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 Respondent

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Statement of Jurisdiction

The Federation of Palmenna and the Independent State of Kenweed have agreed in the Palmenna-Kenweed BIT that "any dispute between the Parties arising from, relating to or in connection with this BIT" shall be submitted to this Honorable Tribunal in Kuala Lumpur, Malaysia in accordance with Rule 1.1(a) of the Asian International Arbitration Centre Arbitration Rules 2023.

However, Canstone Fly Limited submits that since:

a. it is not a Party, i.e., the Government of Palmenna and the Government of Kenweed, as defined in the Preamble of the Palmenna-Kenweed BIT; and
b. it is a legal person with the nationality of Palmenna, therefore cannot be sued by the Government of Palmenna under Palmenna-Kenweed BIT,

the Tribunal shall dismiss this case on the grounds of lack of jurisdiction.

The Respondent 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. Canstone Fly Limited **("Canstone"** or the "**Respondent"**) is an energy company incorporated in the Federation of Palmenna (i.e. the Claimant in the present case) with a primary business of manufacturing palm oil biodiesel in Palmenna. Canstone has two biodiesel plants in Appam and Karheis, two cities in Palmenna.
2. In January 2018, Prime Minister Gan **("PM Gan")** was elected Prime Minister of Kenweed with a promise to boost Kenweed's economy in whatever means.
3. On 3 June 2021, Akbar **("PM Akbar")** was elected to lead the Government of Palmenna, i.e., the "**Claimant**", after making the former Prime Minister Elsie **("PM Elsie")** step down.
4. On 27 August 2021, PM Akbar and PM Gan signed a Memorandum of Understanding **("MOU")** outlining 5 key principles and commitments. After signing the MOU, PM Akbar sought to push things forward. PM Gan expressed concerns on pushing things quickly. Then, PM Akbar assured PM Gan that the Claimant would assist in any way possible and would tweak certain things to their favor. Specifically, the Claimant assured that it would not rush the timeline of submitting the necessary papers to the relevant Ministry.
5. Upon receiving PM Akbar's promise, on 3 October 2021, the Palmenna-Kenweed BIT **("PK BIT")** was quickly signed between the Claimant and Kenweed. In less than a month's time, on 26 October 2021, the Respondent was incorporated in Palmenna. Then, in November 2021, the Respondent quickly started its business in Palmenna.
6. After the incorporation, the Respondent actively recruited great numbers of new employees, including in-house experts who were responsible for ensuring the plants were operating in accordance with the industry standards.
7. Alan Becky, one of the most seasoned professionals in the industry, was engaged as the Quality Control to supervise the biodiesel plants in Appam and Karheis. Alan requested the two in-house experts located in their respective plants (Jackey Jake at Karheis and Fey Lin

at Appam) to every four months conduct a brief environmental assessment note and a report on the condition of the machinery and equipment **(**"**Report**"**)**, which were crucial to the assessment of environmental risks.

8. On 26 November 2023, when the worst flash flooding in history hit Appam, heavy tanks and machinery were seen entering and leaving the factories neighboring the Respondent's Appam site. The Respondent stationed its employees at the station during the flooding to ensure that the facilities are maintained and to quickly respond to any emergency which may occur.
9. After the flood subsided, nearby occupiers were admitted to the hospital due to respiratory tract injuries. The Respondent's internal doctor also treated some of the affected employees, stating that it was plausible that the flood could have potentially carried other various toxic chemicals, dispersing them throughout the area and contributed to the spread of the infection.
10. After this incident, former PM Elsie of the Claimant seized this opportunity to target at her political opponent PM Akbar. PM Elsie strongly criticized the PM Akbar of the Claimant on social media, which lead to an outrage among the local activists in Appam.
11. On 15 December 2023, activists initiated legal actions against the Claimant and SZN on the grounds of negligence. On 14 February 2024, the High Court found the Claimant and SZN jointly liable for negligence and ordered for compensation to be paid to the victims of the incident.
12. After the ruling, the Claimant intended to appeal for this decision by enlisting Jackey, an in-house expert of the Respondent. However, Jackey signed his statutory declaration only after an alleged deal with the Claimant.
13. On 1 March 2024, PM Akbar of the Claimant convened a conference call involving Tara Sharma, Alan and Luke Nathan. At the meeting, PM Akbar emphasized the urgency of

finding a solution to the ongoing challenges plaguing his political life. However, the meeting ended up with no solution but an impasse.

14. On 3 March 2024, former PM Elsie of the Claimant held a meeting attended by countless members of the political parties in Palmenna, aiming to overthrow the Claimant's current administration.
15. On 5 March 2024, to show power, head of the Claimant PM Akbar held a meeting with other important members of the Claimant, with statements of “do the necessary to overturn that decision” and “Let us await the big reveal tomorrow” emphasized.
16. On 6 March 2024, the Claimant commenced arbitration proceedings against the Respondent.

Summary of Pleadings

The Respondent 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. Article 12(1) of the PK-BIT being jurisdictional and mandatory;
    b. The Claimant's failure to comply with Article 12(1) of the of the PK-BIT.
2. Whether the Government of Palmenna is precluded from initiating an arbitration against Canstone;
    a. State-to-state dispute settlement mechanism under the PK-BIT;
    b. Canstone being the national of Palmenna;
    c. Failure to comply with the pre-arbitration steps;
    d. Abuse of the arbitration proceedings.
3. Whether Canstone had breached its obligations under the PK-BIT; and
    a. Not falling within the scope of activities as defined by Article 4(2) of the PK-BIT;
    b. No breach of Article 4 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. No evidence to prove causation and quantum;
    b. No action taken by the alleged injured citizens of Palmenna against the Respondent.

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". As a result, 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 Respondent 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 before arbitration proceedings may be commenced by the Claimant against the Respondent?

3. The Respondent submits that the requirements to negotiate and mediate under Article 12(1)(a) of the PK-BIT are "jurisdictional and mandatory." Therefore, compliance with the pre-arbitration steps is a prerequisite for commencing the current arbitration proceedings, and the Claimant failed to comply with the pre-arbitration steps.

(A) Article 12(1) of the PK-BIT being jurisdictional and mandatory

4. The Respondent submits that Article 12(1) of the PK-BIT is jurisdictional and mandatory.
    a. Firstly, according to Born and Šćekić (2015), the objective of pre-arbitration procedural mechanisms is enhanced efficiency and avoidance of formal legal

proceedings: parties seek to encourage the amicable resolution of disputes through informal negotiations or conciliation, thereby avoiding the expenses, delays, and contention of actual arbitral proceedings.[1] This is also of great significance concerning long-term contracts and cooperation.

b. Also, as stated in by Born (2013) *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*:

"*[M]ost commonly*, the arbitration clause in a contract or investment treaty will, provide for the parties to negotiate to resolve their differences before initiating an arbitration." (Emphasis added)

c. Accordingly, the pre-arbitration steps in most bilateral investment treaties are designed to ensure efficient dispute resolution and facilitate further cooperation between the parties. These steps have become a prevalent and universal requirement for the signing and ratifying of BITs. Specifically, in the present case, both parties agreed to adhere to these pre-arbitration procedures upon signing the treaty to show their commitment to an orderly and effective dispute settlement process.

5. Additionally, it is to be noted that some tribunals regard obligations to seek to resolve disputes by negotiation in good faith as binding and enforceable. For instance, in *United Group Rail Services v Rail Corporation New South Wales* (2009) 127 Con LR 202, a contract for the design and construction of rolling stock, contained a dispute resolution clause that provided that the parties should "meet and undertake genuine and good faith negotiation with a view to resolving the dispute.[2] The New South Wales Court of Appeal

[1] Born, G. & Šćekić, M. (2015). *Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'*. p. 229, para.1.
[2] *Group Rail Services v Rail Corporation New South Wales*. [2009]. NSWCA 177, paras. 1&15.

held that the obligation to negotiate was enforceable, and further acknowledged that there was a public interest in giving effect to dispute resolution clauses requiring the parties to negotiate settlement of disputes prior to commencing proceedings.

6. In the PK-BIT, similar pre-arbitration steps are explicitly outlined in Article 12(1): first, the parties must attempt to settle the dispute through amicable and good faith negotiations; second, if the dispute is not resolved via negotiation, they must proceed to mediation; third, if the dispute remains unresolved through mediation within 90 days from the commencement of mediation, it must be submitted to arbitration administered by the Asian International Arbitration Centre ("**AIAC**") in accordance with its prevailing arbitration rules at the time of the dispute.[3] The clauses in the PK-BIT are not only similar to those in the 127 Con LR 202 contract mentioned in the previous paragraph, but also provide clearer and more detailed requirements by setting the period of pre-arbitration steps within 90 days. Accordingly, there is no indication in the PK-BIT that the pre-arbitration steps are optional.

7. As a result, the pre-arbitration steps in Article 12(1) of the PK-BIT are jurisdictional and mandatory to be followed strictly.

(B) The Claimant's failure to comply with Article 12(1)(a) of the PK-BIT

8. The Claimant may argue that they initiated the pre-arbitration steps through a conference call on March 1, 2024.[4] However, the Respondent disagrees, contending that the Claimant failed to comply with the pre-arbitration steps as required under Article 12(1)(a) of the PK-BIT.

9. It is important to pinpoint that in some similar cases, both parties have followed the pre-

[3] The PK-BIT, Article 12(1).
[4] The Moot Problem, para. 49.

arbitration steps thoroughly before the arbitration proceedings took place. For example, in *Prime Mineral Exports Private Limited ("PMEPL") v Emirates Trading Agency LLC ("ETA")*, Clause 11 of the Long-Term Contract dated 20 October 2007 ("LTC") stated that if no solution can be found for a continuous period of 4 weeks, then arbitration can be invoked.[5] Thus, the parties have agreed that the discussions may last for 4 weeks but if no solution is achieved a party may commence arbitration. Alternatively, the discussions may last for less than 4 weeks in which case a party must wait for a period of 4 continuous weeks to elapse before he may commence arbitration. In the end, Miss Selvaratnam, representing the claimant, expressed that the continuous discussions from 1 December 2009 to 9 March 2010 can fairly be regarded as doing so. The court had jurisdiction to decide the dispute between ETA and PMEPL because the condition precedent to arbitration was enforceable and satisfied.

10. In the present case, the Respondent submits that the Claimant has not observed the pre-arbitration steps.

    a. Article 12(1)(a) requires that disputes be resolved through amicable and good faith negotiations. In the case of *PMEPL v ETA*, negotiation is defined as a formal discussion between the parties attempting to reach an agreement.[6] In this instance, when Canstone was incorporated in Palmenna on 26 October 2021, it was owned 70% by Mehstone Ltd and 30% by SZN.[7] As the Prime Minister of Kenweed, PM Gan appointed himself as the leader of MTI, which owns 60% of the shares in Mehstone Ltd, making him the largest shareholder of Canstone as a matter of course.[8] In contrast, Tara Sharma and Luke Nathan hold relatively small shares, limiting their ability to make significant

[5] *Prime Mineral Exports Private Limited ("PMEPL") v Emirates Trading Agency LLC ("ETA")*. [2014] EWHC 2104, para. 8.
[6] *Ibid,* para. 31.
[7] The Moot Problem, para. 21.
[8] *Ibid.*, paras. 5&10.

decisions.

b. However, during the conference call convened by PM Akbar on March 1, 2024, Canstone was represented by Tara Sharma, Alan, and Luke Nathan, with PM Gan absent.[9] While this call was a form of negotiation, it was not formal and valid as a pre-arbitration step because PM Gan, who effectively controls Canstone, did not participate. Therefore, the meeting does not satisfy the requirement for a valid pre-arbitration negotiation under Article 12(1)(a).

11. From what has been discussed above, the Respondent submits that Article 12(1) of the PK-BIT is jurisdictional and mandatory, while the Claimant did not observe the PK-BIT due to its ignorance of the pre-arbitration steps.

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

12. It is submitted that the Claimant is precluded from initiating an arbitration against the Respondent on the following four grounds.

(A) State-to-state dispute settlement mechanism under the PK-BIT

13. First, the Respondent submits that the dispute settlement mechanism under Article 12 of the PK-BIT is only confined to the Parties, i.e., the Governments of Palmenna and Kenweed. Therefore, the Claimant is precluded from initiating arbitration against the Respondent, which is not one of the Parties.

14. Article 12 of the PK-BIT explicitly states that it applies only to "[a]ny dispute between the Parties arising from, relating to or in connection with this BIT." The term "Parties" is

[9] The Moot Problem, para. 49.

defined in the Preamble to the PK-BIT as solely the Governments of Palmenna and Kenweed. Moreover, the entire PK-BIT, with the exception of Articles 4 and 5, regulates the rights and obligations between these Parties under the treaty. Accordingly, the Claimant cannot initiate arbitral proceedings against the Respondent.

15. Articles 4 and 5 of the PK-BIT impose certain obligations solely on investors. 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. It is submitted that this obligation, whether or not an investor has submitted such a report, can only be enforced by the Parties, not by any other investors. This further indicates that the dispute settlement mechanism under Article 12 of the PK-BIT is confined exclusively to the Parties.

16. Article 1(3) of the PK-BIT does provide:

"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."

17. A plain reading of this clause indicates that the obligations can be enforced in either of two ways: (i) an investor can enforce the obligations against another investor, or (ii) the Parties themselves can enforce the obligations against each other. However, the first method of enforcement is not feasible and practically ineffective. For example, an investor does not have access to information in reality regarding whether or not another investor has submitted an environmental impact assessment report to the relevant ministry of the Party, as required under Article 4 of the PK-BIT.

18. In light of the above, the Respondent submits that the dispute settlement mechanism under

Article 12 of the PK-BIT is confined exclusively to the Parties and therefore the Claimant is precluded from initiating an arbitration against the Respondent in the first place.

(B) Canstone being the national of Palmenna

19. Second, even if the Claimant has the standing to sue an investor from another Party, which the Respondent disagrees with, the Respondent submits that the Respondent cannot be sued because Canstone is a national of Palmenna and not an investor under the PK-BIT.

20. The Respondent observes that the PK-BIT does not define the term "investor". However, according to Article 25 Clause (1) of the ICSID Convention which states the jurisdiction of an international investment arbitration arising from a treaty is "[a]ny legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State", it is submitted that an investor must be an individual or corporate entity that is a national of one Party and has investments in the territory of the other Party.[10]

21. In *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*, the tribunal held:[11]

"As a general rule, States apply either *the head office or the place of incorporation* criteria in order to determine nationality. By contrast, *neither the nationality of the company's shareholders nor foreign control*, other than over capital, normally govern the nationality of a company…" (Emphasis added)

22. Similarly, in *Amco v Indonesia*,[12] *LETCO v Liberia*,[13] and *Autopista v Venezuela*,[14] this

[10] *The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Article 25(2).
[11] *SOABI v Senegal*, Decision on Jurisdiction, 1 August 1984, para. 29.
[12] *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(ii).
[13] *LETCO v Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports, pp. 351–354.
[14] *Autopista v Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 108.

rule of determining the nationality by its incorporation place or head office place was applied.

23. In *LANCO v Argentina*, a case arising from the US-Argentina BIT, the respondent Argentina argued that LANCO shall not be a US national due to non-US foreign control. However, the tribunal rejected this argument by holding that the claimant LANCO "has U.S. nationality and should consequently be considered a national of another Contracting State for Article 25 of the ICSID Convention",[15] on the grounds that LANCO not only "*is incorporated* in Illinois" (a state in the United States) but also "has its *principal place of business* in Illinois".

24. In the present case, the Respondent submits that since it was incorporated in Palmenna on 26 October 2021,[16] the Respondent is clearly a national of Palmenna. On top of that, the Respondent submits that since it started operation in Palmenna in November 2021 after its incorporation in Palmenna,[17] since the two biodiesel plants of the Respondent were in Appam and Karheis (both are cities in Palmenna),[18] and since over 70% of the Respondent's employers were Palmennian,[19] its principal place of business is Palmenna, which further clears any doubt on its Palmennian nationality.

25. In light of the above, the Respondent submits that since the Respondent's nationality is Palmennian, it is not an investor of another Party in the PK-BIT to the Claimant, and therefore cannot be sued by the Claimant.

(C) Failure to comply with the pre-arbitration steps

26. Third, and alternatively, even if the Claimant was entitled to sue the Respondent, it has

[15] *Lanco v Argentina*, Decision on Jurisdiction, 8 December 1998, para. 46.
[16] The Moot Problem, para. 21.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*, para. 23.

failed to comply with the pre-arbitration steps required under Article 12 of the PK-BIT, as submitted previously.

(D) Abuse of the arbitration proceedings

27. Finally, and alternatively, the Respondent submits that the Claimant has abused the arbitration process in order to circumvent the High Court's ruling.

28. As opined by Judge Sir Gerald Fitzmaurice of International Court of Justice, abuse of process ensures that "even if a court has jurisdiction, it is not necessarily be bound to . . . exercise it."[20] It is clear that if the Claimant "had the right of access to an international court yet used it in an abusive way, the court shall refrain from exercising its jurisdiction over the State and its claims."[21]

29. This concept of abuse of process, derived from Article 26 of the Vienna Convention on the Law of Treaties which provides that every treaty "must be performed by [the parties] in good faith", has been recognized in multiple recent cases, such as *The Rompetrol Group NV v Romania*, *Telekom Malaysia Berhad v Republic of Ghana*, and *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*.

30. To be more specific, abuse of the arbitration proceedings refers to the action of "instrumentalize the arbitral process" for "gaining a benefit which is inconsistent with the purpose of international arbitration."[22]

31. Accordingly, regarding its purpose, an international arbitration aims to "resolve a genuine dispute between two or more parties which those parties cannot resolve themselves."[23] In

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[20] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 2 (Grotius Publications Limited 1986), p. 447.
[21] *Ibid.*
[22] *ICSID Review*, Vol. 32, No. 1 (2017), pp. 17–37.
[23] Gary B Born, *International Commercial Arbitration: Commentary and Materials* (2nd, Kluwer Law International 2001) 252.

other words, treaty obligations shall "be carried out according to the common and real intention of the parties."[24] However, if a party of an arbitration files the arbitration for alternative motives rather than for solving a genuine dispute, an abuse of proceeding occurs, as in *Neckarpri GmbH v Electricite de France (EDF) International S.A.S.*[25]

32. In *Neckarpri GmbH v EDF International S.A.S*, an International Chamber of Commerce ("**ICC**") arbitration case, Neckarpri GmbH, a wholly-owned entity of the German State of Baden-Württemberg, commenced arbitration against the French electricity company EDF. However, after careful investigation of related facts[26] (including quotes from the Green Party Leader assuring the public that the Party would "shed light on the dark affair of the billion-dollar EnBW deal of Prime Minister Stefan Mappus"[27]), the tribunal held that the claimant shall pay a 75% of the arbitration fee to ICC and a 4 million euros compensation to the respondent EDF, on the grounds that the arbitration was instrumentalized by the newly elected government to gain political benefits of diminishing its political opponent's image while increasing its own image, which was further made amply clear when the arbitration tribunal only received the expert report on the matter six months after the report was televised.[28]

33. In the present case, the Respondent submits that the Claimant has abused the arbitration process to circumvent the High Court's ruling for political gain rather than to resolve a genuine dispute. It is in the submissions of the Respondent that there is sufficient factual evidence and a clear causal link between the initiation of this arbitration and the attempt

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[24] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment, 25 September 1997, ICJ Rep 7, para 142.
[25] *Neckarpri GmbH v EDF International S.A.S*, ICC Case No 1815/GFG/FS. *Neckarpri GmbH v EDF International S.A.S. v Federal State of Baden-Württemberg*, ICC Case No. 18519/GFG.
[26] *Neckarpri GmbH v EDF International S.A.S. v Federal State of Baden-Württemberg*, Final Decision, 6 May 2016, paras. 95-129.
[27] *Ibid.*, para. 101.
[28] *Ibid.*, paras. 113, 340. See also Kyriaki Karadelis and Alison Ross, 'EDF Faces ICC Claim Over German Power Company Purchase' Global Arbitration Review (6 June 2012), as cited in Emmanuel Gaillard, Abuse of Process in International Arbitration, *ICSID Review*, Vol. 32, No. 1 (2017), pp. 17–37.

to overturn the High Court's decision for political purposes.

a. On 14 February 2024, the High Court ruled against the Claimant and found the Claimant liable in negligence and compensation. Upon receiving the ruling, the Claimant enlisted the support of Jackey (the in-house expert of Canstone) through a deal given by the Claimant, seeking to overturn the High Court's ruling.[29] Yet, overturning the ruling would take a lot of time, and enlisting Jacket raised skepticism. This solution did not ease the Claimant's political challenges as people continued to rage and situation escalated.[30]

b. On 1 March 2024, as political pressure continued to rise, the head of the Claimant PM Akbar had a conference call with the Respondent, urgently seeking a solution to the ongoing political challenges. As discussion became more and more intense, the conference ended terribly with a fierce split.[31] Similarly, for the Claimant, this way to reduce political challenges did not work.

c. On 3 March 2024, former PM of the Claimant, Elsie, dropped the atom bomb. Since the High Court's ruling was against the Claimant, together with the rage from highly spirited people, Elsie's proposal of overthrowing the Claimant was on the table, which made the situation extremely urgent for the Claimant.[32]

d. On 5 March 2024, the Claimant quickly organized a political meeting to deal with this disastrous political threat. Head of the Claimant PM Akbar said to other important members of the Claimant "You have my word, that I will do the necessary to overturn that decision." and "Let us await the big reveal tomorrow."[33]

e. On 6 March 2024, the Claimant commenced arbitration proceedings against Canstone

[29] The Moot Problem, paras. 45-46.
[30] The Moot Problem, para. 47.
[31] *Ibid.*, paras. 49-51.
[32] *Ibid.*, para. 52.
[33] *Ibid.*, para. 53.

pursuant to Article 12 of the PK-BIT.[34]

34. Under the circumstances, an amply clear causal relationship between filing this arbitration and circumventing the High Court's ruling for political purposes can be observed. In less than a month's time, as the political situation for the Claimant got worse, the Claimant anxiously sought ways to overturn the High Court's ruling. Although many of the solutions did not work, no direct political threat, i.e., the overthrow of the current administration of the Claimant, was yet present. However, the former administration of the Claimant eventually put up a direct political threat, leaving the Claimant no choice but to immediately instrumentalize the arbitration to circumvent the High Court's ruling, to divert people's attention, and to relieve the fierce attack from its political enemies, which constitutes an abuse of the arbitration proceeding.

35. The Respondent further submits that since the Claimant's filing this case is abusive, the Tribunal shall dismiss the case either as inadmissible, on the grounds that abuse of the arbitration proceeding "does not negate the court's jurisdiction as such, but only prevents the exercise thereof", as held in *Islamic Republic of Iran v United States of America*.[35]

36. In light of the above, the Claimant shall be precluded from commencing an arbitration against the Respondent.

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

37. The Respondent submits that even if it is assumed to have the status of an investor under the PK-BIT, it has not breached its obligations under Article 4 of the PK-BIT on the following grounds.

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[34] The Moot Problem, para. 54.

[35] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, 6 November 2003, ICJ Rep 161, para. 29. As cited in Yuka Fukunaga, Abuse of Process under International Law and Investment Arbitration, *ICSID Review - Foreign Investment Law Journal*, Volume 33, Issue 1, Winter 2018, pp.181–211.

(A) Not falling within the scope of activities as defined by Article 4(2) of the PK-BIT

38. The Respondent submits that the activities it carried out in Palmenna do not fall within the scope of activities as defined by Article 4(2) of the PK-BIT.

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

> "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)

40. A plain reading of Article 4(1) indicates that the scope of its application is very broad, applying to any activity that has a significant environmental impact. It requires that a qualified person conduct an environmental impact assessment ("**EIA**"), and the resulting report must be submitted to the relevant ministry of the Party, with no exceptions permitted.

41. However, the Respondent submits that it is not the intention of the Parties to allow such wide application of Article 4(1). It is because Article 4(2) immediately narrows the scope by stating that "*[f]or the avoidance of doubt*, activities which may have significant environmental impact *shall include the following*: […]" (Emphasis added) and then proceeds to list exhaustively specific activities that require the submission of an EIA report.

42. Such an interpretation of Articles 4(1) and 4(2) is in line with Article 31(1) of the *1969 Vienna Convention on the Law of Treaties* ("*1969 Vienna Convention*"), which requires "[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."

43. The ordinary meaning of the phrase "for the avoidance of doubt" in Article 4(2) is clear. It

aims to clarify and eliminate any uncertainty regarding whether Article 4(1) applies to "any activity" with significant environmental impact. Similarly, the phrase "shall include the following" is also clear. It is not phrased as "shall include, but not limited to, the following." Moreover, the absence of a catch-all provision in Article 4(2) to address activities not listed further indicates that the specific activities listed are intended to be exhaustive.

44. This interpretation aligns with the object and purpose of the PK-BIT. In this regard, the Respondent refers to the Preamble:

"Desiring to promote *greater economic cooperation* between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party; […]

Upholding the need to protect against climate change and to *safeguard the environment* in line with the UN Framework Convention on Climate Change (UNFCCC) and its Paris Agreement, and the Convention on Biological Diversity (CBD); […]

Promoting *a transparent business environment that will assist enterprises in planning effectively and using resources efficiently*." (Emphasis added)

45. Under the circumstances, the Respondent submits that the PK-BIT seeks to strike a balance between safeguarding the environment on the one hand and promoting "greater economic cooperation" and "a transparent business environment that will assist enterprises in planning effectively and using resources efficiently" between the Parties on the other, among other objectives. Accordingly, Article 4(1) of the PK-BIT, if interpreted in isolation from Article 4(2), would place over-emphasis on environmental protection, which will be

directly in conflict with the object and purpose of the treaty.

46. In the present case, the Respondent built two biodiesel plants - one in Appam and another in Karheis.[36] To be specific, producing palm oil, rather than other raw materials, is the focus of the two biodiesel plants.[37] Therefore, this type of industry is not referred to in Article 4(2) of the PK-BIT, where only activities carried out by non-ferrous, cement, and petrochemicals industries are considered to have significant environmental impact.

47. Additionally, though the Respondent has its drainage system, the system neither belongs to "construction of man-made lakes and artificial enlargement of lakes with surface areas of 50 hectares or more in or adjacent or near to environmentally sensitive areas"[38] or "any drainage of wetland, wild-life habitat or of dry inland forest covering an area of 20 hectares or more."[39]

48. As the specific activities listed in Article 4(2) of the PK-BIT are also intended to be exhaustive, the Respondent's industrial process is in fact not included in the above scope. In this way, then, the Respondent can prevent driving the company to bankruptcy by not frequently investigating and investing the company's resources,[40] and can better facilitate cooperation and utilisation of the business opportunities between the nations.[41]

49. Therefore, activities carried out in Palmenna by the Respondent are not equivalent to activities defined by Article 4(2) of the PK-BIT, and thus the Respondent need not necessarily appoint a qualified person to conduct an environmental impact assessment and to submit the report as required in Article 4(1) of the PK-BIT.

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[36] The Moot Problem, para. 21.
[37] *Ibid.,* 14.
[38] The PK-BIT, Article 4(2)(c)(i).
[39] *Ibid.*, Article 4(2)(c)(ii).
[40] The Moot Problem, para. 29.
[41] *Ibid.*, para. 20.

(B) No breach of Article 4 of the PK-BIT

50. Alternatively, even if there is an obligation for the Respondent to submit an EIA report, the Respondent has not yet breached it because there is some degree of flexibility in meeting its obligations under Article 4 of the PK-BIT.

51. Article 4(1) does not specify the deadline or frequency for submitting an EIA report. Only Article 4(4) states that "[a]ny investor(s) carrying out such activity shall submit the report to the relevant ministry as soon as practically possible."

52. In the present case, the Respondent has not failed to submit a report and is currently in the process of preparing the EIA report and will submit it to the Ministry of Natural Resources and Environmental Sustainability as soon as practically possible.

    a. Since Canstone was incorporated in Palmenna on 26 October 2021, it has been operating at full capacity. By the end of 2022, Canstone achieved profitability and contributed 20% to the total production capacity of 2,722,000 tonnes per year in Palmenna.[42] Canstone's dedication to the production has left it insufficient time and resources to conduct a comprehensive and time-consuming environmental impact assessment.

    b. During two years of operation, Canstone has gradually matured and has intended to spare time for preparing an integrated assessment. On 6 September 2023 in the meeting including the Board of Directors and the senior management, Alan proposed for a consulting firm to be hired to conduct an EIA on behalf of Canstone.[43]

    c. In the process of preparing the EIA report, Palmenna has been experiencing

[42] The Moot Problem, para. 27.
[43] *Ibid.*, para. 33.

continuous heavy rainfall and flash floods throughout November to December,[44] which severely interrupted the preparation of the EIA report. The EIA report is expected to be submitted to the Ministry of Natural Resources and Environmental Sustainability as soon as practically possible.

53. Alternatively, even if the Respondent is required to submit an EIA report "as soon as practically possible," the Respondent submits that it still has not breached this obligation because the Prime Minister of Palmenna promised the Prime Minister of Kenweed that he would not insist that investors from Kenweed rush the timeline for submitting the necessary papers to the Ministry of Natural Resources and Environmental Sustainability.[45]

54. The Prime Minister of Palmenna further assured the Prime Minister of Kenweed:

"[Y]ou are my bro. I asked you to come and invest. What good am I if I now make your life difficult. Take your time dear friend, do only what you are able to at the moment. I am sure we will accommodate. I will remember to tweak certain things to your favor."[46]

55. The Respondent submits that this assurance has given rise to the operation of the principle of estoppel, which prevents the Claimant from denying the leniency it had previously extended.

56. In relation to the principle of estoppel, the International Court of Justice in *Land and Maritime Boundary between Cameroun and Nigeria* held that:

"An estoppel would only arise if by *its acts or declarations* Cameroun had consistently

[44] The Moot Problem, paras. 34-35.
[45] *Ibid.*, para. 19.
[46] *Ibid*.

made it fully clear that it had agreed to settle the boundary dispute submitted to the court by bilateral avenues alone. It would further be necessary that *by relying on such an attitude Nigeria had changed position to its own detriment or had suffered some prejudice*."[47] (Emphasis added)

57. A plea for estoppel must satisfy both (i) representation/conduct and (ii) reliance. The requirement of reliance is satisfied if it can be shown that a distinct act was undertaken by a party in reliance on a representation which could either be to the detriment of the party relying on or to the benefit of the maker of the representation. In *Temple of Preah*, Judge Fitzmaurice in his separate opinion articulated the view on reliance as follows:

"The essential condition of the operation of the rule of preclusion or *estoppel*, as strictly to be understood, is that *the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's advantage*."[48] (Emphasis added)

58. In the present case, Canstone relied on the promise of Prime Minister of Palmenna by focusing mainly on matters related to production and profitability in the first two years, such as recruiting employees and experts, setting up biodiesel plants in Appam and Karheis, and conducting periodic Reports,[49] and meanwhile was on the verge of preparing the submission of the EIA report until the end of 2023 when the company gradually matured and stabilized.[50]

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[47] *Land and Maritime Boundary between Cameroon and Nigeria,* Preliminary Objections, [1998] ICJ Rep 275.
[48] Case Concerning the Temple of Preah Vihear (*Cambodia v Thailand*) Merits, (Separate Opinion of Judge Fitzmaurice [1962] ICJ Rep 52 (ICJ), 63.
[49] The Moot Problem, paras. 23-25.
[50] *Ibid.*, para. 33.

59. Canstone was desperate to make profits and was getting pressured by both nations to be successful when operations first started.[51] As a newly established company, Canstone is facing the dual challenge of managing a myriad of affairs during its adaptation phase and meeting the pressure to deliver success and profitability. The promise from the Prime Minister provides an avenue to alleviate Canstone's stress, as the Prime Minister stated:

"Take your time dear friend, *do only what you are able to at the moment*. I am sure we will accommodate. *I will remember to tweak certain things to your favor*."[52] (Emphasis added)

60. Accordingly, guided by this promise, Canstone was able to concentrate on its core objectives of production and profitability, deferring less critical tasks. Apparently, this strategic focus has yielded positive results, with the company achieving profitability in its first year and contributing 20% to Palmenna's total production capacity.[53]

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

61. The Respondent submits that even if it has failed its obligations under Article 4 of the PK-BIT, the Claimant is not entitled to an award of declaration and damages.

62. A declaratory award establishes the legal position definitively and has a binding effect between the parties.[54] It has become a common remedy in international arbitration, often accompanied by requests for contractual damages.[55] The remedy of damages, as directed by an international arbitral tribunal, involves the payment of a sum of money by one party

[51] The Moot Problem, para. 23.
[52] *Ibid.*, para. 19.
[53] *Ibid.*, para. 27.
[54] *Redfern and Hunter on International Arbitration*, section 9.61.
[55] *Ibid.*, section 9.59.

to another as compensation for loss suffered.[56]

63. In respect of damages, the Claimant bears the burden of proving causation and quantum. In the case of *United Parcel Service of America v Canada*, the tribunal held that:

"[…] a claimant must not only show that it has *persuasive evidence of damage* from the actions alleged to constitute breaches […] but also that *the damage occurred as a consequence of the breaching Party's conduct* […]"[57] (Emphasis added)

64. Causation is expressed in various ways in different arbitration cases. For example, in *S.D. Myers v Canada*, the tribunal held that damages must be the proximate cause of the breach and could be awarded only for "harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached."[58] Similarly, in *Marvin Roy Feldman Karpa v Mexico*, the tribunal also held that damages had to be "adequately connected" to the breach.[59] In other words, it is often required that the loss claimed be the proximate cause of the damage, that such loss not be too remote or speculative, or that it be the direct and foreseeable result of the breach.

65. In respect of quantum, in *Rompetrol Group NV v Romania*, the tribunal found that while the claimant had established Romania's breach of the BIT's fair and equitable treatment provision, it had not proven that it suffered economic loss or damage as a result of that breach. Consequently, the tribunal awarded no compensation.[60]

66. Under the circumstances, the Respondent submits that the Claimant is not entitled to both

[56] *Redfern and Hunter on International Arbitration*, section 9.42.
[57] *United Parcel Service of America v Canada*, Award on the Merits, 24 May 2007, para. 38.
[58] *S.D. Myers v Canada*, Partial Award, 13 November 2000, paras. 316–322.
[59] *Marvin Roy Feldman Karpa v Mexico*, Award, 16 December 2002, para. 194. See also *Pope & Talbot Inc. v Canada* (UNCITRAL), Award in Respect of Damages, 31 May 2002, para. 80.
[60] *Rompetrol Group NV v Romania*, Award, 6 May 2013, at [283], [286], and [288].

declaratory reliefs and damages. The declaration sought by the Claimant reads as follows:

"A declaration that the failure and/or omission of Canstone to abide by the terms of the BIT had resulted in respiratory tract infections among the citizens of Palmenna."

67. In the present case, the Claimant submits that even if there is a breach of Article 4, this Tribunal may render a declaratory relief to that effect. However, there is no evidence to prove a connection between the breach of Article 4 and the respiratory tract infections among the citizens of Palmenna.
68. The origin of the chemical leak is unconfirmed, with neighboring factories also being potential sources. Although two neighboring factories were shut down after a heavy flood, it is uncertain that whether the leak has occurred there. The presence of "Under Maintenance" sign and heavy tanks and machinery entering and leaving the neighboring factories indicate the possibility of leakage.[61]
69. Moreover, even if such a connection exists, there are other possible causes leading to this incident. It is almost impossible to measure the specific harm caused by Canstone's operations among other potential contributors without a clear method of differentiation. Respiratory infections are often caused by a variety of factors, including viruses, bacteria, fungi, and pre-existing health conditions. Also, other potential sources of chemical leaks have not been ruled out. The Claimant has not proven the quantum of damages. Without evidence that isolates the impact of Canstone's operations on the respiratory health of citizens, it is unjust to hold the company fully responsible for all reported infections.
70. More importantly, the Claimant cannot claim damages on behalf of the alleged injured

[61] The Clarifications to the Moot Problem, para. 10.

citizens of Palmenna, who have not taken any action against the Respondent. In arbitration, only those directly injured by an alleged violation typically possess the standing to bring a claim. To bolster its claim, the Claimant must provide evidence of the citizens' authorization, a legitimate interest in the arbitration outcome, and justification for why the citizens cannot bring the claim themselves. Without such substantiation, the Claimant's right to intervene in the legal process on behalf of the alleged injured citizens appears unfounded.

Prayer for Relief

71. As a result, the Respondent respectfully requests the arbitral tribunal to issue an award:

a. declaring that the Claimant failed to avail of the pre-arbitration steps as required;

b. declaring that the Claimant is precluded from initiating an arbitration against the Respondent;

c. declaring that the Respondent had not breached its obligations under the PK-BIT; and

d. ordering that the Claimant is, therefore, not entitled to an award of declaration and damages.