19th LAWASIA International Moot Competition (International Rounds)

Name of the Tribunal: Kuala Lumpur Regional Centre for Arbitration

Year of the Competition: 2024

Name of the Case: Government of Palmenna v Canstone Fly Ltd

Title: Memorial for Claimant

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Statement of Jurisdiction

The Arbitral Tribunal constituted under the AIAC Arbitration Rules 2023 has subject matter jurisdiction over this case pursuant to Article 8 of the UNCITRAL Arbitration Rules and Rule 11 of the AIAC Arbitration Rules 2023.

The Government of Palmenna entered into a Terms of Reference dated 6 March 2024, agreeing on the applicability of the AIAC Arbitration Rules 2023. It has paid the security deposits and necessary fees under the AIAC Rules 2023 to the AIAC.

The Government of Palmenna reserved its rights to comment on the constitution of the Arbitral Tribunal.

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

1. The Federation of Palmenna ("**Palmenna**") is a country located in Southeast Asia, bordered by the Independent State of Kenweed ("**Kenweed**") to the north. Palmenna maintains a historical and contemporary connection to the Commonwealth, and the current Government of Palmenna (the "**Claimant**") is led by Prime Minister Akbar.
2. On 3 October 2021, the Palmenna-Kenweed BIT ("**PK-BIT**") was signed between the Claimant and Kenweed.
3. On 26 October 2021, Canstone Fly Limited ("**Canstone**" or the "**Respondent**") was incorporated in Palmenna, with prominent companies in Kenweed, Mehstone Ltd and SZN, owning 70% and 30% of its shares, respectively.
4. Following the Respondent's internal discussions, it was determined that the nominees of SZN would manage the day-to-day operations of the Respondent while CEO Tara Sharma would determine general policies relating to the Respondent.
5. In mid-February, 2023, the Respondent's Karheis plant received an unsigned note stating a potential leak in one tank.
6. Two days after, Alan, the Quality Control of the Respondent, reviewed the report on the condition of the machinery and equipment ("**Report**") prepared in December 2022, claimed the note unfounded, and rejected the in-house expert Jakey's request for a detailed investigation.
7. Two weeks after the accident, nearby farmers were hospitalised due to suspected contamination. Findings of investigations were not disclosed, but an undisclosed

compensation was paid to the victims.

8. On 6 September 2023, the Board of Directors of the Respondent had a meeting with its senior management. Alan requested for a consulting firm to be hired to conduct an environment impact assessment ("**EIA**") on behalf of the Respondent. The Board did not approve it immediately and claimed to provide an answer no later than December 2023, and Alan also decided to put further Reports on hold.

9. On 23 November 2023, news reports alerted of a flooding risk in the rural parts of the city in Karheis. While neighbouring factories at the Appam plant facility decided to immediately shut down their operations for the next 3 days and ordered an emergency evacuation, the Respondent's operations in Appam stayed normal and all employees were ordered to continue working hard to get good bonuses.

10. Shortly after the flood subsided, more than 129 people had respiratory tract injuries in that area, and 39 individuals were hospitalised. Doctors considered the inhalation of irritant gases or exposure to corrosive chemicals as the cause.

11. On 15 December 2023, the activists initiated legal actions against the Claimant and SZN on the grounds of negligence, citing the inadequacies of the Respondent's drainage and ventilation systems:

    a. The drainage system in place exhibited flaws in its design and engineering. It lacked the capacity to handle significant volumes of liquid, especially during periods of heavy rain and flooding.

    b. Despite previous instances of flooding, heavy rain and warnings from experts regarding

the vulnerability of the drainage system, the authorities failed to take proactive measures to mitigate these risks.

c. The ventilation systems were found to be lacking in functionality and compliance with safety standards. The ventilation systems suffered from neglect and insufficient maintenance […].

12. After the ruling in favour of the activists, Jakey signed a statutory declaration alleging that the Respondent had been engaging in bribery to cover up cases relating to oil spills.

13. On 1 March 2024, the Claimant convened a conference call involving Tara Sharma, Alan and Luke Nathan to seek a solution. During the phone call, the Claimant emphasized the urgency of finding a solution to the ongoing challenges plaguing the political landscape in Palmenna. The opposing end of the call presented their perspectives and proposed courses of action, resulting in vigorous debate and disagreement over the best path forward.

14. The parties abruptly concluded the call, leaving the matter unresolved. Before leaving the call, Tara Sharma told the Claimant "I can't believe you are being so unreasonable… we cannot admit to things we did not do… seems like there is no point in talking to you anymore".

15. On 6 March 2024, the Claimant commenced arbitration proceedings against the Respondent pursuant to Article 12 of the PK-BIT.

Summary of Pleadings

The Claimant hereby submits its pleadings to address the following issues:

1. Whether the pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Government of Palmenna against Canstone;
    a. The requirements to negotiate under Article 12(1)(a) of the PK-BIT are "directory and procedural" rather than "jurisdictional and mandatory;"
    b. Article 12(1)(b) of the PK-BIT is incomplete and cannot be enforced;
    c. The Claimant has complied with Article 12(1)(a) of the PK-BIT.
2. Whether the Government of Palmenna is precluded from initiating an arbitration against Canstone;
    a. The PK-BIT confreres standing upon the Claimant;
    b. There was no abuse of the arbitration proceedings.
3. Whether Canstone had breached its obligations under the PK-BIT; and
    a. The Respondent is the protected investor under the PK-BIT;
    b. There was breach of the PK-BIT.
4. If the answer to issue III is in the affirmative, whether Palmenna is entitled to an award of declaration and damages.
    a. The Claimant is entitled to a declaratory relief.

Pleadings

- **Law applicable to the current dispute**

1. To start with, it is noted that the PK-BIT is not very clear as to the applicable law. Article 12(1)(c) of the PK-BIT merely refers to "in accordance with its prevailing arbitration rules at the time of the dispute". In this regard, other instruments may provide guidance. Article 35(1) of the 2021 UNCITRAL Arbitration Rules provides that, failing a designation of the applicable law by the parties, "the arbitral tribunal shall apply the law which it determines to be appropriate." Article 42 of the ICSID Convention also provides that, in the absence of an agreement on the applicable law, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."
2. Accordingly, the Claimant submits that the applicable law in the present case is (i) the PK-BIT itself, (ii) the law of the Parties and (ii) relevant international law.

I. Whether the pre-arbitration steps must be complied with before arbitration proceedings may be commenced by the Claimant against the Respondent.

3. The Claimant submits that compliance with pre-arbitration steps is not a prerequisite for commencing the current arbitration proceedings.

(A) Article 12(1)(a) of the PK-BIT being directory and procedural

4. The Claimant submits that the requirements to negotiate under Article 12(1)(a) of the PK-BIT are "directory and procedural" rather than "jurisdictional and mandatory."

5. In *SGS v Pakistan*, a case arising under the Switzerland-Pakistan BIT, Article 9 of that BIT stated: "[F]or the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party [...] consultations shall take place between the parties concerned." Article 9(2) went on to state that "[i]f these consultations do not result in a solution within twelve months" and the investor concerned gave its consent, the dispute shall be submitted to the International Centre for the Settlement of Investment Disputes ("**ICSID**") arbitration. The tribunal found that consultations provisions are generally "directory and procedural rather than jurisdictional and mandatory" in nature.[1] Accordingly, the tribunal held that compliance with such provisions is not a condition precedent to tribunal jurisdiction. To dismiss a claim and require the parties to consult, after which they could resubmit the claim to arbitration, would be inefficient.

6. Similarly, in *Bayindir v Pakistan*, a case arising under the Turkey-Pakistan BIT, the tribunal held that a failure to comply with a notice requirement, intended to give the parties an opportunity to settle the dispute, did not deprive the tribunal of jurisdiction. On 15 April 2002, Bayindir submitted a Request for Arbitration to the ICSID and sought relief, while no pre-arbitration step has been employed before the phase of arbitration. On 16 April 2002,

[1] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, Aug. 6, 2003, para. 184.

the tribunal accepted the arbitration between Pakistan and the United States of America irrespective of the notice being absent.[2]

7. In the present case, irrespective of whether the Claimant has observed Article 12 of the BIT, it is submitted that Clause (1)(a) of Article 12 is procedural and directory. Particularly, Article 12(1)(a) is closely modelled after Article 9 of the Switzerland-Pakistan BIT, as seen in the *SGS v Pakistan* case, which addressed the requirement for negotiations or consultations between the parties involved. Accordingly, as determined by the tribunal in Bayindir v. Pakistan, non-compliance with Article 12(1)(a) of the PK-BIT does not deprive the Tribunal of its jurisdiction, as this provision is procedural and directive rather than jurisdictional and mandatory.

8. Moreover, Clause (1)(a) of Article 12 is inherently subjective.

   a. Generally, negotiation and mediation, by their very definitions and the literal interpretation of the law, aim to resolve disputes and reach agreements through peaceful means. In *Wah v Grant Thornton*, Hildyard J. stated that [a]greements to agree and agreements to negotiate in good faith, without more, must be taken to be unenforceable: good faith is too open-ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve and when it can objectively be determined to be properly concluded.[3]

[2] *Bayındır İnşaat Turizm Ticaret v Sanayi A.Ş. v. Islamic Republic of Pakistan (I),* ICSID Case No. ARB/03/29. Decision on Jurisdiction, Nov. 14, 2005, para. 48.
[3] *Wah v Grant Thornton* [2013] 1 Lloyd's Law Reports 11, para. 57.

b. Specifically, Article 12(1)(a) writes that disputes be referred "to the higher management of Parties in an attempt to settle such dispute by amicable and good faith negotiation[.]"[4] Different individuals may have varying perspectives on whether a negotiation is amicable or conducted in good faith, and this requirement for the parties to resolve disputes is intuitive and irrational, since it is difficult to define what constitutes amicable and good-faith negotiation.

9. Consequently, resolving the dispute through negotiation is merely a directory step rather than a jurisdictional and mandatory one, and the execution of the Clause can also be inefficient and ineffective. Since the negotiation would not prompt substantial effect, there is no need to conduct all the pre-arbitration steps.

(B) Article 12(1)(b) of the PK-BIT being incomplete

10. Alternatively, even if Article 12 of the PK-BIT is somehow deemed mandatory, a position with which the Claimant disagrees, it is submitted that not all clauses within Article 12 are enforceable. In particular, the Claimant submits that Article 12(1)(b) is incomplete and cannot be enforced.

11. In *Holloway v Chancery Mead Limited*, Ramsey J. identified three requirements for such agreements to be enforceable:

[4] PK-BIT, Article 12(1)(a).

"First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."[5]

12. Similarly, in *Sul America v Enesa Engenharis*, the High Court of Justice of England and Wales had to consider whether an undertaking by the parties that, "prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation" was an enforceable obligation.[6] Consequently, the High Court decided that in circumstances where the clause did not set out a defined mediation process or refer to the services of a specific mediation provider, it is not sufficient to create an enforceable obligation to commence or participate in mediation.

13. In contrast, Article 12(1)(b) of the treaty merely states: "[I]f the dispute is not resolved via negotiation, to mediation."[7] Referring back to the case of *Holloway v Chancery Mead Limited*, it is submitted that Article 12(1)(b) of the PK-BIT does not specify where the parties should seek mediation, when mediation should occur after failed negotiations, or under what circumstance the mediation should be conducted. With Article 12(1)(a)(b) of the PK-BIT comprising only 31 words without detailing how the mediation process should

[5] *Holloway v Chancery Mead Limited* [2007] EWHC 2495 (TCC), para. 81.
[6] *Sul America v Enesa Engenharis* [2012] 1 Lloyd's Reports 671, para. 5.
[7] PK-BIT, Article 12(1)(a) &Article 12(1)(b).

be set out, the pre-arbitration steps in the PK-BIT are vague and therefore unenforceable, as the Claimant would lack guidance on how to proceed with mediation.

(C) The Claimant's compliance with Article 12(1)(a) of the of the PK-BIT

14. Alternatively, if the requirement to negotiate under Article 12(1)(a) is jurisdictional and mandatory, which the Claimant disagrees with, it is submitted that the Claimant has complied with this requirement.

15. In this regard, the Claimant submits that as long as some effort at amicable resolution has been made, tribunals should generally find such efforts sufficient. For example, in *Salini v Morocco*, a case arising under the Italy-Morocco BIT, the tribunal observed that the attempt to consult should include the existence of the grounds for the complaint and the desire to negotiate a resolution but need not be complete or detailed. Documents submitted to the Moroccan government were sufficient to put Morocco on notice of the dispute and met the treaty's specification that any dispute "should, if possible, be resolved amicably."[8]

16. In *Sedelmayer v Russia*, a case arising under the Germany-Russia BIT, the claimant had made numerous attempts to resolve his dispute with the Russian government, but the government had refused to meet with him. The tribunal rejected the respondent's argument that the necessary efforts at amicable settlement had not been made, observing that, having

[8] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, Jul. 23, 2001, para. 151.

refused to communicate with the claimant, "[t]he Respondent cannot now complain that measures have not been taken with a view to finding an amicable solution of the dispute."[9]

17. In the present case, it is submitted that the Claimant has adhered to the requisite pre-arbitration steps.

    a. M. Akbar, representing the Claimant, initiated a conference call with Tara Sharma, Alan, and Luke Nathan to seek a resolution.[10] M. Akbar's action in convening the call and expressing the urgency of resolving the ongoing challenges in Palmenna demonstrates his proactive effort to negotiate—a crucial pre-arbitration step. During the call, M. Akbar "emphasized the urgency of finding a solution to the ongoing challenges plaguing the political landscape in Palmenna[,]"[11] while Tara Sharma retorted before leaving the call, "I can't believe you are being so unreasonable… seems like there is no point in talking to you anymore."[12] These facts demonstrate the Claimant's effort to pursue resolution and the Respondent's refusal of negotiation.

    b. Consequently, the Claimant has fulfilled the BIT requirement of negotiation as a pre-arbitration step. Given the Respondent's unwillingness to engage in further dialogue, mediation was neither an effective nor a necessary step under the circumstances.

[9] *Franz Sedelmayer v The Russian Federation*, Decision of the German Federal Court of Justice, Jan. 29, 2015, para. 124.
[10] The Moot Problem, para. 49.
[11] *Ibid.*, para. 50.
[12] *Ibid.*

II. Whether the Claimant is precluded from initiating an arbitration against the Respondent?

18. It is submitted that the Claimant should not be precluded from initiating an arbitration against the Respondent on the two following grounds.

(A) The PK-BIT conferring standing upon the Claimant

19. The Claimant submits that the PK-BIT confers standing upon the Claimant and the Claimant is therefore entitled to a cause of action against the Respondent in arbitration.

20. To begin with, it is in the submissions of the Claimant that the PK-BIT does not expressly confer standing upon the Claimant to bring a claim against the Respondent.

21. Article 1(3) of the PK-BIT provides:

> "For the avoidance of doubt, the obligations stated therein shall be enforceable by the investor(s) of the Parties, against the investor(s) of the Parties or, between the Parties themselves as against one another."

22. *Prima facie*, a plain reading of this clause indicates that enforcement of the obligations is only possible in the following two ways: (i) an investor can enforce the obligations against another investor, or (ii) the Parties themselves can enforce the obligations against each other.

23. However, this enforcement mechanism appears to be inconsistent with the dispute settlement mechanism under Article 12 of the PK-BIT, which applies only to "[a]ny dispute

between the Parties arising from, relating to or in connection with this BIT." Here, as defined in the Preamble to the PK-BIT, only the Government of Palmenna and the Government of Kenweed are referred to as the Parties, not investors of the Parties.

24. It is submitted that the plaining reading of these two articles may reveal an anomaly under the PK-BIT, as it fails to allow for at least one additional possibility, namely, that the Parties can enforce the obligations against investors in arbitration. Accordingly, the PK-BIT should be construed to give effect to the intention of the Parties as expressed in this investment treaty.

25. Since the PK-BIT is an international law instrument, it must be interpreted in light of Article 31 of the 1969 Vienna Convention on the Law of Treaties ("**1969 Vienna Convention**"), to which both countries are also parties. Article 31 states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[13] In addition, "a special meaning shall be given to a term if it is established that the parties so intended."[14]

26. In the present case, as far as the object and purpose of the PK-BIT is concerned, *inter alia*, they are to promote "clear and mutually beneficial investment between the Parties" and "to safeguard the environment".[15] Accordingly, the Claimant submits that it is entitled to receive an investment that will contribute to its economic development while also protecting the environment. If the investment violates the Claimant's domestic law, whether

[13] The 1969 Vienna Convention, Article 31(1).
[14] *Ibid.*, Article 31(4).
[15] PK-BIT, Article 1(1)(d) & Article 1(1)(e).

at the outset or during its development, the Claimant should have grounds for a breach of the PK-BIT.

27. As to the context, one may refer to Articles 4 and 5 of the PK-BIT, which impose certain obligations solely on investors.[16] Specifically, Article 4 states that any investor(s) carrying out any activity in any of the Party which may have significant environmental impact shall submit an environmental impact assessment report to the relevant ministry of the Party. Accordingly, it is submitted that this obligation, whether or not an invested has submitted such a report, can only be practically enforced by the Parties, not by any other investors, if any investor fails to do so.

28. Additional evidence can be found in Article 12(1)(a) which states that any dispute between the Parties arising from, relating to or in connection with this BIT shall be referred to the "higher management of Parties." The term "higher management" is unusual when referring to government entities, as it is more commonly used in a corporate context. This indicates that the PK-BIT intended to allow for investor-investor dispute settlement through arbitration but fails to clearly articulate this due to imprecise language. In this regard, the Claimant further submits that this intention applies to situations where the Party enforces obligations against the investors of the other Party.

29. In light of the above, the Claimant submits that the PK-BIT confers standing upon the Claimant to enforce obligations against the Respondent and therefore the Claimant should not be precluded from initiating an arbitration against the Respondent in the first place.

[16] PK-BIT, Article 4(1) & Article 5(1).

30. The Claimant acknowledges that it is not common for a state to act as a claimant against an investor in treaty-based arbitration. However, there are precedents, such as *Republic of Peru v Caravelí Cotaruse Transmisora de Energía S.A.C.*; *Republic of Equatorial Guinea v CMS Energy Corporation*; *Government of the Province of East Kalimantan v PT Kaltim Prima Coal* and *Gabon v Société Serete S.A.*.

(B) No abuse of the arbitration proceedings

31. It is further submitted that the Claimant has not abused the arbitration proceedings to circumvent the High Court's ruling.

32. For the High Court case, the Claimant is now merely appealing against the preliminary decision for a more fair and just final decision, since there are more evidence emerging and more witnesses appearing.[17] The Claimant submits that it is not trying to circumvent the High Court's ruling, and the High Court's final decision will be greatly respected and complied.

33. Regarding abuse of process, the Claimant submits that there is no abuse of process in the present case.

34. In *Ampal-American v Egypt*, a case arising under the Egypt-US BIT, the tribunal held that part of the claimant's claims constituted an abuse of process, on the grounds that that the claimant had already submitted the same claim "in respect of the same 12.5% indirect interest in EMG" in two other cases. The court held that this is "tantamount to double

[17] The Moot Problem, para. 47.

pursuit of the same claim in respect of the same interest", and therefore, it constituted an abuse of process. In the words of the tribunal, an abuse of process may occur only when the claims submitted in two cases concern the same issue and relate to the same interest.[18]

35. In *Occidental v Ecuador*, a case arising under the United States-Ecuador BIT, the tribunal held the claimant's claims did not consist of an abuse of process, on the grounds that the dispute submitted to local courts arose out of an alleged breach of the tax laws of Ecuador, while the dispute submitted to the tribunal alleged violations of the BIT. The tribunal held that the dispute submitted to local courts would be considered the same dispute as that submitted to investor-state arbitration and then constitutes an abuse of process only if it involved the same parties, object, and cause of action.[19]

36. Based on the above, an abuse of process could only stand when the cause of action, the parties involved, and the claims of the cases are the same. However, in the present case, there is clearly no abuse of process on the grounds that:

    a. The cause of action is different. In the High Court case, the cause of action is negligence based on the domestic law of Palmenna. However, in the present case, the cause of action is the breach of PK-BIT based on international law.

    b. The parties involved are different. In the High Court case, the plaintiffs are activists and victims of the incident in Palmenna, and the defendants are the Government of Palmenna (the Claimant in the present case) and SZN Company Limited. However, in

[18] *Ampal-American v Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, Feb. 1, 2016, paras. 331&334.
[19] *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, Jul. 1, 2004, paras. 52&57-62.

the present case, the Claimant is the Government of Palmenna, and the Respondent is Canstone Fly Limited.

c. The claims are different. In the High Court case, the claim is compensation paid to the victims of the incident from the Claimant and SZN. However, in the present case, the claim is declaratory relief from the Respondent.

37. Accordingly, it is submitted that given the Claimant's standing to enforce the obligations under the PK-BIT against the Respondent and the absence of any abuse of process, the Claimant shall not be precluded from commencing an arbitration against the Respondent.

III. Whether the Respondent had breached its obligations under the PK-BIT?

38. The Claimant submits that the Respondent, as a protected investor under the PK-BIT, had breached its obligations by failing to submit an EIA report to the Claimant in accordance with Article 4 of the PK-BIT.

(A) The Respondent being the protected investor under the PK-BIT

39. The Claimant notes that the PK-BIT does not define the term "investor". However, it is submitted that a protected investor must be an individual or corporate entity that is a national of Kenweed for the purpose of seeking treaty protection.

40. In the present case, the Claimant submits that although the Respondent was incorporated in Palmenna, on 26 October 2021, it should be treated as a national of Kenweed due to the

fact that it is fully controlled by the nationals of Kenweed.[20]

41. In this regard, for support and guidance, the Claimant relies on Article 25(2)(b) of the ICSID Convention, which permits a locally incorporated company to assume the nationality of its foreign controllers. Article 25(2)(b) provides:

> "'National of another Contracting State' means: […] *any juridical person which had the nationality of the Contracting State party to the dispute on that date* and which, *because of foreign control, the parties have agreed should be treated as a national of another Contracting State* for the purposes of this Convention."[21] (Emphasis added)

42. In relation to the agreement between the parties to treat a locally incorporated company as a national of another Contracting State under Article 25(2)(b), the ICSID Tribunal, in *Amco Asia Corporation and Others v Republic of Indonesia*, found that there is no formal or express requirement for such an agreement to exist. The ICSID Tribunal held that:

> "[…] Nothing in the Convention, and in particular in Article 25, provides for a formal requisite of an express clause stating that the parties have decided to treat a company having legally the nationality of the Contracting State, which is a party to the dispute, as a foreign company of another Contracting State […].

[20] The Moot Problem, para. 21.
[21] The ICSID Convention, Article 25(2)(b), Mar. 18, 1965, 575 U.N.T.S. 159.

What is needed, for the final provision of Article 25(2)(b) to be applicable, is (1) that the juridical person, party to the dispute be legally a national of the Contracting State which is the other party and (2) that this juridical person being under foreign control, *to the knowledge of the Contracting State*, the parties agree to treat it as a foreign juridical person."[22] (Emphasis added)

43. In *Liberian Eastern Timber Corporation v Republic of Liberia*, the ICSID Tribunal further held that "unless circumstances clearly indicate otherwise, it must be presumed that where there exists foreign control, the agreement to treat the company in question as a foreign national is 'because' of this foreign control."[23]

44. In the present case, the Respondent shall be treated as the national of Kenweed according to the following facts:

    a. Mehstone Ltd owns 70% of Canstone's shares whilst SZN owns 30% of shares.[24] In particular, Mehstone Ltd was established to produce biofuel for Kenweed with the MTI-one of Kenweed's national ministries-owning 60% of the shares and KLT-Kenweed's largest energy company-owning the remaining 40% shares.[25] Both Mehstone Ltd and SZN are the nationals of Kenweed, and thus with Kenweed's substantial shares in Canstone, this juridical person is under the control of Kenweed. This corresponds to aforementioned application of Article 25(2)(b) of the ICSID Convention.

[22] *Amco v Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Sept. 25, 1983, para. 14.
[23] *LETCO v Liberia*, ICSID Case No. ARB/83/2, Award, Mar. 31, 1986, para. 16(7).
[24] The Moot Problem, para. 21.
[25] *Ibid.*, paras. 5&7&10.

b. The management of the day-to-day operations of Canstone and the determination of the general policies relating to Canstone are not carried out by any individual or corporate entity of Palmenna.[26] With both shares and the operational oversight from Kenweed, Canstone is fully under the control foreign to Palmenna.

c. The Claimant is aware of this foreign control, and it is evident as well that the Claimant has not received any notifications stating or circumstances indicating otherwise. Thus, it is an implied consent that Canstone shall be treated as a national of Kenweed and thus a protected investor under the PK-BIT.

45. In fact, the Claimant further submits that concluding otherwise would imply bad faith on the part of the Claimant, suggesting it never intended to honour the PK-BIT terms, such as Article 1(2) regarding the protection of "the interests of both Parties and their respective investors." This would undermine the reciprocal promotion and protection of investment that the PK-BIT stands for.

(B) Breach of the PK-BIT

46. The Claimant submits that the Respondent has breached its obligations by failing to submit an Environmental Impact Assessment (EIA) report to the Claimant in accordance with Article 4 of the PK-BIT.

47. Article 4(1) of the PK-BIT provides：

[26] The Moot Problem, para. 22.

"Any investor(s) carrying out *any activity* in any 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." (Emphasis added)

48. This clause requires that any activity with a significant environmental impact must have an environmental impact assessment conducted by a qualified person, and the report must be submitted to the relevant ministry of the Party, with no exceptions permitted.
49. However, it is noted that Article 4(2) of the PK-BIT adds that "[f]or the avoidance of doubt, activities which may have significant environmental impact shall include the following: […]," and proceeds to list out some specific activities considered to have *significant environmental impact*. *Prima facie*, it appears that Article 4(2) may conflict with Article 4(1) by potentially narrowing the scope of activities covered under the latter.
50. Accordingly, the Claimant submits that Article 4(2) of the PK-BIT should not be narrowly construed. As submitted above, the PK-BIT, an international law instrument, must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, according to Article 31 of the 1969 Vienna Convention.
51. In this regard, the Claimant first refers to the Preamble and Article 1(1)(e) of the PK-BIT:

"Upholding the need to protect against climate change and to *safeguard the environment*."

(Emphasis added)

52. Under the circumstances, a narrow interpretation of Article 4(2) would be explicitly and blatantly incompatible with the purpose and object of the PK-BIT, which is to safeguard the environment, among others. Accordingly, to resolve this incompatibility, the Claimant submits that the activities stipulated in Article 4(2) should not be considered exhaustive. In other words, Article 4(2) should be taken to mean "[f]or the avoidance of doubt, activities which may have significant environmental impact shall include, *but not limited to*, the following."

53. In the present case, the Claimant submits that the Respondent has failed to submit the requisite EIA reports. Despite being made aware on two separate occasions that the activities conducted could potentially have adverse environmental impacts, the Respondent still did not re-evaluate the environmental effects of its operations and submit the EIA report.

    a. In mid-February 2023, the Respondent received an unsigned note detailing a potential leak in one of the storage tanks.[27] The leak indicated by the note suggests that the factory might be in violation of environmental regulation and requires a make-up EIA before deciding whether or not to maintain the normal operation of the plant. However, according to the facts, Alan's solution did not comply with Article 4's requirement. Alan hastily signed off a report concluding no sign of leak existed and updated the relevant stakeholders.[28] The proposal for an EIA, despite being raised after this incident, was

[27] The Moot Problem, para. 28.
[28] *Ibid.*, para. 29.

actually delayed by 7 months until a meeting attended by the Board of Directors and the senior management on 6 September 2023, where Alan officially requested for a confirming firm to be hired to conduct an EIA on behalf of Canstone. The response to this requirement was again put off until the middle of next month.[29]

b. Before the proposed EIA report was conducted, the Respondent was alerted to the risk of flooding which may impair the condition of storage tanks and other equipment, and cause potential environmental harms.[30] In face of the critical decision which may have significant environmental impacts, an EIA should have been conducted as required by Article 4. However, Lee ordered operations to resume as normal and even encouraged all employees to work hard simply because he did not receive any call from Alan. Accordingly, the Respondent has again breached the PK-BIT.

54. Moreover, the Claimant submits that the submitted report is not the substitute for the EIA report. The report that Alan submitted to the shareholders of Canstone concluding there was no sign of a leak as suggested in the unsigned note is not equivalent to the EIA report.

a. Alan himself did not consider the two reports to be equivalent. Alan's decision to propose an EIA report after submitting the initial report suggests he recognized a difference between the two.[31] There is no other logical explanation for this action, indicating that Alan himself did not consider the reports equivalent.

b. Alan's report lacked a detailed investigation as he personally rejected this proposal,[32]

[29] The Moot Problem, para. 33.
[30] *Ibid.*, para. 34.
[31] The Moot Problem, para. 29.
[32] *Ibid*.

which may cause the report to lack of the breadth and detail required for a thorough assessment, undermining the report's reliability.

c. Alan's report was not adequately scrutinized by an independent third party. As per Article 4(1), the Respondent is obligated to "submit a report thereof to the *relevant ministry of the Party* [,]" (Emphasis added) which is the Ministry of Natural Resources and Environmental Sustainability. In this case, Alan made the judgement himself, and merely updated the relevant stakeholders.[33] However, it can not be guaranteed that the shareholders will fulfill their duties for a range of possible reasons, such as lack of expertise, rational apathy, information asymmetry, trust in management, and focus on the financial performance. The Respondent should submit the report to the third party to ensure it is under professional supervision.

55. Accordingly, it is submitted that the substitute report is by no means equivalent to the EIA report.

IV. If the answer to issue III is in the affirmative, whether the Claimant is entitled to an award of declaration and damages?

56. The Claimant submits that the Claimant is entitled to a declaratory relief if the Respondent has breached the terms of the PK-BIT. Although the PK-BIT does not contain provisions concerning remedies, there is no reason why an arbitrary tribunal should not grant such relief. Indeed, declaratory relief has become a common remedy in international

[33] The Moot Problem, para. 34.

arbitration.[34]

57. A declaratory award establishes the legal position definitively and has a binding effect as between the parties. It is a useful device, particularly where the parties have a continuing relationship and want to resolve a dispute without the risk of damaging that relationship by a demand for monetary compensation.

58. In *Saudi Arabia v Arabian American Oil Company (Aramco)*, the parties only claimed declaratory relief. Aramco claimed that its exclusive right to transport oil from its concession area in Saudi Arabia had been infringed by the agreement made between the Saudi Arabian government and the late Aristotle Onassis, the Greek shipping magnate, and his company, Aramco. The dispute was significant—but neither party wished it to jeopardize their trading relationship, which was a continuing relationship dating back many years.[35] Accordingly, it was agreed that the dispute should be referred to an ad hoc tribunal of three arbitrators based in Geneva. It was further agreed that the award should be of declaratory effect only, with neither of the parties claiming damages for any alleged injury.

59. Accordingly, in the present case, since the Respondent's breach of BK-BIT exists, the Claimant submits that the Claimant is entitled to a declaratory relief.

[34] *Redfern & Hunter on International Arbitration* § 9.59 (Nigel Blackaby et al. eds., 6th ed. 2015).
[35] *Saudi Arabia v Arabian American Oil Company (Aramco)* (1963) 27 ILR 117.

Prayer for Relief

60. As a result, the Claimant respectfully requests this Tribunal to issue an award:

a. declaring that the pre-arbitration steps is not a prerequisite for commencing the arbitration proceedings by the Claimant against the Respondent;

b. declaring that the Claimant is not precluded from initiating an arbitration against Canstone;

c. declaring that the Respondent had breached its obligations under the PK-BIT; and

d. ordering that the Claimant is, therefore, entitled to a declaratory relief.