



ASIAN INTERNATIONAL ARBITRATION CENTRE

KUALA LUMPUR, MALAYSIA

19TH LAWASIA INTERNATIONAL MOOT COMPETITION 2024

GOVERNMENT OF PALMENNA

V.

CANSTONE FLY LIMITED

MEMORIAL FOR CLAIMANT

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STATEMENT OF JURISDICTION

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

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

QUESTIONS PRESENTED

- I. Whether the pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Government of Palmenna against Canstone;
- II. Whether the Government of Palmenna is precluded from initiating an arbitration against Canstone;
- III. Whether Canstone had breached its obligations under the PK-BIT; and
- IV. If the answer to Issue III is in the affirmative, whether Palmenna is entitled to an award of declaration and damages.

STATEMENT OF FACTS

PARTIES

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

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

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

MEMORANDUM OF UNDERSTANDING

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

PK-BIT

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

CANSTONE'S INCORPORATION

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

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

KARHEIS INCIDENT

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

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

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

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

APPAM INCIDENT: THE DISASTER

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

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

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

PALMENNA HIGH COURT: PALMENNA ACTIVISTS V PALMENNA AND SZN

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

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

INITIATION OF AIAC PROCEEDINGS

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

SUMMARY OF PLEADINGS

I.

Pre-arbitration steps do not have to be complied with before arbitration proceedings may be commenced as they are merely directory, illustrating the hopes and good relations of the parties during its creation. Where the parties are in a frigid stance, or have intractable differences, which cause the impossibility of an amicable settlement of dispute, pre-arbitration proceedings are not mandatory for the parties. Furthermore, the PK-BIT's mediation clause is insufficient in its certainty to bind the parties to oblige in commencing mediation prior to arbitration.

II.

Palmenna is not precluded from initiating arbitration against Canstone. The matter being brought forward to the Tribunal is not barred by issue preclusion nor *res judicata*. The PK-BIT is a crucial agreement in the second litigation which was not raised during the Palmenna High Court proceedings, thus issue preclusion would be inapplicable. Additionally, Canstone was not a party to the prior litigation, and the cause of actions for both litigations differ: Palmenna's law of negligence under tortious acts was litigated in the prior litigation, and currently before this Tribunal, to be litigated is on the matter of the breach of the PK-BIT under the law of contracts.

III.

The Respondent had breached the PK-BIT by failing to comply with its Art.4 sustainability obligations and Art.5 environmental obligations. Canstone had breached Art.4 due to the failure to conduct an environmental impact assessment ("EIA") and to submit a report to

the Ministry of Natural Resources and Environmental Sustainability of Palmenna (“Ministry”). The Respondent’s biodiesel plant facility located in Appam had discharged polluting chemical content into the inland waters following the flooding incident, and in extension, had caused respiratory tract infections amongst the nearby occupiers, breaching the environmental obligations under Art.5.

IV.

The Claimant is entitled to a declaratory award from this Arbitral Tribunal as well as monetary compensation. The evidence and facts clearly indicate that the Respondent is responsible for the consequences of the breach, specifically the infections suffered by the citizens of Palmenna, establishing a direct causation. This chain of causation supports the Claimant’s right to a declaration that accurately assigns liability to the Respondent. Furthermore, the environmental harm caused by Canstone’s breaches of the PK-BIT justifies the right to monetary compensation, which is essential for implementing measures to restore and protect the safety of the environment.

PLEADINGS

I. PRE-ARBITRATION STEPS ARE NOT REQUIRED TO BE COMPLIED WITH BEFORE ARBITRATION PROCEEDINGS CAN BE COMMENCED BY PALMENNA AGAINST CANSTONE.

A. PRE-ARBITRATION STEPS ARE NOT A MATTER OF JURISDICTION.

1. Pre-arbitration steps have been deemed as merely a **question of admissibility** for the Tribunal,¹ rather than a question which impacts the Tribunal's jurisdiction and ability to hear the case. On this basis, pre-arbitration steps are not mandatory for the Claimant to comply with prior to the invocation of the arbitration.
2. Furthermore, if not admissibility, pre-arbitration steps have been deemed to be merely **directory**, expressing only the hopes and good relations between the parties prior during the creation of the agreement.²
3. Where the parties are in a **frigid stance**, or have intractable differences,³ where an **amicable settlement of the dispute is virtually impossible**, arbitration **can be invoked** without the fulfilment of the pre-arbitration steps, and it will not be deemed to be have been invoked prematurely.⁴
4. It is submitted to this Tribunal that the Claimant and Respondent are currently in a frigid stance and an amicable settlement of the dispute seems virtually impossible.

¹ *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm)

² *Itex Shipping v China Ocean Shipping Co* [1989] 2 Lloyd's Reports 522

³ *Uphealth v Glocal Healthcare Systems* [2024] ICC Case No.27329/PDP

⁴ *Visa International v Continental Resources (USA) Ltd* AIR 2009 SUPREME COURT 1366

(a) Allegations against one another during the Palmenna High Court case.

5. During the Palmenna High Court case, SZN and Palmenna strongly contested their respective stances, which essentially **laid responsibility solely on the other party** and none with themselves. SZN was of the stance that they had been wrongly named in the suit, and only Palmenna was to be liable.⁵ Meanwhile, Palmenna stated that they had no liability due to the act of God, as well as that as the citizens who were affected were residing nearby the Canstone Appam facility, only SZN would be liable.⁶

(b) Stands firm on each respective stance.

6. In addition to that, the Claimant and Respondent are both strongly standing firm on their respective stances. During the video call between the Claimant and Respondent to seek for a solution for Palmenna's political landscape, all suggestions on a manner in which to approach the issue by the Respondent had been all **rejected by the Claimant.**⁷
7. Furthermore, the Respondent is in a firm stance that **they did not do any wrongdoing**, and therefore would not be able to admit to any such doings. Respondent has stated, "... *There is no point in talking to you anymore.*" to the Claimant.⁸
8. Thus, it is submitted to the Tribunal that the parties are **currently in such a frigid stance**, with intractable differences, that it would be futile to proceed with pre-arbitration steps prior to commencing this arbitration, making it so that pre-arbitration steps would not be mandatory for the Claimant to comply with.

⁵ *Moot Problem*, p15-16, para. 42

⁶ *Moot Problem*, p16, para. 43

⁷ *Moot Problem*, p17, para. 50

⁸ *Moot Problem*, p17-18, para. 51

B. THIS PK-BIT'S ARBITRATION STEPS ARE NOT MANDATORY.

9. For pre-arbitration steps to be mandatory, there are three (3) criteria in which it has to fulfil.⁹

(a) Process should be set out.

10. The Claimant concedes that, indeed, the process of **pre-arbitration steps has been set out** in the PK-BIT.¹⁰ However, the pre-arbitration steps do not fulfil the next two (2) criterias.

(b) Process must be sufficiently certain.

11. For a process of pre-arbitration to be certain, it must indicate the parties' clear intentions to be bound to the pre-arbitration steps, i.e an **inclusion to comply with a specific organisation's recommendations for ADR procedures.**^{11,12}

12. It is submitted to this Tribunal that the PK-BIT's dispute resolution article is **absent** on this matter.

(c) Administrative process of the ADR, including the selected person, and payment to that person, should be defined.

13. In specification of mediation clauses, it has been decided that such clauses can only be obligatory and binding upon the parties where they **include a defined mediation process** or it refers to a **specific mediation provider.**¹³

⁹ *Holloway & Anor v Chancery Mead Ltd* [2008] 1 All ER (Comm) 653

¹⁰ *PK-BIT*, p11, Art.12

¹¹ *Cable & Wireless PLC v IBM United Kingdom Limited* [2002] EWHC 2059 (Comm)

¹² *Sonatrach v Medex Petroleum* (2016)

¹³ *Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA Civ 638

14. It is submitted to this Tribunal that the PK-BIT's mediation clause is **absent** on this matter,¹⁴ and thus cannot bind the Claimant to oblige by it prior to the invocation of arbitration.
15. Therefore, it is submitted to this Tribunal that **pre-arbitration steps do not have to be complied** with before the commencement of this arbitration proceeding by the Claimant to the Respondent as matters of pre-arbitration steps are **not a matter of jurisdiction**, and the pre-arbitration steps are **insufficient in their certainty** as to bind the parties to it.

¹⁴ *PK-BIT*, p11, Art.12(1)(b)

II. PALMENNA IS NOT PRECLUDED FROM INITIATING ARBITRATION PROCEEDINGS AGAINST CANSTONE.

16. A party may only be precluded from initiating an action against another when barred by either issue preclusion or *res judicata*. It is submitted to this Tribunal that **neither issue preclusion nor *res judicata* are applicable** in this litigation, and therefore, Palmenna would not be precluded from initiating an action against Canstone.

A. ISSUE PRECLUSION IS INAPPLICABLE.

17. Issue preclusion is a doctrine which “*an issue of fact or law that was actually litigated and necessarily decided is conclusive in a subsequent action between the same parties or their privies.*”¹⁵

18. This doctrine is inapplicable where a **relevant agreement to the second litigation was not raised** in the prior litigation.¹⁶ It is submitted to this Tribunal that the agreement brought forward in this arbitration is the PK-BIT, which was not raised during the Palmenna High Court case.

19. Additionally, issue preclusion is inapplicable where the prior case did not rule on the specific contested issues, which would leave nothing new for the Tribunal to adjudge.¹⁷ In the Palmennian High Court case, there was no ruling given regarding the Respondent’s breach of the PK-BIT,¹⁸ merely regarding SZN’s negligence in maintaining Canstone’s Appam facility’s drainage system and equipment, alongside with Palmenna’s

¹⁵ *En Canfor Corporation v United States of America* Civil Action No.07-1905 (RMC)

¹⁶ *Pertamina International Marketing & Distribution Pte Ltd v P-H-O-E-N-I-X Petroleum Philippines, Inc* [2024] SGHC(I) 19

¹⁷ *Stati v. Kazakhstan Memorandum* Civil Action No.15-MC-91059-LTS

¹⁸ *Moot Problem*, p18, para. 55

lackadaisical enforcement of environmental laws.¹⁹ These completely differ from the issue of the Respondent's breach of the PK-BIT.

20. Thus, it is submitted to the Tribunal that issue preclusion is **inapplicable** as a crucial document was not litigated in the prior litigation, thus this would be considered as a new and separate issue.

B. RES JUDICATA IS INAPPLICABLE.

21. *Res judicata* precludes a “party or their privies from re-litigating issues that were or **could have been raised in the action.**”²⁰

22. It is submitted to this Tribunal that the PK-BIT only provides three (3) methods of dispute resolution – negotiation, mediation and finally, arbitration.²¹ This PK-BIT is silent on the matter that domestic courts of either party are capable of resolving disputes arising from the PK-BIT. As such, it was not, and could not, have been brought forward to the Palmenna High Court. Thus, this would make *res judicata* inapplicable.

23. Furthermore, there are two (2) criterias for *res judicata* to be fulfilled before it could be applicable to the parties and preclude a party from initiating an action.²²

(a) *The same parties are involved.*

24. It is submitted to the Tribunal that there are **different parties** involved in the Palmenna High Court case, and now, in front of this Tribunal. The Palmenna High Court case concerned the Palmenna activists, SZN and Palmenna.²³ This arbitration, on the other hand, concerns Palmenna, the Claimant, and Canstone, the Respondent.²⁴

¹⁹ *Moot Problem*, p15, para. 41

²⁰ *Federated Department Stores, Inc v. Moitie* 452 U.S. 394

²¹ *PK-BIT*, p11, Art.12

²² *Eni and Vitol v. Ghana and GNPC* SCC Case No. U2021/114

²³ *Moot Problem*, p15, para. 41

²⁴ *Moot Problem*, p18, para. 54

25. Despite SZN being the parent company of Canstone and was found liable for the actions of Canstone, SZN and Canstone are two (2) **separate legal entities**.²⁵ Canstone has its own legal responsibility and obligations to be held accountable for.

(b) The same subject matter is being litigated.

26. It is submitted to this Tribunal that where there are two (2) **separate causes of action**, it is regarded as a new subject matter and therefore would not be precluded under *res judicata*.

27. The Palmenna High Court case concerned a **tortious cause of action** by the Palmenna citizens under Palmenna's law of negligence.²⁶ Meanwhile, this arbitration concerns a **contract cause of action** by the Claimant to the Respondent for the breach of contractual obligations.²⁷

28. Therefore, it is submitted to this Tribunal that **both criterias for *res judicata* are unfulfilled**, and therefore, Palmenna, the Claimant, cannot be precluded from initiating this arbitration against Canstone, the Respondent.

²⁵ *Adam v Cape Industries plc* [1990] 2 WLR 659

²⁶ *Moot Problem*, p15, para. 41

²⁷ *Moot Problem*, p18, para. 55

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

29. The PK-BIT had spelled out the obligations in which the parties have to abide by. Specifically under Art.4 and Art.5, the Claimant submits that Canstone had breached its sustainability and environmental obligations.

A. ARTICLE 4.

30. Art.4 of the PK-BIT stipulates that any investors that carry out activities that may cause significant environmental impact shall hire a qualified person in conducting an EIA and to submit a report thereby, to the relevant ministry.²⁸

31. In the present case, the investment activity that the Respondent carries out in Palmenna involves biodiesel production. The process of producing biodiesel involves the transesterification process where a waste removal technology was used in order to refine the palm oil.²⁹ With this, the Respondent's biodiesel plants located in both Karheis and Appam in Palmenna, fall under the definition under Art.4(2)(f)(i).³⁰ Canstone's activities on Palmenna land constitute "*significant environmental impact*" to the environment, and hence, EIA and a report shall be conducted and submitted to the Palmenna Ministry of Natural Resources and Environmental Sustainability.

32. However, based on the facts, the Respondent had failed to submit **any** reports that should have been produced after conducting an EIA. In fact, the Claimant submits that the "*brief environmental assessment note*" produced by the Respondent internally every 4 months is **not** equivalent to the one as requested by the PK-BIT.³¹ Following international

²⁸ PK-BIT, p5, Art. 4

²⁹ Moot Problem, p11, para. 28

³⁰ PK-BIT, p7

³¹ Moot Problem, p10, para. 25

customary law,³² EIA's "*should contain an evaluation of the possible transboundary harmful impact of the activity.*"³³ Following the Environmental Impact Assessment Guideline in Malaysia,³⁴ an "*EIA study must follow the typical steps commonly followed by EIA practitioners and widely adopted by environmental agencies worldwide,*" where phases such as screening, baseline study, environmental audits, etc. should be present. The internal brief environmental notes by Canstone, the Claimant submits, do not involve any of the steps required for a proper EIA to be conducted, thus not meeting the industrial standard, breaching its obligations under Art.4.

B. ARTICLE 5.

33. Art.5 stipulates that no investor(s) shall discharge any polluting, chemical content into any river, rendering it harmful to public health. However, several instances can be derived from the facts into reaching the conclusion that Canstone had breached its environmental obligations under this specific clause.

(a) Only one in operation.

34. Following the rainfall in Appam, neighbouring factories decided to immediately shut down their operations for the next few days and ordered an emergency evacuation due to the severity of the flood.³⁵ However, in contrast, Canstone's Appam facility did not do the same and instead had directed that operations continue as usual.

³² International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities*. UN Doc. A/RES/56/82, art.7 para. 7.

³³ United Nations, '*Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries 2001*' (2001).

³⁴ Ministry of Natural Resources and Environment Malaysia, '*ENVIRONMENTAL IMPACT ASSESSMENT GUIDELINE in MALAYSIA*' Department of Environment Ministry of Natural Resources and Environment Malaysia' (2016)

³⁵ *Moot Problem*, p13, para 34

(b) Close time and place proximity.

35. Nearby occupiers were being admitted to the hospital due to respiratory tract injuries **shortly** after the flood had subsided, and that more than 129 people were affected, with even 13 of 39 individuals hospitalised being Canstone's very own employees working at the Appam plant facility.³⁶ An inference can be drawn into seeing a close link between the Appam facility operated by Canstone and the contamination, as well as the respiratory tract infections.

(c) Results of the medical report.

36. Besides, Canstone's very own internal doctor, Dr. Ragu's medical report following the infections revealed that the sample being used to conduct the test contained traces of biodiesel.³⁷ And a biodiesel plant is exactly what Canstone's facility in Appam is.³⁸ Once again, pointing to the Respondent being the one responsible for the contamination which occurred in the inland waters of Appam.

37. The Claimant is aware of the fact that the evidence as presented above are mainly factual basis and that there is a lack of direct evidence. However, the *Corfu Channel* case provides that, "*the State which is the victim must, in that case, be allowed more liberal recourse to inferences of fact and circumstantial evidence; such indirect evidence must be regarded as to especial weight when based on a series of facts, linked together and leading logically to a single conclusion.*"³⁹

38. In this regard, it is submitted to this Tribunal that the circumstantial evidence as previously provided supports the conclusion that it is indeed the Respondent who had

³⁶ *Moot Problem*, p14, para 36

³⁷ *Corrections and Clarifications to the Moot Problem*, p3, clarification 13

³⁸ *Moot Problem*, p9, para 21

³⁹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (1947) International Court of Justice (ICJ).

caused the discharge and by extension, the respiratory tract infections, hence breaching its environmental obligations under Art.5 of the PK-BIT.

IV. IF THE ANSWER TO ISSUE III IS IN THE AFFIRMATIVE, THE GOVERNMENT OF PALMENNA IS ENTITLED TO BOTH THE AWARD OF DECLARATION AND DAMAGES.

39. On the basis that this Tribunal had determined that the Respondent committed breaches under the PK-BIT, the Claimant submits that the Government of Palmenna is entitled to the declaratory award and damages, due to the evident chain of causation.

A. DECLARATION.

40. The circumstantial evidence as provided above sufficiently suggests a conclusion that there is a causal link between the breach of the obligations and the consequence, ie. respiratory tract infections.

41. The declaration sought by the Claimant from this Tribunal particularly connects the breach and the consequence, thereby establishing the Respondent's liability. The Claimant maintains that this is necessary in order to ensure justice for those who have suffered due to Canstone's breaches of the PK-BIT by Canstone.

B. DAMAGES.

42. In regards to the damages, the Claimant submits that the Government of Palmenna is entitled to damages for the purposes of **environmental restoration** which flows from Canstone's breaches of the PK-BIT.

43. In international arbitration cases where environmental harm caused by investors under bilateral investment treaties, *Perenco v Ecuador* provides that, "[...] such a claim is substantiated, the State is entitled to full remediation for the restoration of the environment."⁴⁰

⁴⁰ *Perenco v Ecuador Interim Decision on the Environmental Counterclaim* (2015) ARB/08/6, ICSID. p7, para 34.

44. Additionally, *Burlington v Ecuador* echoes the same view. In this similar case where contamination of waters is involved, it is common for the Tribunal to award damages to the State in order for application of equipment for filtering and purifying the polluting compounds over a period of time.⁴¹

45. With that, it is the Claimant's submission that the sufficient causation between the Respondent's breach and the consequence caused concludes that the Government of Palmenna is entitled to both the award of declaration and damages.

⁴¹ *Burlington v Ecuador* (2017) ARB/08/5, ICSID.

PRAYERS OF RELIEF

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

- A. Pre-arbitration proceedings are **not** required;
- B. The Government of Palmenna is **not** precluded from initiating arbitration proceedings;
- C. Canstone **had** breached its obligations under the PK-BIT; and
- D. The Government of Palmenna **is** entitled to both award of declaration and damages.