under Section 42 of the Specific Relief Act 1950. Therefore, the issuance of a declaration is crucial in resolving the dispute between the Claimant and the Respondent, particularly in determining responsibility for the respiratory tract infections suffered by the citizens of the Claimant.

It is a well-established principle that damages should be awarded to compensate the innocent party for losses caused by the breach, once such a breach is proven.⁸ The Claimant seeks the following

⁸ *Tenaga Nasional Bhd v Big Man Management Sdn Bhd* [2024] 2 MLJ 652 (CA)

heads of damages: general damages for environmental harm, expectation loss, and reputational damage. Additionally, we are pursuing specific damages to cover the medical expenses incurred.

In the event that damages are not awarded or are deemed inadequate, we respectfully request this arbitral tribunal to grant specific performance as provided for under the Specific Relief Act 1950. This would ensure that the Claimant receives appropriate redress for the harm suffered.

B. Causation Is Established

To establish causation, it is sufficient to demonstrate that the Respondent's act materially contributed to the injury suffered; it is not necessary to prove conclusively that it was the sole cause of the injury. In this case, Dr. Ragu's medical report has adequately established the causal link between the Respondent's discharge of harmful substances and the resulting respiratory tract infections suffered by the citizens of the Claimant state.⁹

As a corollary, damages arose in the ordinary course of events, as per Section 74 of the Contracts Act 1950. Since the Respondent's actions caused the respiratory tract infections, the Claimant is entitled to recover medical expenses. Furthermore, the Respondent's contamination of the river necessitates the rectification of environmental damage, as well as compensation for the loss of income that the Claimant could have generated in the absence of the toxic substances.

Lastly, the Respondent's breach compromised the Claimant's ability to effectively manage their drainage and ventilation systems, exposing the Claimant to litigation and contributing to political

⁹ Moot Problem, [40].

turmoil. Given these circumstances, the Claimant's claim for reputational loss is not too remote and is therefore justified.

C. Respondent Cannot Rely on Force Majeure Defence

The breach of the PK-BIT constitutes strict liability, meaning that no defense can be relied upon unless explicitly provided for in the PK-BIT itself. This principle is supported by the decision in ***Raineri v Miles and another* [1980] 2 All ER 145**, where it was held that no defense can be raised against the non-fulfillment of a duty.

Furthermore, the defense of force majeure is not included in the PK-BIT and, therefore, cannot be invoked by the Respondent. According to the Federal Court's decision in ***Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577**, a contract must be interpreted solely based on the intention of the parties as expressed within the four corners of the agreement. Since the defense of force majeure is neither explicitly nor implicitly mentioned in the PK-BIT, the Respondent cannot rely on it as a defense.

PRAYER FOR RELIEF

The Claimant respectfully requests this Tribunal to hold the following:

I

The pre-arbitration steps may be dispensed with.

II

The Government of Palmenna is not precluded from initiating arbitration against Canstone.

III

Canstone has breached its obligations under the PK-BIT.

IV

If the answer to Issue III is in the affirmative, find that the Government of Palmenna is entitled to an award of both declaratory relief and damages.

Respectfully Submitted,

Counsels for Claimant