
THE 19TH LAWASIA INTERNATIONAL MOOT COMPETITION

ASIAN INTERNATIONAL ARBITRATION CENTRE

2024

BETWEEN:

THE GOVERNMENT OF PALMENNA

(CLAIMANT)

AND

CANSTONE

(RESPONDENT)

MEMORIAL FOR CLAIMANT

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INDEX OF AUTHORITIES

BIT	Bilateral Investment Treaty
PK-BIT	Palmenna-Kenweed Bilateral Investment Treaty
AIAC	Asian International Arbitration Centre
EIA	Environmental Impact Assessment
SZN	SZN Company Limited
MTI	Ministry of Trade and Investment
KLT	KLT Company Limited
Mehstone Ltd	Mehstone Star Limited
MOU	Memorandum of Understanding
UNFCCC	United Nations Framework Convention on Climate Change
Canstone	Canstone Fly Limited

STATEMENT OF JURISDICTION

The parties, PALMENNA, the **CLAIMANT**, and CANSTONE, the **RESPONDENT**, have agreed to the following: (1) to submit any dispute arising from or in connection with the PK-BIT before an arbitral forum 'arbitral tribunal', a panel which was constituted at the AIAC, (2) in accordance with the rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization and its Covered Agreements, and other multilateral, regional and bilateral agreements to which they are both parties.

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

- ◆ The Government of Palmenna [hereinafter “CLAIMANT”] and Canstone [hereinafter “RESPONDENT”] are the ‘PARTIES’ to this arbitration.

- ◆ CLAIMANT is located in Southeast Asia. They are a Commonwealth of Nations member state. Their varied landscapes, which includes coastal plains, mountain ranges, and tropical rainforests, are what they are recognized for.

- ◆ RESPONDENT is a company created following the successful signing of the PK-BIT, owned by both Mehstone Ltd and SZN. Mehstone owns 70% of the company while SZN owns 30%. They obtained two biodiesel plants, one in Appam, Palmenna’s capital city and the other one in a city nearer to the border of Kenweed named Karhies.

- ◆ The purpose of the Palmenna – Kenweed Memorandum of Understanding [“PK-BIT”] is to develop the economy of both Palmenna and Kenweed. The MOU was proposed by the CLAIMANT to secure potential future investments between both countries followed along by Kenweed with a proposal of establishing business collaborations.

January 2018	Gan Ridhimajoo was appointed as the Prime Minister of Kenweed. He assured to take immediate measures to sustain the country more and establish a more stable revenue stream	The Independent State of Kenweed
After the appointment of Minister Gan	Creation of Ministry of Trade and Investment (“ MTI ”) by Prime Minister Gan to explore several ways to bring in money for both in and out of the country.	The Neoteric
Within 1 year of MTI’s creation	Two fully owned subordinates named Quick Tech Solutions Corporation and BRC Rubber Corp were created by Prime Minister Gan under MTI	The Neoteric
2 February 2021	Prime Minister Gan held a meeting with several major companies: KS Group (a leading multinational company specializing in agribusiness and food processing), Ken Cement Group (a successful company focusing in cement, building materials and packaging), Pengko Bank (one of Kenweed’s and Southeast Asia’s largest banks), Makel Group (a diversified multination company with interests in retail, real estate and hospitality), KLT Company Limited (largest energy company in Kenweed involved in oil and gas exploration and distribution) and SZN Company Limited (a startup aiming to venture into the sustainable energy sector) where Prime Minister Gan expressed his hopes that these companies would be able to come together and unite such that the Ministry of Trade and Industry (MTI) and them can collaborate in securing a stable income for the government, ultimately benefiting the residents of Kenweed	The Neoteric

Two weeks after the Meeting	Tara Sharma, CEO of KLT arranged a lunch meeting to deliberate about possible collaboration for the oil and gas sector with Prime Minister Gan	The Neoteric
16 May 2021	The establishment of Mehstone Star Limited (“Mehstone Ltd”) with the aim of harvesting, extracting and refining palm oil for the production of biofuel	The Neoteric
3 June 2021	Appointment of M Akbar as the new Prime Minister of Palmenna	The Narcissist
June & July 2021	Prime Minister Akbar was noticed making two visits to Prime Minister Gan in Kenweed where he had proposed for Palmenna and Kenweed to enter into a Memorandum of Understanding to secure potential future investments for Palmenna	The Narcissist
Late July 2021	Prime Minister Gan was paid another visit by Prime Minister Akbar where the meeting was in presence of CEO Tara Sharma who has been appointed to explore potential collaborations with Palmenna. CEO Tara Sharma proposed the possibility of Mehstone Ltd establishing a subsidiary in Appam which will stabilize the costs and revenue for the production of the biofuel	The Narcissist
27 August 2021	The signing of a Memorandum of Understanding by Prime Minister Akbar and Prime Minister Gan in Palmenna’s capital city, which emphasizes the 5 key principles and commitments agreed by both countries	The Narcissist
6 September 2021	Prime Minister Akbar was compelled to disclose all the details leading up to the signing of the MOU at a parliament discussion which was conducted after the mixed reviews and criticisms of	The PK-BIT

	the residents of Palmenna. The former Prime Minister Elsie had also shared relevant opinions pertaining to this issue	
29 September 2021	Proposal of a draft bilateral investment treaty to Prime Minister Akbar's Cabinet	The PK-BIT
3 October 2021	The Palmenna-Kenweed BIT (PK-BIT) signing ceremony held in Appam, with Prime Minister Gan in audience	The PK-BIT
26 October 2021	Establishment of Canstone Fly Limited (Canstone) in Palmenna where 70% of Canstone was owned by Mehstone Ltd and SZN owns the rest 30%	The Creation of Canstone
November 2021	Canstone Fly Limited (Canstone) officially started their operations	The Creation of Canstone
Mid-February 2023	Canstone encountered their initial challenge at its Karheis facility when an anonymous note had surfaced, reportedly from a nearby factory. This note had mentioned details of a possible leak in one of the tanks for holding refined palm oil, once the oil had undergone transesterification	The Palm before the Storm
Two weeks after the anonymous note	News outlets reports the hospitalization of nearby farmers due to suspected contamination. Following this incident, an employee informed Jakey that an undisclosed amount of compensation had been paid to the families of the victims, in exchange for the retraction of their reports	The Palm before the Storm
6 September 2023	A meeting was held by the Board of Directors with the senior management of Canstone with the presence of Luke Nathan and Tara Sharma where the board members were updated on the current status of the facilities by Alan	The One That Got Away

23 November 2023	News reports warned of a flooding risk in the rural areas of Karheis. The facilities in Appam however continued as normal as Lee did not get a response from Alan, even though the nearby facilities had shut down and evacuated	The Disaster
26 November 2023	As the weather in Karheis improved, conditions had deteriorated in Appam. Intense rainfall in the urban area led the water to accumulate on streets and other low-lying areas. Shortly after this disaster, nearby residents and some employees were hospitalized due to respiratory tract injuries	The Disaster
15 December 2023	Initiation of legal actions by the Palmennian activists against the Government of Palmenna & SZN on the basis of negligence	The Legal Battle
14 February 2024	Decision of the High Court of Palmenna made in favor of the activists	The Ruling
1 March 2024	M Akbar arranged a conference call with Tara Sharma, Alan and Luke Nathan seeking a solution to the issue which had then escalated and concluded with the matter yet unresolved	The Walk Away
3 March 2024	The convention of a secretive meeting by the former Prime Minister Elsie at the Majestic Seasons Hotel in the presence of numerous members of political parties in Palmenna with the intention of discussing to overthrow the government led by M Akbar	The Walk Away
5 March 2024	M. Akbar addressed his cabinet ministers and political members, emphasizing that any actions considered detrimental to parliamentary democracy would be regarded as offences	The Walk Away

6 March 2024	Initiation of the arbitration proceedings by the Government of Palmenna against Canstone, under Article 12 of the PK-BIT	Initiation of AIAC Proceedings
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SUMMARY OF PLEADINGS

1. Alan was negligent in investigating and examining the machinery and equipments in Karhies facility which supposedly led to the hospitalisation of nearby farmers due to suspected contamination.
2. Canstone and Alan was involved in bribery to cover up cases regarding the oil spills.
3. Alan was negligent in responding when Lee attempted to contact him whether or not the facility in Appam should continue their operation during the heavy rain fall and flood flash which led to Lee making his own decision to continue the operations. This decision affected both the nearby residents and employees of Canstone leading them to get hospitalized due to a respiratory tract injuries. This was caused by the negligence of both Alan and Canstone.
4. Prime Minister Akbar was targeted by both the former Prime Minister Elsie and activists of Palmenna for the actions of Alan and Canstone leading the activist to take legal actions against both the Government and SZN.
5. During the lawsuit in the High Court of Palmenna, SZN was found defending themselves by blaming the Government of Palmenna which can be seen as a stab on the back.
6. The High Court of Palmenna decided in favour of the activists holding both the Government of Palmenna and SZN for negligence. The main cause of this issue and lawsuit was the negligence of both Alan and Canstone leading the activists to blame the Government of Palmenna too even though they were not at fault.
7. Tara Sharma was seen calling M Akbar unreasonable during the conference call which was convened to negotiate and find a solution for the issue.

PLEADINGS

ISSUE ONE AND TWO: PRE-ARBITRATION STEPS MUST BE COMPLIED BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE

Article 12 of the BIT sets out the following pre-arbitral steps that must be followed before invoking an arbitration proceeding.

Pre-arbitral steps, as referenced in case laws, often vary based on jurisdiction and the specific terms of the contracts involved. However, common pre-arbitral steps in many case laws include the following:

Higher Management Practice

The higher management of the parties should make an attempt to settle such dispute by amicable and good faith negotiation.

Negotiation

Parties are often required to engage in direct negotiations to try and resolve their disputes amicably.

Case Law Example: In *Klaus E. Mittelbachert v. East India Hotels Ltd.*¹, the court emphasized the importance of direct negotiation as a first step in resolving disputes before proceeding to arbitration.

Mediation/Conciliation

Mediation: Engaging a neutral third party to facilitate discussions and help the parties reach a mutually acceptable solution.

¹ *Klaus E. Mittelbachert v India Hotels Ltd* [1997]

Case Law Example: In *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*², the English Court of Appeal considered whether mediation was a condition precedent to arbitration.

Expert Report

Utilizing an independent expert to determine specific issues (often technical) before moving to arbitration.

Case Law Example: In *Cable & Wireless plc v. IBM United Kingdom Ltd.*³, the court discussed the requirement for expert determination as a precondition to arbitration.

Dispute Resolution Boards

Panels of experts set up to provide decisions on disputes as they arise, commonly used in construction contracts.

Case Law Example: In *Attorney General of the Virgin Islands v. Global Water Associates Ltd.*⁴, the importance of referring disputes to a Dispute Resolution Board before arbitration was upheld.

With respect to the above, we understand the Government of Palmenna has fulfilled all initials steps or procedures that are typically required before starting the arbitration process against Canstone.

1. It was challenging for Canstone to find experienced field experts so they opened the job advertisement to everyone in an attempt to attract the youth.
2. Upon arrival of an unsigned note, stating that there is a potential leak in of the tanks used to store the refined palm oil that has gone through transesterification, the phone call made by Jakey Jake to Alan requesting for an urgent examination of the machinery and equipment at the Karheis Facility was ignored by Alan after he examined the Report

² *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A* [2012] EWCA Civ 638

³ *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] EWHC 316

⁴ *Attorney General of the Virgin Islands v Global Water Associates Ltd (British Virgin Islands)* [2020] UKPC 18, [2021] AC 23, [2020] 3 WLR 584, [2021] 2 All ER (Comm) 1 [2021] 4 LRC 1

prepared in December 2022. Alan stated that Jakey Jake was young and naïve for requesting an examination simply because of an unsigned note. He also stated that it was a waste of the company's resources if he have to conduct an investigation every time they receive unsigned documents.

3. Soon after this, there were reports made on the news portals stating that the nearby farmers has been hospitalised due to suspected contamination. Several reports were made by the victim's families. Following this incident, it was known by Jakey from one of his employees that the victim's family received an undisclosed sum of compensation in exchange for them withdrawing their reports. Even though the source of the compensation was unknown, it was suspected that this was done by Canstone. The support for this is when Jakey accused them by sharing his alleged suspicions with Alan, he was informed by Alan that there is no proof that Canstone or Alan was involved in the cover up. However, the discussion went for another 15 minutes and it was alleged that the nearby employees heard yelling going on in the room (Lee's office) they were discussing the matter. During the discussion, Alan stormed out of Lee's office and was seen returning back to the office 10 minutes later with a thick white envelope in his hand. Following this, Jakey was seen leaving the facility with a huge smile on his face.
4. Upon the experience of heavy rainfall, Lee attempted to contact Alan while he was visiting the Karhies facilities to confirm if Canstone should resume its operations as the neighbouring facilities had decided to immediately shut down their operations for the next 3 days and was ordered an emergency evacuation. However, this was ignored by Alan and it was ordered by Lee to resume the operations as normal. This led to the hospitalization of nearby occupiers including 13 of the employees who works at the Appam facility among the 39 people due to respiratory tract injuries.

5. Following this incident, a statement was made by the former Prime Minister Elsie on Birdie, blaming Prime Minister Akbar for the incident as Canstone was the only facility in full operation during the flash flood.
6. The comments made by the former Prime Minister Elsie gained traction and sparked outrage amongst the local activists in Appam, where the activists were led by a nationalist named Kelvin Malhotra. This issue was protested against the Government of Palmenna on the street accusing them of being silent in this matter. Later on, legal actions were initiated by the activists against the Government of Palmenna and SZN on the grounds of negligence on 15 December 2023.
7. In the defence of this matter, SZN argued that they had been wrongly named in the suit and that the action instead should be made against the Government of Palmenna solely.
8. The decision was made in favour of the activists on 14 February 2024 by the High Court of Palmenna. Both the Government and SZN was held liable for negligence was ordered for compensation to be paid to the victims family.
9. In the Court of Appeal, the Government of Palmenna in an attempt to appeal the decision made by the High Court of Palmenna, Jakey further disclosed Alan's lackadaisical approach to his responsibilities, claiming that Alan had been signing off reports without proper scrutiny.
10. On 1 March 2024, a conference call was convened by M Akbar involving Tara Sharma, Alan and Luke Nathan to resolve this issue. However, the call was concluded without finding a solution as the discussion heated and at the end of the call, Tara Sharma called M Akbar unreasonable and stated that they cannot admit to the things they were not involved in.

**ISSUE THREE & FOUR: CANSTONE HAS BREACHED ITS OBLIGATIONS
UNDER PK-BIT, AWARDING PALMENNA FOR DECLARATION AND DAMAGES.**

I. Respondent has breached Article 4 (1) and 5 of the PK-BIT

Article 4(1) of the BIT sets out that – Any investor(s) carrying out any activity in ant of the Party which may have significant environmental impact shall appoint a qualified person to conduct an environmental impact assessment and to submit a report thereof to the relevant ministry of the Party.

1. Respondent has failed to hire a qualified person for the conduction of EIA's and submit the investigated reports to the board. This is further substantiated by the fact that Canstone has breached their obligation of conducting an urgent examination of the machineries and equipments at their Karhies facility following the receival of an unsigned note claiming that there is a potential leak in one of their tanks used to store refined palm oil that has gone through the process of transesterification. Instead, the report was not completed as it was claimed to be a waste of money.

This would prove that damages can be awarded to the claimant because this would cause major damages due to negligence of the respondent, Canstone, and also on the public health level as the gas leak would harm the citizens.

- (a) More precisely, Respondent's actions amounted to a violation of Article 5 (a) and (b). The respondent, Canstone is responsible for damaged to the environment, as due to their negligence in maintaining their equipment at their factory, and in surveilling their equipment and doing the proper assessments for functionality, with the monsoon there would have been a lot of pollution to the rivers. This is substantiated by the fact that several farmers nearby the factory had gotten ill. Furthermore, workers of the respondent, Canstone had also suffered respiratory tract infections, as when they had worked during the flash flood as instructed by their upper management.

Damages can be levied against Canstone, the respondent, due to damage to the river and thus compromising on the safety of those around the river and in contact with it.

II. Respondent has breached Article 13 of the PK-BIT

1. The respondent, Canstone is in breach of this Article as there were internal reports that were manipulated, by means of domestic corruption, which would further exacerbate the issues, thus it can be claimed that damages are to be awarded to the claimant, Palmenna for this issue.

The evidence for this is that Alan has signed off a report mentioning that the unsigned note was fake, instead of doing a proper investigation, as the report was brushed off.

III. Respondent has breached Article 2 of the PK-BIT

1. The respondent has breached this Article by not publishing the expert reports, further supporting the evidence against Canstone, that damages may be awarded to the Claimant, Palmenna