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IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE

AT KUALA LUMPUR, MALAYSIA

THE 19TH LAWASIA INTERNATIONAL MOOT COMPETITION 2024

GOVERNMENT OF PALMENNA

(CLAIMANT)

V

CANSTONE FLY LIMITED

(RESPONDENT)

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

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

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

QUESTIONS PRESENTED

I. Whether the pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Government of Palmenna against Canstone?

II. Whether the Government of Palmenna is precluded from initiating an arbitration against Canstone?

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

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

STATEMENT OF FACTS

PARTIES

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

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

RELEVANT FACTS

(1) Pre-Arbitration Steps

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

Sharma (CEO of KLT, who determines the general policies related to Canstone), Alan (appointed Quality Control Officer), and Luke Nathan (owner of SZN and the face of Canstone). The respondent's representatives presented their perspectives and proposed course of action. However, all of this suggestions was shut down by the Claimant. As a result, the discussions reached an impasse with the respondent's representatives unwilling to continue further negotiation. However, 5 days later, the Claimant initiated an arbitration without attempting to go to mediation as provided for in Article 12 of the PK-BIT.

(2) Preclusion from Initiating Arbitration

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

(3) Breaches under the PK-BIT

The Respondent established two factories in Palmenna: one in Karheis (a rural area) and another in Appam (a city). Initially, the Respondent was hesitant to set up the factories, but continued

operation after receiving encouragement from local authorities. In-house experts were hired to conduct a brief environmental impact assessment and to evaluate the condition of the machinery. As a precautionary measure, the company also hired Alan Becky as the Quality Control Officer to confirm and validate the in-house experts' findings. The assessment found no major environmental harm.

In mid-February 2023, the Karheis factory received an unsigned note alleging a potential leak in one of the tanks used to store refined palm oil. Upon investigation, Alan Becky concluded that the note was a hoax.

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

(4) Damages

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

SUMMARY OF PLEADINGS

I

Pre-arbitral steps in Article 12 of the PK-BIT are mandatory, as indicated by the use of the word "shall," which implies a binding obligation. Non-compliance with these mandatory steps directly affects the tribunal's jurisdiction, making them essential for establishing the tribunal's authority to hear the case.

II

The Doctrine of Identical Factual Predicates requires that claims based on the same factual circumstances be resolved in a single proceeding to avoid duplicative litigation. Since both the High Court claim and the current claim arise from the same incident—the flash floods in Appam on November 26, 2023—Canstone should have sought joinder in the High Court proceedings and is now precluded from initiating this separate claim.

III

Respondent did not breach any obligation under the PK-BIT because the bribery is not proven, the EIA report has been submitted and the discharge of harmful substances is not proven beyond reasonable doubt.

IV

The arbitral tribunal has no power to grant declaration as it is not provided in PK-BIT and is prohibited by Malaysian Law if other remedies are available. In any event, the causation between

the Respondent's action and remedies sought is not establish. Hence, no declaration and damages can be claimed by the Claimant.

PLEADINGS

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

It should be noted that the present claim involves a preliminary objection raised by the Respondent. In doing so, we posit that the pre-arbitration steps must be complied with. We advance the following arguments in support of this position:

First, we submit that Malaysian law should be the applicable law to guide the Tribunal on this matter. Under Malaysian law, pre-arbitration steps can only be bypassed in situations where there is urgency. This is in line with the broader notion of commercial practicality and ensures that parties' access to justice is not impeded by mere technicalities. The current situation does no satisfy this requirement.

A. The Applicable Law is Malaysian Law

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

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

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

B. Pre-Arbitral Steps need to be complied with due to the Mandatory Nature of the Clause

When pre-arbitral steps are phrased in mandatory terms, they cannot be disregarded. Article 12 of the PK-BIT uses the word "shall," which carries mandatory connotations. In the Federal Court case of ***Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain***, it was affirmed that “the word ‘shall’ prima facie ought to be considered mandatory”.[3]

Moreover, in ***Public Prosecutor v Mohd Saifuddin bin Ab Rahman***, the court addressed whether the word “shall” in a provision should be interpreted as mandatory.[4] The court held that this determination largely depends on the intention of the Legislature, the facts and circumstances of the case, and the potential injustice that might result from a particular interpretation.

[1] *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638.
[2] Section 3 of the Civil Law Act.
[3] [2022] 3 MLJ 450.
[4] [2021] 2 MLJ 629.

Considering the intent behind Article 12 of the PK-BIT, particularly the sequential structure of the pre-arbitral steps (e.g., "first," "second," "third"), it is clear that these steps are intended to be mandatory. Therefore, the pre-arbitral steps outlined in Article 12 must be strictly complied with.[5]

C. Pre-Arbitral Steps Concern Jurisdiction and Not Admissibility

Courts and tribunals have determined that pre-arbitral steps concern jurisdiction rather than admissibility. In ***Republic of Kazakhstan v World Wide Minerals Ltd.***, the English Court of Appeal held that non-compliance with pre-arbitral procedures, such as the mandatory requirement for negotiation or mediation before arbitration, directly affects the tribunal's jurisdiction.[6] Similarly, in ***International Research Corp PLC v Lufthansa Systems Asia Pacific,*** the Singapore Court of Appeal found that the failure to adhere to pre-arbitral steps, specifically a mediation clause, deprived the tribunal of jurisdiction.[7]

The rationale behind treating pre-arbitral steps as a matter of jurisdiction rather than admissibility lies in the nature of these steps as foundational prerequisites for the arbitration process. When parties agree to a dispute resolution mechanism that includes pre-arbitral steps such as negotiation or mediation, they are effectively setting conditions that must be satisfied before arbitration can be initiated.[8] Therefore, these steps are integral to the consent that the parties have given for arbitration. If these conditions are not met, the tribunal does not have the authority to proceed

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[5] PK-BIT, Article 12.
[6] [2020] EWHC 2058
[7] [2012] SGCA 226.
[8] *Ibid.*

because the agreement to arbitrate has not yet been fully activated. Hence, pre-arbitral steps are viewed as integral to a tribunal's jurisdictional authority.

II. THE CLAIMANTS ARE PRECLUDED FROM INITIATING THIS CLAIM

A. The Doctrine of Identical Factual Predicates Apply

The Doctrine of Identical Factual Predicates prevents multiple claims based on the same or substantially the same factual circumstances as they should be resolved in a single legal proceeding to avoid duplicative litigation and inconsistent rulings. For example, in ***Genentech, Inc. v Eli Lilly & Co.***,[9] the court applied this doctrine to dismiss a second claim that was based on the same set of facts as an earlier arbitration, emphasizing the need for consistency in legal outcomes.

Here, the factual premise for both the High Court claim and the current claim is the same — both concern the flash floods in Appam on the 26th of November 2023.[10] Hence, the doctrine applies and Canstone should have applied for a joinder in the High Court proceedings, failing which they are precluded from initiating this claim now.

III. RESPONDENT DID NOT BREACH THE PK-BIT

A. Article 1

Article 1 of the PK-BIT sets forth the objectives of the treaty but does not create any express or implied duty on the parties. As a result, the Claimant has not materially breached any obligation under the PK-BIT. For a breach to be considered material, it must result in a substantial deprivation

[9] *United States Court of Appeals, Federal Circuit* (Sep. 23, 1993), 998 F.2d 931, 933 (Fed. Cir. 1993).
[10] Moot Problem, [35].

of the entire benefit under the agreement, as articulated by Lord Diplock in ***Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26**. Since Article 1 merely outlines the objectives without imposing any binding obligations, any alleged non-compliance with these objectives does not constitute a material breach that would meet the threshold required for substantial deprivation of the treaty's benefits.

B. Article 2 and Article 3

The Respondent has not breached any obligations under Article 2 and Article 3 of the PK-BIT, which collectively require parties to conduct their policies and procedures in a fair and transparent manner.

The Respondent has taken appropriate steps to comply with industry standards, including conducting a brief environmental assessment and hiring suitable experts to ensure that its business practices align with fair industry practices. When the unsigned note incident arose, the Respondent's quality controller, Alan, – who is recognised as a seasoned professional in the industry, having dedicated the past 13 years to overseeing biodiesel plants located around Southeast Asia – conducted a thorough investigation. He corroborated the findings with previous reports before concluding that the incident was a hoax. These actions demonstrate that the Respondent has conducted its procedures in a fair and reasonable manner.

Regarding any allegations of bribery, the Respondent has consistently refrained from engaging in any corrupt practices. The evidence available does not conclusively indicate that the Respondent committed any acts of bribery. Furthermore, the fact that the compensation sum remains

undisclosed does not constitute a breach of the transparency obligations under Malaysian law, as the matter pertains to a private dispute, if any.

In light of the foregoing, there is no breach of Article 2 or Article 3 by the Respondent.

C. Article 4

The Respondent has not breached Article 4 of the PK-BIT, as an Environmental Impact Assessment (EIA) report has indeed been prepared. The in-house experts prepared brief environmental impact assessment notes, which, under international law, do not have a prescribed standard for their content. Therefore, we contend that the reports prepared by the Respondent are sufficient, as they cover the condition of the machinery and any foreseeable environmental consequences.

Furthermore, these reports have been submitted, as evidenced by the statement of Tara Sharma, who affirmed that, "*my guys have been complying with the PK-BIT and have been taking all the necessary steps to ensure compliance.*" This statement confirms that the Respondent has adhered to its obligations under Article 4 by preparing and submitting the required EIA report.

D. Article 5

The Respondent has not breached Article 5(1) of the PK-BIT, as there is no evidence of any discharge of harmful substances into the river by the Respondent's Karheis or Appam facilities.

The standard of proof required for establishing an environmental breach is beyond a reasonable doubt, as held in the case of ***Fermpro Sdn Bhd v Pendakwa Raya* [2021] 12 MLJ 955**, where the court emphasized that environmental breaches must be proven to this high standard.

In this case, none of the evidence presented or tendered in the facts conclusively proves that harmful substances were discharged from the Respondent's factories. For example, the note detailing a potential leakage is unsigned, and its authenticity remains in doubt. Moreover, an investigation was conducted, and no signs of leakage were found. The mere presence of victims within the vicinity of the factory does not, in any conclusive way, prove that the Respondent discharged harmful substances. The same reasoning applies to the Appam facility, where no evidence has been presented that conclusively proves any discharge of harmful substances by the Respondent. Therefore, there is no breach of Article 5(1) by the Respondent.

IV. CLAIMANT IS NOT ENTITLED TO DECLARATION AND DAMAGES

A. Arbitral Tribunal Has No Power to Grant a Declaratory Relief

Firstly, the power of the arbitral tribunal is derived from the arbitration agreement, in this case, the PK-BIT. It is a well-established principle that consent is the cornerstone of arbitration;[11] therefore, the arbitral tribunal can only exercise the powers conferred upon it by the parties. Failure to adhere to the arbitral procedure agreed upon by the parties would render the award liable to be set aside, as per Article 5(d) of the New York Convention, which is incorporated into Malaysian law via

[11] *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal* [2020] MLJU 1901

Section 37 of the Arbitration Act 2005. Since the PK-BIT does not expressly provide for declaratory relief, the parties cannot claim such a remedy within this arbitration framework.

Furthermore, Article 5(d) of the New York Convention stipulates that an arbitral procedure that does not comply with the law of the seat may be set aside. Given that this arbitration is seated in Malaysia, the tribunal must also consider the limitations imposed by Malaysian law, specifically Section 41 of the Specific Relief Act 1950. Section 41 provides that a declaration cannot be granted where the plaintiff is able to seek further relief beyond a mere declaration. In this case, since the Claimant is seeking damages, declaratory relief is not available to the Claimant under Malaysian law.

B. No Causation Between Damage and Relief Sought

The declaration sought by the Claimant is to establish that the Respondent caused the respiratory tract infections. However, there is no conclusive proof of such a causal link. Even Dr. Ragu's medical report indicates that the cause of the infections is unclear. Without clear evidence establishing causation between the Respondent's actions and the respiratory tract infections, the basis for claiming damages is fundamentally undermined.

Since causation is a necessary element for any damages to be awarded, and there is no conclusive evidence to support the claim that the Respondent's actions caused the infections, no damages can be claimed in relation to the respiratory tract infections. Therefore, the tribunal should reject the Claimant's request for both declaratory relief and damages on this ground.

PRAYER FOR RELIEF

The Respondent respectfully requests this Tribunal to hold the following:

I

The pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Government of Palmenna against Canstone

II

The Government of Palmenna is precluded from initiating an arbitration against Canstone.

III

Canstone has not breached its obligations under the PK-BIT.

IV

If the answer to Issue III is in the affirmative, find that the Government of Palmenna is not entitled to an award of both declaratory relief and damages.

Respectfully Submitted,

Counsels for Respondent