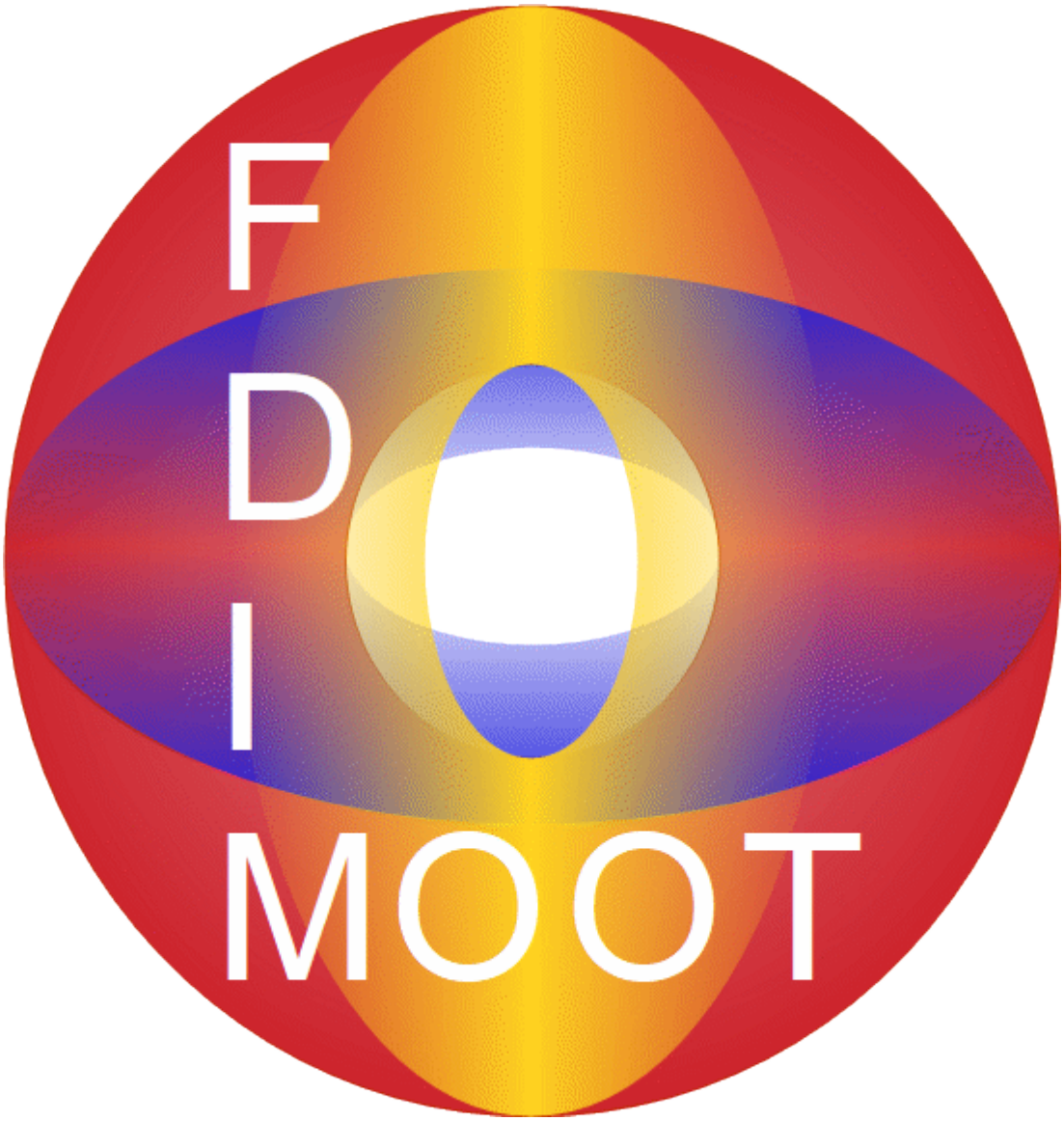
2021 Case



Foreign Direct Investment International Arbitration Moot

Case elaborated by Elina Arocena Basso, Meagan Brae Vestby, Vishakha Choudhary, Mitchell Dorbyk, and Aglaya Melnik under the supervision of the FDI Moot's Review and Advisory Boards.

Vemma Holdings Inc. v. Federal Republic of Mekar

Table of contents

NOTICE OF ARBITRATION

Notice of Intent to Submit a Claim to Arbitration

Under Chapter 9

of the Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement

Vemma Holdings Inc. (Claimant)

v

The Federal Republic of Mekar (Respondent)

1. Pursuant to Article 9.16 of the Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement (the "CEPTA") and Article 2 of the International Centre for the Settlement of Investment Disputes Additional Facility Rules, Vemma Holdings Inc. ("Vemma"), an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru ("Bonooru"), hereby submits its dispute with the Federal Republic of Mekar ("Mekar") to arbitration.

Jurisdiction

2. By submitting this Notice of Arbitration, the Claimant accepts Mekar's standing consent to arbitration contained in Article 9.17 of the CEPTA.

> Article 9.17: Consent of Each Party to Arbitration
> 1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
> 2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to satisfy the requirements of:
> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
> (b) Article II of the New York Convention for an "agreement in writing".

3. Bonooru has signed and ratified the ICSID Convention, Mekar has not. Vemma, therefore, submits this dispute to arbitration under the ICSID Additional Facility Rules.

4. Mekar was notified of the Dispute on 15 November 2020. Pursuant to Article 9.16, Vemma attempted to reach a mutually agreeable resolution with Mekar, which failed despite Vemma's best efforts. In accordance with the terms of CEPTA, Vemma is subsequently permitted to pursue arbitration.

Summary of Facts

<u>Vemma Acquires Caeli</u>

5. Vemma submits to arbitration through this Notice of Arbitration, the dispute concerning certain unfair treatment of Vemma's investment in Caeli Airways JSC ("Caeli Airways" or "Caeli") by the courts, the administrative bodies, and the government of Mekar.

6. As part of a privatisation program, Mekar decided to sell a controlling stake in the State-owned Caeli Airways. Mekar set-up a competitive bidding process, securing bids from various airlines.

7. Vemma's bid was successful and on 5 January 2011, Vemma acquired an 85% stake in Caeli Airways. Mekar maintained 15% ownership through Mekar Airservices Ltd.

8. Mekari officials cited Vemma's competitively priced bid and membership in the prestigious Moon Alliance as reasons for choosing Vemma to turn Caeli Airways into a profitable enterprise.

Vemma Turns Caeli into a Profitable Airline

9. Vemma invested significant capital into Caeli Airways. Within three short years of taking over the control and management of Caeli, Vemma turned Caeli into a venture generating net profit.

10. Caeli Airways' pricing strategy expanded its consumer base. Akin to other airlines such as Tui Airways, Airasia X, or WestJet, Caeli offered prices below competitors to attract existing customers, and to expand the overall consumer base by allowing more Mekari citizens to afford air travel.

Mekar Violates The CEPTA

11. Although Vemma's investment strategies were earning profit for both Caeli and Mekar, Mekar began to actively impede Vemma's efforts. Officials from Mekar Airservices pushed Vemma to halt the growth of Caeli Airways. Vemma remained confident in the investment and persisted with its successful strategy.

12. However, Vemma's investment in Caeli began to turn sour due a series of acts and omissions deliberately pursued by the Mekari State organs, government and, eventually, the Mekari courts. As expounded further in the Notice, taken together and individually, such acts and omissions constituted unfair and inequitable treatment of the investor by Mekar and ultimately led to the Respondent's capitalization on the investment to the detriment of Vemma. Together, these acts and omissions brought the investor to the brink of bankruptcy.

13. Despite Vemma's connection to the Moon Alliance being a selling feature of Vemma's bid to acquire Caeli, Mekar's administrative bodies used the Moon Alliance membership to unfairly prejudice Caeli Airways and Vemma.

14. The Competition Commission of Mekar (the "CCM") initiated an investigation against Caeli Airways in violation of Mekari law and the CEPTA. Under the *Monopoly and Restrictive Trade Practice Act, as Amended in 2009*, the CCM was not permitted to initiate an investigation against Caeli Airways when Caeli's market share was only 43%. Fellow members in the Moon Alliance should not have been considered by the CCM. Airline alliances are common in the global airline industry, as is slot-trading, and these are not grounds for concern about collusion.

15. The fines associated with the first CCM investigation, along with the consequence of the second investigation that was requested by Caeli Airways' competitors, were unfair and arbitrary. As part of these investigations, the CCM placed airfare caps on Caeli Airways. While the investigations were illegal, Vemma recognizes the caps—when implemented—were reasonable.

16. However, the maintenance of these caps came in the context of a deteriorating economic situation in Mekar. In late 2016, the Mekari MON began to rapidly decline in value. Despite the quickly changing value of the Mekari currency, the CCM continued to require Caeli Airways to abide by the now unreasonable and unnecessary airfare caps.

17. As the currency crisis continued, Mekar dramatically shifted its economic policy. Mekar required Caeli Airways to price its services in MON despite the constantly fluctuating price of the currency. Due to the long-term outlook of the airline industry, this change hurt Caeli Airways' profitability. Neither this change, nor the refusal to periodically revise the inflation rate could have mitigated any economic crisis in Mekar.

18. Mekar alleviated the economic harm only for Caeli Airways' competitors, which hurt Caeli Airways' market position further. On September 25, 2018, Mekar's President passed Executive Order 9-2018 which granted subsidies for airlines operating in Mekar. Nevertheless, Executive Order 9-2018 denied subsidies to Caeli Airways because Bonooru owns a significant stake in Vemma. This decision arbitrarily discriminated against Vemma, despite the fact that other non-State-owned airlines in Mekar receive greater subsidies from their home jurisdictions.

19. At this point, representatives of Vemma began to believe that Mekar was refusing to aid Caeli Airways in hopes to push Vemma to sell its investment. Certainly, this behaviour was in line with the hostile climate towards investors adopted by the new LPM government.

20. Caeli Airways fought these illegal actions in Mekari courts, but Vemma was denied justice. Mekar's courts were underfunded, leading to significant delays in hearing urgent matters. Even when its pleas were finally heard, Caeli's claims on the merits were dismissed prematurely. As a result, Caeli Airways suffered in the interim.

21. The cumulative effect of Mekar's unfair actions put Vemma in a dire financial situation. Left with no options, and an investment that was once profitable but was now hemorrhaging money, Vemma began looking for someone to purchase its stake in Caeli Airways.

22. Vemma acquired a *bona fide* offer from the third party, Hawthorne Group LLP, to buy Vemma's stake in Caeli. Under the Shareholders' agreement between Vemma and Mekar Airservices Ltd., Vemma was required to offer Mekar Airservices Ltd. the right to purchase the shares at the price offered by the Hawthorne Group.

23. Rather than buy the shares, or allow the purchase by the Hawthorne Group, Mekar Airservices disputed the validity of the Hawthorne Group's offer due to the Hawthorne Group's Moon Alliance membership. Mekar Airservices instead offered a significantly lower price for Vemma's stake in Caeli Airways.

24. The dispute over the validity of the Hawthorne offer was submitted to arbitration under the rules of the Sinnoh Chamber of Commerce with the seat of the arbitration in Sinnoh. Mr. Rett Eichel Cavannaugh was selected as the sole arbitrator by the SCC Secretariat, given that the parties failed to agree on the candidacy of the arbitrator in good time. This occurred in the context of the subsequent challenge of Mr Cavannaugh by Vemma on the grounds of his lack of impartiality, which was later confirmed by the relevant materials released by the Centre for Integrity in Legal Service (the "CILS") in its report dated 14 June 2020. Mekar Airservices Ltd. requested the sole arbitrator to declare the Hawthorne Group's offer untenable under Article 39(1)(a) of the Shareholders' Agreement. Mekar Airservices in essence sought to exclude the possibility of a *bona fide* third party purchasing Vemma's

investment for a reasonable price in order to force the investor to sell its stake to it at a fire sale price, as became plainly obvious soon after.

25. On 9 May 2020, Mr. Rett Eichel Cavannaugh released the award, ruling in favour of Mekar Airservices. The arbitrator's odd and short legal reasoning hinged on the unsupported finding that the Hawthorne Group offer was not an arm's length offer, given that the latter was "*affiliated with Vemma*" by virtue of their membership in the Moon Alliance. Immediately following the decision, Mekar Airservices sought to enforce the award in Mekar.

26. Following the release of the final award, the CILS issued a report showing that Mekar Airservices engaged in fraud and corruption by bribing Mr. Cavannaugh. Due to this revelation, Vemma approached a Sinnoh court seeking to set aside the award. On 1 August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the 9 May 2020 award on the grounds that the award was tainted with corruption, which violated the public policy of Sinnoh.

27. Despite the award being set aside in Sinnoh, Mekar's courts enforced the award on 23 August 2020. Enforcing an award that had been set aside at the seat of the arbitration grossly violated international conventions and agreements to which Mekar is party, as well as Mekar's own domestic law. Vemma tried to appeal this unjust decision, but it was ultimately forced by the outcome of these decisions to sell its shares at the rate offered by Mekar Airservices.

28. The unfair and illegal actions taken by Mekar, and by organs of the Mekari State, caused Vemma's investment to depreciate in value. Left with an investment that was a drain on Vemma's global operations, Vemma obtained a buyer to cut its losses. Instead of allowing it to cut its losses, Mekar's courts further compounded them by enforcing a tainted award, impelling Vemma to sell its stake far below a fair market value. After consistently being denied justice, and with no alternatives, Vemma commenced these arbitral proceedings.

Compensation Claim

29. Mekar's actions, either individually or taken together, breached Mekar's commitment to fair and equitable treatment in the CEPTA. Thus, Vemma is entitled to compensation.

30. Vemma hereby requests 700 Million USD in compensation corresponding to the "fair market value" of the investment prior to the violation by Mekar, according to both principles of international law and the most favoured nation obligation contained in CEPTA.

Prayer for Relief

31. In light of the above, Vemma respectfully requests the Tribunal to:
    a. find that the Respondent treated the Claimant's investment unfairly and inequitably and thereby breached Chapter 9 of the CEPTA;
    b. order Mekar pay the Claimant 700 Million USD plus interest as of the date of the violation; and
    c. order Mekar to reimburse the Claimant for all costs and expenses associated with this arbitration.

RESPONSE TO THE NOTICE OF ARBITRATION

Response to Notice of Intent to Submit a Claim to Arbitration

Under Chapter 9

of the Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement

Vemma Holdings Inc. (Claimant)

v

The Federal Republic of Mekar (Respondent)

1. Pursuant to the agreement of the disputing parties to apply the ICSID Additional Facility Rules, except to the extent modified by the provisions of Chapter 9 of the Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement (the "CEPTA"), the Federal Republic of Mekar (the "Respondent") provides this Response to the Notice of Arbitration filed by Vemma Holdings Inc. (the "Claimant").

Jurisdiction

2. The Tribunal does not have jurisdiction to hear the Claimant's case, given that the present dispute constitutes State-to-State arbitration.

3. Since its inception, Vemma has been beholden to Bonooru as the State has historically maintained a sizable stake in the company. As recognized by Bonooru's own highest courts, State shareholding in Vemma was preserved at all times for it to continue to perform the governmental functions of its State-owned predecessor. The founding documents of Vemma Holdings Inc. also indicate that it exercises its functions under the entrustment and/or direction of the Bonoori government.

4. Even if Vemma was not a State-owned enterprise at the time it made its investment in Mekar, it certainly acquired this status by March 2021. By that time, Bonooru increased its interest in Vemma to a controlling 55% stake. This fact, alone or considered in combination with Vemma's existing ties with the Government of Bonooru, indicates that Vemma qualifies as a State-owned enterprise. Therefore, this arbitration would in effect be between Bonooru and Mekar.

5. The ICSID Additional Facility Rules only contemplate proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, pursuant to Article 2 of the ICSID Additional Facility Rules. Mekar has not consented to State-State arbitration with Bonooru under Chapter 9 of CEPTA either.

6. In light of the foregoing, Respondent submits that Vemma is not entitled to bring the present claims under the ICSID Additional Facility Rules and CEPTA Chapter 9.

Response to claims on Merits

7. Alternatively, without prejudice to the Respondent's position on the lack of jurisdiction of the Tribunal over the present dispute, Mekar has not violated its obligations contained in Article 9 of the CEPTA.

8. The Federal Republic of Mekar has faced a tumultuous path to economic recovery. Since the mid-1920s, the colonial Pevensian administration in Mekar concentrated its industrial-development efforts in this under-populated and resource-rich province, resulting in a considerable influx of people into the territory from neighbouring agrarian provinces. However, since the decline of the Pevensian empire, Mekar's economy has suffered as both people and resources have left the nation.

9. For this reason, Mekar has maintained a cautious approach to economic governance post-independence. While Mekar has opened up to foreign investment since 1994, it has been careful not to compromise its right to regulate its internal affairs in the process. The CEPTA concluded between Mekar and Bonooru in 2014 provides for this right.

10. To successfully argue that its rights under the CEPTA have been breached, the Claimant must demonstrate that Mekar's actions exceed the regulatory authority that the CEPTA secures for its contracting parties. However, in light of the facts of the present case, the Claimant cannot possibly do so.

11. When the Claimant made its investment in the territory of Mekar in 2011, it also inherited debt liabilities associated with Caeli Airways. Given the Claimant's experience with the airline industry in its home State and globally, it could not have been blind to the volatility thereof. Despite this, the Claimant took an extravagant approach to its investment activities, funnelling funds towards rapid expansion and ill-strategised business plans instead of tending to long-term financial health. It did so against the clear warnings of the representatives of Mekar present on Caeli Airways' board. It is this risky strategy that precipitated into a precarious financial situation for the Claimant when the economic downturn hit Mekar.

12. The rapid expansion of Caeli Airways naturally drew the attention of the Competition Commission of Mekar ("CCM") and Caeli's competitors. It is important to recall here that even before the Claimant's investment was admitted in the territory of Mekar, it was sufficiently notified that any anti-competitive behaviour would be subject to the review of the CCM. The two investigations conducted by the CCM into Caeli Airways, and consequent fines imposed, were merely proper application of the domestic laws of Mekar, which were in force when the Claimant made its investment.

13. As an interim measure, and in the rightful and legitimate use of its faculties, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits. Caeli never protested the airfare caps, and there is no evidence the caps hurt its profitability in 2016. The airfare was only kept in place until 2019 due to clear evidence of anti-competitive behaviour by Caeli, including abuse of dominant position, predatory pricing, and unfair subsidization. As indicated, Mekar lifted the airfare caps as soon as Caeli's market share

(when considered in conjunction with the market share of its Moon Alliance partner, Royal Narnian) fell below 40%.

14. The Claimant also puts emphasis on the decision taken by Mekar´s government on 30 January 2018, requiring all companies operating in the country to offer goods and services denominated exclusively in MON. Trust in the MON has been fragile ever since the beginning of the economic crises. History is witness to many such currencies hit by crises whose value ultimately goes into free fall, unleashing catastrophe for the nation. A State's right to reduce reliance on foreign currencies, in order to mitigate against capital outflows and secure its macroeconomic situation, cannot be put on trial before this tribunal. Neither can its framework for inflation targeting.

15. The Claimant could not have expected Mekar to bail it out of a financial disaster of its own making. Mekar had no obligation under the CEPTA or international law to disburse its taxpayers' money to the Claimant. In any case, the Claimant enjoyed a benefit that several of its competitors in Mekar did not – continuous influx of funds from its home State under the Horizon 2020 Scheme.

16. Finally, the Claimant's allegations against the conduct of Mekar's judiciary come to nothing. Despite being overwhelmed by cases, Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority. The courts even managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters. Importantly, the courts enjoy the discretion to recognize and enforce an arbitral award that is set aside in the country, or under the law of which the award was made. They appropriately exercised this discretion, considering the evidence on record and the public policy of Mekar.

17. A country engulfed in economic crises has no obligation to cater to the whimsical demands of a foreign investor. Hence, not a single act or omission taken by Mekar can be construed to give rise to a breach of the fair and equitable treatment standard in the CEPTA. There is no basis in CEPTA or international law for the Claimant to argue that: despite not individually constituting internationally wrongful acts, a combination of acts or omissions can be considered to cumulatively constitute a composite breach of the CEPTA's fair and equitable treatment standard.

18. At the time the Claimant decided to sell off its stake in Caeli Airways, it still enjoyed considerable market share in Mekar, that would have allowed it to make quick recoveries when the crisis abated. Not only did the Claimant run Caeli Airways into the ground, but it also abandoned the enterprise at its own volition. During the course of the Claimant's investment, government officials from Bonooru have often exerted pressure on Mekar to treat the Claimant favourably. They have threatened to hold back funds promised to rebuild Phenac's port as part of the Caspian Project. The present claim is clearly retaliation against Mekar's refusal to relent to Bonooru's demands and must be dismissed as baseless.

Compensation Claim

19. Mekar has not violated the CEPTA and is confident that the Tribunal will also come to this conclusion. Therefore, Mekar owes no compensation to the Claimant. However, if the Tribunal concludes that Mekar has violated the CEPTA and owes the Claimant

compensation, the Tribunal should apply the "market value" standard contained in Article 9.21 of the CEPTA.

20. The Claimant cannot avail the "fair market value" compensation standard in respect of any alleged damage suffered. Neither the most favoured nation clause in the CEPTA nor international law allows the Claimant to derogate from the standard expressly prescribed in the CEPTA.

21. Due to the Claimant's inability to attract another suitable buyer for its shares in Caeli, and the currency crisis precipitating in Mekar, the Tribunal should find that Mekar has already paid the "market value" for Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million. Therefore, the Claimant is owed no compensation.

22. If the tribunal does not agree, any compensation awarded to the Claimant should be reduced primarily because that the Claimant bears responsibility for the losses it has incurred. The Claimant's rapid expansion in Mekar's market was ill-advised. Mekar, which continuously warned the Claimant against such an exorbitant approach, cannot be held accountable for the Claimant's risky business choices. Finally, any compensation that may be awarded would have to take the dire economic situation in Mekar into account.

Prayer for Relief

23. In light of the above, Respondent hereby respectfully requests the Tribunal to:

    a. Decline to exercise jurisdiction due to the Claimant's status as a State-owned enterprise;

    b. Find that Mekar did not violate Article 9.9 of CETPA; and

    c. In case the Tribunal finds Mekar did violate Article 9.9, then the tribunal should conclude Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

24. Respondent reserves its right to make detailed written submissions in course of these proceedings.

PROCEDURAL ORDER 1

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

Procedural Order No. 1

ICSID Case No. ARB(AF)/20/78

March 25, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

This first procedural order sets out the procedural rules to which the Claimant and the Respondent (the "disputing parties") have agreed, or which the Arbitral Tribunal has determined shall govern this arbitration.

I. THE TRIBUNAL AND ADMINISTRATIVE AUTHORITY

A. Constitution of the Tribunal

1. The disputing parties agree and confirm that the Tribunal has been duly constituted in accordance with Article 9.16 of CEPTA.

2. The disputing parties confirm that they waive any possible objection to the constitution of the Tribunal and to the appointment of each Member of the Tribunal on the grounds of conflict of interest and/or lack of independence or impartiality or any other ground in respect of matters known to them, or which reasonably should have been known to them based on available information, at the date of signature of this Procedural Order.

3. Each arbitrator is and shall remain at all times impartial and independent of the disputing parties and the Tribunal will take the IBA Guidelines on Conflicts of Interest of 2004 into account. Declarations of the Members of the Tribunal as to their independence and impartiality have been provided to the disputing parties in the form required by Article 13 of the ICSID Arbitration Rules.

[…]

B. Case Administration

5. ICSID shall administer the arbitral proceedings and will provide registry services and administrative support. The cost of ICSID's services will be calculated in accordance with ICSID's *Schedule of Fees* and shall be included in the costs of the arbitration.

6. Contact details of the Secretary of the Tribunal designated by ICSID further to the disputing parties' request are as follows:

Ms. Kaushiki Agarwal
International Centre for Settlement of Investment Disputes
1818 H Street N.W.
Washington, D.C. 20433
U.S.A. Tel: 202.473.9105
Fax: 202.522.2615
Email: kagarwal@worldbank.org

7. All correspondence and documents for ICSID in this arbitration will be delivered to the above address.

II. DISPUTING PARTIES AND THEIR REPRESENTATIVES

8. Each disputing party shall be represented by its respective counsel listed below and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Secretary of the Tribunal promptly of such intended designation, subject to the approval of the Tribunal.

9. Vemma Holdings Inc. represented by:

Ms. Vishakha Choudhary
Ms. Elina Arocena Basso
Mr. Mitchell Dorbyk

Choudhary & Partners LLP
124 Conch St., Bikini Bottom
Szeto, Bonooru
A1A 2B2

10. The Federal Republic of Mekar represented by:

Ms. Meagan Vestby
Ms. Aglaya Melnik

Mekari Ministry of Justice
1 Parliament Blvd
Phenac, Mekar
C3C 4D4

III. PLACE OF PROCEEDINGS

7. The place of proceedings shall be Szeto, Bonooru.

8. The hearings shall take place in Seoul, Republic of Korea. The Arbitral Tribunal may meet at any time and location it deems appropriate. The Arbitral Tribunal reserves the right to schedule hearings or meetings online where necessary and appropriate.

[…]

IV. FEES AND PAYMENTS

[…]

V. LANGUAGE

9. The Language of the Proceedings shall be English.

VI. WRITTEN AND ORAL PROCEDURES

[…]

17. The Tribunal is aware the parties have agreed to settle certain issues to limit the scope of this arbitration in order to save costs. The Claimant has agreed to limit its substantive claim to the alleged violation of Article 9.9 of the CEPTA. In turn, the Respondent has agreed to accept that all actions taken by Mekar Airservices Ltd. were at all material times attributable to the Federal Republic of Mekar.

18. The parties have agreed to a specialized procedure to save costs in relation to the compensation claim. Each party agreed not to hire their own respective experts to value the appropriate compensation amount if any compensation is granted. Instead, the parties will make submissions to the tribunal concerning the appropriate compensation standard between "market value" and "fair market value" and the relative compensation associated with each standard – including Mekar's submission that under a "market value" standard Vemma is owed no compensation. The Tribunal will also entertain arguments about whether any compensation paid to Vemma should be reduced considering the presence of mitigating factors. Exact valuations will be conducted at a later date through a tribunal-appointed expert.

19. If a request for the submission of an *amicus curiae* brief is filed, the Tribunal will give the appropriate directions in the exercise of its powers under Article 41 of the ICSID Arbitration Rules.

20. Any non-disputing party that is a person of a CEPTA Party or that has a significant presence in the territory of a CEPTA Party and wishes to file a written submission with the Tribunal (the "applicant") will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.

21. The application for leave to file a non-disputing party submission will:

(a) be made in writing, dated, and signed by the person filing the application, and include the address and other contact details of the applicant;

(b) be no longer than 5 typed pages;

(c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

(d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;

(e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;

(f) specify the nature of the interest that the applicant has in the arbitration;

(g) explain to the greatest extent possible, by reference to the factors specified in Article 41(3) of the ICSID Arbitration Additional Facility Rules and Article 9.19 of the CEPTA, why the Tribunal should accept the submission; and

(h) be made in a language of the arbitration.

[…]

VII. ORGANIZATION OF THE HEARING

26. The Arbitral Tribunal and the Parties have agreed that, although jurisdiction, admissibility, liability, and compensation may be addressed in separate stages, in these Proceedings, they shall be dealt with together in the "Main Stage".

27. The Main Stage will address:

a) whether the tribunal has jurisdiction over the present claims under Article 9 of the CEPTA and the ICSID Additional Facility Rules;
b) whether the Respondent has violated Article 9.9 of the CEPTA; and
c) if the Respondent has violated Article 9.9, what then becomes the appropriate basis for the grant of compensation.

Twyla Sands
President
On Behalf of the Tribunal
Date: March 25, 2021

AMICUS SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

APPLICATION FOR LEAVE TO FILE A NON-DISPUTING PARTY AMICUS CURIAE SUBMISSION

ICSID Case No. ARB(AF)/20/78

April 19, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

Application

1. The Consortium of Bonoori Foreign Investors ("CBFI") hereby applies for leave to file a non-disputing party submission in the Comprehensive Economic Partnership and Trade Agreement (the "CEPTA") Chapter 9 arbitration between Vemma Holdings Inc. ("Vemma") and the Federal Republic of Mekar ("Mekar") in ICSID Case No. ARB(AF)/20/78. The CBFI's application is made pursuant to Procedural Order No. 1 in this arbitration, Article 41(3) of the ICSID Arbitration (Additional Facility) Rules and Article 9.19 of the CEPTA.

2. The CBFI is a non-profit industry association that represents Bonoori investors investing in the Greater Narnian Region and internationally. The CBFI is the national leader in public policy advocacy on national and international business issues and is focused on fostering a strong, competitive economic environment that facilitates growth and development of Bonooru as well as the Greater Narnian Region.

3. Our members include businesses of all sizes, in all sectors of the economy, and all regions of Bonooru. No part of the association's income is payable to or otherwise available for the personal benefit of any proprietor, member, or shareholder of the association. No government, person or organization associated with Vemma or otherwise has provided financial or other assistance in the preparation of this document.

[…]

Disclosure

6. Thirty-eight (38) members of the CBFI hold investment rights in Mekar. Two such members, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against the Federal Republic of Mekar under Chapter 9 of CEPTA.

7. Vemma Holdings Inc. and Lapras Legal Capital are members of the CBFI in good standing. Lapras Legal Capital is advising Vemma on funding strategies with respect to its claim against the Federal Republic of Mekar.

Nature of Interest in the Arbitration

8. Bonoori foreign investors of all sizes rely on stable regulatory regimes secured through agreements between countries. In particular, the access to an independent and impartial judicial system that guarantees the rights of foreign investors against arbitrary acts of another sovereign is crucial in inducing the flow of capital from Bonooru into such States. Only by protecting this right uniformly can States in the Greater Narnian region continue to develop a marketplace that rewards investments in innovation and creation, and foster stronger economic growth, new jobs, and greater prosperity. To arbitrarily carve-out enterprises with formal or informal links to their countries of origin, a model that underpins the economies of most nations in the Greater Narnian region, would deal a death knell to the collective growth of the region, including that of Mekar.

9. The impact of the decision in this case on the interpretation of investor-State dispute settlement provisions of current and future investment agreements in Mekar holds significant interest for all Bonoori businesses, which are frequent investors in the country and have made sizable contributions of capital in Mekar.

Specific Issues of Fact or Law

10. This brief posits that society benefits from a robust, predictable investor-State dispute settlement (ISDS) regime that is consistent with international norms, that standing in ISDS is

intrinsically tied to a claimant's commercial activities alone, and that deviation from international norms facilitating participation of State-linked enterprises in commercial activities will have negative consequences on exchange of capital in Greater Narnia by introducing uncertainty into the business framework. Specifically:

- § The regulatory framework in Bonooru introduced through *inter alia* the Corporations Act 1969, the Privatisation of Enterprises Act 1972, the Air Corporation (Amendment) Act 1984 fosters market competition among business entities;
- § Bonooru's business landscape is primarily comprised of such entities competing based on free market principles without direction or instruction of the Bonoori government, irrespective of their ownership structure;
- § The nature of activities of such enterprises and not their purpose should guide a tribunal's decision;
- § The uncertainty generated by the invalidation of the standing of such enterprises to voice their grievances before a free and fair judicial system impacts future capital flows; and
- § This case will have global implications for the investment protection regime, which must not be represented as protective of "purely private investment".

Concluding Remarks

The attached brief is intended to provide context regarding the business climate of Bonooru, the existing corporate framework in which enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia. An attempt has been made to draw conclusions about the relationship between corporate governance framework and standing under ISDS provisions. An attempt has also been made to identify facts and business structures in impacting industries beyond the aviation sector that are crucial to the economic growth of Greater Narnia, merit protection under CEPTA, but may not otherwise find an audience within these arbitration proceedings.

Respectfully submitted:

[signed]

Gayathree Devi Kalliyat Thazhatuveetil
Director, Aviation Policy
Consortium of Bonoori Foreign Investors
221B Baker Street
Szeto, 1344 Bonooru
gkalliyat@cbfi.gov.bn

AMICUS SUBMISSION BY EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

APPLICATION FOR LEAVE TO FILE A NON-DISPUTING PARTY AMICUS CURIAE SUBMISSION

ICSID Case No. ARB(AF)/20/78

May 28, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

Dear Members of the Tribunal,

Amici respectfully request leave from the Tribunal to submit an amicus curiae brief, in the above-mentioned case, pursuant to Article 41(3) of ICSID's Arbitration (Additional Facility) Rules and Article 9.19 of the CEPTA. We present this request in good time prior to the hearing on the merits, so as not to disrupt the arbitral proceedings in accordance with the terms of cited Article 41(3).

Amici are members of Mekari civil society whose professional focus is investment banking. In 2010, *Amici* were engaged as external advisors to the Committee on Reform on Public Utilities ("Committee") set up under the Law on Privatisation of State Property ("Law on Privatisation") to advise on the privatisation, liquidation, and/or restructuring of Caeli Airways. *Amici* were selected for this role through a transparent and competitive process approved by the Cabinet of Ministers of Mekar and based on criteria of competence as identified in the Law on Privatisation. *Amici* had actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Vemma Holdings Inc. ("Vemma").

The tasks of the *Amici* in this process included performing an audit, an analysis of the economic, technical and financial performance of Caeli Airways, bringing indicators in the financial statements in line with accounting standards, the preparation of a financing model, the determination of the attractiveness of the enterprise for investors and ways to improve it, setting of the initial price and the preparation of an information package on the airlines, as well as identification of potential investors. For their work, *Amici* were remunerated with both a set fee and a success fee as a percentage from the sales price.

[…]

There is a clear public interest in the subject matter of this arbitration, especially in light of the aforesaid evidence that the rights received by Vemma Holdings were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee. The *Amici*, as independent advisors involved in the entirety of the privatisation process, are in the unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party.

Additionally, the *Amici* possess a general interest in promoting fair business practices in Mekar. The *amici* have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects. Finally, stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the *Amici*, who regularly advise potential investors prospecting opportunities in Mekar.

[…]

The assessment of the legality of Vemma's investment is crucial to the determination of the Tribunal's competence-competence. This arbitration raises important issues regarding the ability of investor-State dispute settlement to address public policy issues fairly and in an unbiased manner, taking the regulatory interests of the State into account. The nature of investor-State relations provides fertile ground for acts of corruption. To prevent this 'insidious plague' from upending investor-State arbitration, caution must be exercised in assessing Vemma's claims that remain tainted by allegations of corruption.

[….]

None of the *Amici* has received any financial or other support from any of the contending parties in relation to the elaboration of this submission.

[signed]

Andres Alvarado G
President
Committee on Reform of Public Utilities
55 Tina Fey Blv
Phenac, Mekar
meangirl123@gmail.com

VEMMA'S APPLICATION TO BAR THE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES

675

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

680

BETWEEN:

Vemma Holdings Inc.

Claimant

685 **AND**

The Federal Republic of Mekar

Respondent

690 ---

CLAIMANT'S COMMENTS ON APPLICATIONS FOR LEAVE TO FILE *AMICUS* SUBMISSIONS

695 **ICSID Case No. ARB(AF)/20/78**

June 15, 2021

TRIBUNAL:

700 **Ms. Twyla Sands (President)**

Mr. Long Feng

Professor Jaqen H'ghar

705

Dear Members of the Tribunal,

This arbitration has attracted significant submissions from potential *amici*. As explained further below, Claimant believes that the *amicus* submission by the Consortium of Bonoori Foreign Investors ("CBFI") reflects valuable perspectives that merit the Tribunal's attention. At the same time, *amici* participation should comport with the principles established by Article 41 of the ICSID Arbitration (Additional Facility) Rules and Article 9.19 of the CEPTA, and consequently be limited to "a matter within the scope of the dispute". The *amicus* submission by the external advisors to Mekar's Committee on Public Utilities Reform ("CPUR") fails to meet this threshold by raising a new jurisdictional question concerning the *ratione legis* jurisdiction of the Tribunal, a question that has not been raised by either party before the Tribunal until this time.

[...]

The CBFI is composed of members that have a significant interest in the stability and reasonableness of the investment protection regime in Mekar, especially in relation to availability of dispute settlement mechanisms under CEPTA. As set out in its application, CBFI represents firms of vastly different sizes that play different roles in the Mekari economy. Their interests may be equally impacted by the outcome of this arbitration – yet, they have no other voice before this tribunal.

[...]

In sum, the Claimant believes it is appropriate to grant leave to CBFI, whereas the Claimant has substantial concerns with respect to the content of the proposed submissions by the external advisors to the CPUR.

MEKAR'S APPLICATION TO BAR THE AMICUS SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

RESPONDENT'S COMMENTS ON APPLICATIONS FOR LEAVE TO FILE *AMICUS* SUBMISSIONS

ICSID Case No. ARB(AF)/20/78

June 18, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

Dear Members of the Tribunal,

We write to provide Mekar's comments on the requests to submit *amicus curiae* briefs filed in the above-captioned matter. Mekar supports openness and transparency in arbitration proceedings under Chapter 9 of the CEPTA, including through the appropriate participation of *amici curiae*. However, the parameters of such participation are those laid down in the interacting provisions of the ICSID Arbitration (Additional Facility) Rules and Article 9.19 of the CEPTA.

Further, pursuant to Article 9.20(6) of the CEPTA, Mekar asks that the Tribunal apply the UNCITRAL Rules on Transparency in Investor-State Arbitration to these proceedings.

In light of this, Mekar raises the following objections with respect to the application by the Consortium of Bonoori Foreign Investors ("CBFI"), elaborated in Sections [I.], [II.] and [III.] below:

1. CBFI does not file its *amicus* application in pursuit of any "public interest" or advance any novel arguments.
2. An essential attribute of *amici curiae* is independence from the disputing parties. The participation of Lapras Legal Capital in this arbitration through CBFI raises a conflict of interest. *Amici curiae* must also be able to assist the tribunal by offering a different point of view from that of the disputing parties, which the CBFI's application fails to do.

[...]

Thus, we request the Tribunal to reject the CBFI's submission and admit that submitted by the external advisors to Mekar's Committee on Public Utilities Reform, recognising the public interest inherent in only the latter.

PROCEDURAL ORDER NO. 2

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

Procedural Order No. 2

ICSID Case No. ARB(AF)/19/78

July 1, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

I. AMICUS SUBMISSIONS

1. The Tribunal has received observations from both disputing parties concerning two applications for leave to file *amici* submissions before it.

2. On 28 June 2021, the Tribunal and the disputing parties held a procedural conference in order to discuss the further procedure related to the aforesaid applications.

3. The Tribunal and the disputing parties have agreed that in light of the potential relevance of the contents of the *amici* submissions for the Tribunal's jurisdiction, approaching deadlines for the parties' written submissions, and the Tribunal's unavailability on subsequent dates feasible for the parties, the parties shall address the questions of the admissibility of the *amici* submissions in their upcoming written submissions. The Parties shall also be given the opportunity to address the admissibility of the *amici* submissions at the hearings scheduled for November 2021.

4. The Tribunal intends to issue a decision on admissibility of the *amici* submissions shortly after the oral hearings in November 2021. The Tribunal shall afford the parties to make further submissions in respect of the substantive content of any admitted *amici* submissions in writing, should either party wish to do so.

5. Subsequently, the Tribunal will render a decision on jurisdiction, considering the contents of the admitted *amici* submissions, if any. Should it find jurisdiction, the Tribunal's decision will be followed by an award on the merits. Given that the parties have agreed to submit arguments on compensation at the Main Stage, the determination of any potential compensation will be included in the final award. The Tribunal will then, if compensation is awarded, commission an independent expert to value the investment according to the tribunal's direction.

6. Mindful of the condensed procedure, the parties have agreed upon a Statement of Uncontested Facts produced below (**APPENDIX**). The Tribunal is grateful to the parties for working amicably to settle the facts.

II. UPDATED ORGANIZATION OF THE HEARING

7. The Tribunal and the disputing parties have agreed to a modified schedule for the Main Stage.

8. The Main Stage will address:

Phase I

a) whether the Tribunal has jurisdiction under Chapter 9 of the CEPTA;

b) whether the Tribunal should grant the leave sought for filing *amici* submissions;

Phase II

c) whether the Respondent has violated Article 9.9 of the CEPTA; and

d) if the Respondent has violated Article 9.9,what then becomes the appropriate compensation standard.

Twyla Sands
President
On Behalf of the Tribunal
Date: July 1, 2021

- APPENDIX -

STATEMENT OF UNCONTESTED FACTS

1. The Greater Narnian region is an unevenly populated area in the Eastern Ocean which spans 7.9 million square kilometres and amounts to 31% of the Aslanian continent. While much of Greater Narnia was a part of the Pevensian empire in the colonial era, the region today extends to 11 independent Aslanian nations. These nations maintain close ties with each other through a variety of treaties.

2. The Commonwealth of Bonooru ("Bonooru"), a developing country, sits at the northern tip of Greater Narnia. Following its independence from Pevensie in 1947, it moved from an agrarian economy to one heavily reliant on rich resource deposits in order to secure rapid industrialisation. Crude oil and natural gas, discovered in the early-1950s, dominate Bonooru's exports, with aviation, mining and finance being equally important economic sectors. Bonooru is a member of a union of the largest petroleum-exporting states, CEPO. CEPO coordinates petroleum supply policies of its members to ensure price stability on the international market.

3. For the first two decades after independence, Ty Lee, Bonooru's first elected Prime Minister, followed a policy of economic self-sufficiency. Major industries such as hydrocarbons and mining were nationalised, and governance was organised through five-year plans. State-owned enterprises ("SOEs") engaged in industrial production operated to achieve centrally planned output targets, whereas private enterprises and foreign investments were barred. However, concerns of inefficient allocation of resources impelled successive governments to gradually ease the State's regulatory role. Bonooru today operates as a market-based mixed economy. Its currency is the "Bakugo" or BAK.

4. Bonooru's move towards decentralisation has propelled it as the dominant capital exporter in Greater Narnia. By 2008, Bonooru's GDP was greater than the next five largest countries (by area) in the region combined. In 2010, Bonooru's government launched the Caspian Project, an initiative to facilitate the movement of goods, people, services, and knowledge amongst its neighbours. Bonooru plans to spend an estimated 100 Billion BAK between 2010 and 2030 to build infrastructure in Narnian States, with the long-term goal of redefining trade patterns. Some neighbouring States have welcomed the initiative, while others have accused Bonooru of using economic leverage as a tool of diplomacy.

5. Bonooru is an archipelagic State comprising 109 islands, of which only four are 'major islands' spanning over 5000 square kilometres. Due to the disparate nature of Bonooru's geography, its major public facilities such as healthcare and educational institutions are concentrated on these 'major islands'. To tackle this disproportionate distribution, Article 70 of the Constitution of Bonooru assigns special importance to mobility rights of its population (**Annex I**). In 1964, the Constitutional Court of Bonooru found that Article 70 bestows positive obligations upon the State to assist and ensure provision of essential transportation to the population living in remote areas (**Annex II**).

6. Historically, populations residing in remote, uneven terrains of Bonooru's islands were connected to each other and to the 'major islands' solely through waterways. With the advent and increased viability of commercial aviation, Bonooru channelled its resources towards developing a robust network of domestic airways. As of 2019, along with the related tourism sector, civil aviation contributed to nearly 13% of Bonooru's GDP and accounted for 11.6% of its total employment. The Civil Aviation Authority (the "CAA"), an arm of Bonooru's Ministry

of Transport and Tourism, regulates all civil aviation. Until 1979, the CAA was also responsible for management of Bonooru's national carrier and monopoly civil airline, Bonooru Air.

7. Following losses from the 1973 and 1979 oil shocks, the CAA restructured the state-owned BA Holdings, Bonooru Air's parent company, into an arms-length enterprise in an effort to enhance its profitability. A scheme to this effect was approved on 17 June 1980 under the Privatisation of Enterprises Act 1972. Pursuant to this scheme, the CAA planned to sell up to 70% stake in BA Holdings to a long-term investor and remain a minority shareholder. The scheme also contemplated the exclusion of domestic carrier competitors emerging from a potential breakup of Bonooru Air as bidders.

8. The intended privatisation of Bonooru Air was not well-received. Protesters blocked runways and demanded for the airline to be "*kept for the people*", voicing concerns that private ownership of the State's only airline would compromise their mobility rights. In a political rally held at Bonooru's capital, Szeto, on 10 November 1980, the then Prime Minister responded:

> "I urge you to ignore the unsubstantiated rumours. Our government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability. In fact, the planned privatisation will allow these routes, and others, to become more efficient and offer better services to our citizens than ever before."

9. The privatisation was briefly stayed until the Constitutional Court of Bonooru rejected a challenge to its constitutionality (**Annex III**). The process was completed on 19 December 1984. Simultaneously, Bonooru Air was split into three airlines. Among these, the Royal Narnian was chosen as the flag carrier of Bonooru, owned and operated by Vemma Holdings Inc. ("Vemma", the "Claimant"), BA Holdings' successor.

10. Vemma is an airline holding company incorporated in Bonooru with 100% ownership in Royal Narnian. From its date of incorporation until May 2020, Bonooru retained minority shareholding in Vemma, which ranged between 31% to 38%. Its right to hold such a stake is recognised in Vemma's memorandum of association (**Annex IV**). Other shareholders in Vemma Holdings include private and institutional shareholders from Bonooru and Goponga, a central-Aslanian nation.

11. Royal Narnian is a leading global airline, with a load factor close to 85.6% in 2019. In 1991, together with five major airlines from Europe, Asia, Latin America, and North America, the Royal Narnian created the Moon Alliance. Today, these alliance members cumulatively operate a fleet of nearly 4800 aircraft and serve over 1100 airports in 178 countries.

12. The Federal Republic of Mekar ("Mekar") sits approximately 1,600 km to Bonooru's south. In the aftermath of the Pevensian empire's decline, Mekar witnessed a period of prolonged political instability, characterised by mass migration from the country as well as exploitation of resource deposits by intermediate occupying powers. High regulatory intervention and late economic reforms starting in 1994 affected Mekar's post-independence growth. Transparency International has consistently scored Mekar between 30/100 to 36/100 on its corporation percentages index since the index's creation. Mekar's currency is the Mekari Mon ("MON").

13. Between 1980 and 2015, the population of Mekar grew from 6 million to 10.8 million. Its judicial system failed to expand at the same rate in this period. As a result, the average time taken from commencing an action to receiving a final decision in Mekari courts rose from 9

months in 1980 to 22 months in 2015. This was even higher in commercial matters (~27 months), as Mekar prioritized criminal cases to avoid prolonged detention for the accused.

14. Until 2003, Mekar's civil aviation industry consisted of Aer Caeli and Caeli Airways. Both state-owned enterprises enjoyed statutory monopoly, the former in respect of national routes and the latter in respect of international routes, till 1994. Both airlines witnessed staggered growth under the Labourers' Party of Mekar ("LPM") in power at the time. Between 1995 and 2004, LPM officials were accused of giving up profitable routes to private competitors, purchasing Airbus aircraft at exorbitant prices, and offering high productivity-linked incentives to persons occupying key managerial positions.

15. In 2003, the erstwhile Managing Director of Caeli Airways ("Caeli"), Mr. Yangchen Su, presided over a merger of Caeli Airways with Aer Caeli. Caeli Airways was making an operating profit but net loss at the time, whereas Aer Caeli was making a smaller profit having cut down its airfare to compete with more expensive alternatives. The merger resulted in ballooning debt, loss in market share, and projected decrease in future profits for the consolidated entity. Members of Mekar's Common Man's Party ("CMP") speculated that Mr. Su had pushed the merger in exchange for kickbacks from private competitors, who hoped to capture the lost market share.

16. In the aftermath of the unfavourable merger, attempts were made to privatise Caeli. However, the prevailing view in Mekar's Ministry of Civil Aviation was against relinquishing government ownership of the national carrier. Instead, Mekar passed Decree F-0056 on 14 February 2004 to extend government assistance to the airline in the form of bond issues facilitated by the government, soft loans on favourable terms, exemptions from navigation and landing fees, privilege in supply of fuel, among others. Mekar also enacted amendments to the decree in 2005 and 2006 to expand the scope of permissible infusions to debt forgiveness, tax and fees deferrals, and industry-specific forms of aid, such as fuel subsidies.

17. Despite this ambitious programme, budgetary constraints impacted Mekar's capacity to maintain Caeli's operating expenses and provide timely state aid. Governmental interference led to shifting managerial strategies, impeded Caeli's commercial flexibility, and abated its consumer-facing development. The 2008 financial crisis pushed Caeli to greater distress. It ended operations on routes that it had operated for several decades due to dwindling passenger numbers and increasing airport taxes. A second bailout plan tabled before the National Assembly failed to receive the required support, as legislators emphasised the need to end bail-outs to "zombie enterprises".

18. Inefficient government spending became a contentious point in the next midterm elections. These elections, held in November 2008, dented the LPM's overwhelming majority in the parliament. Shortly thereafter, Mekar's new cabinet - under the influence of a resurgent CMP - enacted the Emergency Recovery Act 2009, authorising large-scale privatisation of SOEs and rescinding bailout proposals. As the International Monetary Fund cut Mekar's growth forecast by 2.8 percent for 2009, the Ministry of Finance released a policy paper designating telecom company MekarTeleSystems ("MTS"), the State-owned railway, Mekar Lines, and Caeli Airways as appropriate for privatisation.

19. Additionally, to inspire investor confidence, the new legislature revised Mekar's Monopoly and Restrictive Trade Practice Act in 2009 (**Annex V**). This amendment envisaged the creation of a Competition Commission of Mekar ("CCM"), armed with an independent enforcement directorate. Ms. Moira Rose was appointed as the President of this agency. On the day of her

appointment, her office released a press statement detailing her vision "to see the CCM function as an autonomous body independent of government influence".

20. Starting in early 2010, Bonooru and Mekar began negotiations towards a comprehensive trade agreement. Early on in these negotiations, the drafters signalled their intention to include a chapter on investment protection, seeking to replace the 1994 BIT in force between the two States. While Mekar's senate also contemplated the possibility of acceding to the ICSID Convention, the proposal was ultimately defeated due to the perception that the Convention's rules favoured developed countries and scepticism towards the foreclosed possibility of domestic review of awards conflicting with Mekar's public policy.

21. Given its precarious financial condition, the privatisation of Caeli Airways took priority in the new cabinet's agenda. A decree to this effect was enacted in January 2010. Mekar's first two attempts at restructuring failed. Potential investors cited legacy issues such as debt liabilities attached to the airlines as the sticking point. A third attempt was launched in September 2010. In preparation for the same, renowned aviation consultant Goeffrey Hoytsman was appointed as the managing director of Mekar Airservices Ltd., a state-owned and controlled transition vehicle to which Caeli Airways' assets and part of its debt liability were transferred. Under his leadership, Mekar Airservices Ltd. marketed Caeli Airways' core assets to potential bidders – its brand and logo, valuable slots at two highly congested international airports, its profitable ground handling company CA Handling, and well-equipped technical base at Phenac, Mekar's capital. While bidders could purchase Caeli's aircraft and equipment as well as take on existing employees, there was no obligation upon them to do so.

22. Four companies, including Vemma, participated in the tendering process. On 23 November 2010, the same day as Vemma submitted its bid for the purchase of Caeli, the *Szeto Times* reported that Ms Sabrina Blue, erstwhile head of Vemma's board of directors, had been appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.

23. Vemma Holdings' bid proposal envisaged *inter alia* fleet renewal and expansion, as well as route expansion. Vemma also promised to sign leasing contracts for Boeing 737 aircraft on favourable terms and secure Caeli Airways' membership in the Moon Alliance. Its bid stated that it would refinance for the remainder of Caeli's debt liability from PJSC Bonoorian People's Bank ("BPB").[1] In an interview with Gloomberg, a Member of Vemma's board of directors explained "Caeli's contracts with Phenac International Airport would be lucrative to any investor. The repair and storage facilities at Caeli's disposal are the largest of any airline currently operating out of Phenac International, the largest airport in Mekar. This opportunity offers unparalleled access to Mekar's airline market to Vemma, one we are keen to take advantage of."

24. In addition to being the highest bidder, Vemma was found to have proposed the most financially attractive business model for Caeli Airways' short and medium-run development. The Group's tender valued at 800 million USD was accepted on 5 January 2011. However, select members of Mekar's Committee on Reform of Public Utilities noted that Vemma's proposal relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential take-over of the long-distance routes by competitors. The Chairperson of the committee was a strong proponent of selecting Vemma throughout the bidding process. He stressed that Vemma's ties to Bonooru were an asset. He also noted in his concluding remarks that he hoped

[1] BPB is a nationalised bank in Bonooru in which the government holds a 58.96% stake.

Vemma's imminent success would encourage more investors from Bonooru to consider Mekar as an investment destination.

25. The CCM approved Vemma's acquisition of an 85% stake in Caeli Airways and the airline's participation in the Moon Alliance on 5 March 2011. In respect of the alliance, the CCM noted that Caeli's partnership with Moon Alliance members would enable the airlines to offer new and improved services, as well as low-cost services due to economies of traffic density, boosting consumer welfare. However, the CCM sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

26. On 29 March 2011, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were beneficially owned by the Mekari State through Mekar Airservices Ltd. Simultaneously, Vemma and Mekar Airservices Ltd. entered into a Shareholders' Agreement (**Annex VI**). As part of its purchase, Vemma inherited existing discounts on airport services and landing and navigation fees enjoyed by Caeli Airways at Phenac International Airport, along with twelve relatively young A340 aircrafts. Those of Caeli's assets which were not transferred to Mekar Airservices were liquidated by the Mekari government. As soon as the acquisition was complete, Vemma announced tenders for purchase and lease of aircraft for Caeli.

27. Vemma realised its modest early forecasts for Caeli Airways. Despite rising fuel prices between 2011 and 2013, Caeli's operational costs did not overwhelm its revenues. Central to Caeli's stability was the geographic positioning of Phenac International Airport. As the economic centre of the world moved eastwards in the aftermath of the financial downturn, this positioning allowed Caeli to capture global connecting traffic flows and grow ahead of the market. Phenac was also closer to nearly 90 major regional airports in surrounding high-traffic destinations, which could not be well served by the widebody services offered by airlines in far-flung countries competing for connecting traffic. On the other hand, the eight purchased and fifteen leased Boeing 737 aircraft that Caeli added to its fleet in June 2011, through contracts with a fellow Moon Alliance Member, were optimal for this mid-haul journey. The consequent equipment and fuel efficiency allowed it to avoid the deep losses faced by its competitors. Caeli also benefited from its cooperation with other Moon Alliance members, especially the Royal Narnian, in respect of lounge access, terminals, IT platforms, check-in operations and code-sharing.

28. One of the pillars of Caeli Airways' business model during this period was catering to customers travelling from Mekar to Bonooru. Traditionally, Bonooru attracted business travellers from Mekar and other neighbouring countries, routes that Caeli Airways had flown frequently under State ownership. In 2011, Bonooru's Minister of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project to "optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures". A key part of this Scheme was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru. Vemma received the first subsidy under this Scheme on 28 October 2011. Ms. Sabrina Blue, when pressed on the rationale behind these subsidies by opposition party members, stated in June 2011 before the House of Commons that:

> "In its application, Vemma has credibly outlined how its investment in Caeli Airways would draw more travellers from Mekar and the Greater Narnian Region to Bonooru's emerging

tourism markets. Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal."

29. Over the course of 2012, natural formations from the Eldin volcanic eruption piqued tourist interest in Mekar, which was further buoyed by the inexpensive MON. To capitalise on this growing interest, Vemma Holdings decided to offer low-fare, long-distance flights into Mekar. Against the advice of Mekar Airservices, who preferred network development focused on frequency of domestic flights in the initial years following privatisation, Vemma concentrated efforts on expanding routes for cross-continental travel to Mekar using its A340 fleet, adding 20 new destinations in 2012. At the first annual shareholders' meetings, representatives of Mekar Airservices cautioned the new Vemma-appointed management against taking an "extravagant approach", given the volatility of demand in the region, and especially in Mekar, during fall and winter months. However, representatives of Vemma argued that to limit expansion would mean forfeiting unclaimed market share.

30. From August 2011 to December 2013, Caeli Airways was able to capitalise on a much larger demand - both domestically, with an average increase by 21% from 2010 to 2013, and internationally, with an average increase by 17% from 2010 to 2013 - than it had expected and generate significant cash-flow. In this period, it was also able to refinance its inherited debt liability from BPB at more favourable rates than available on the market. While its revenues declined during the fall and winter quarters of these operating years, its summer and spring revenues cushioned its losses. The fall-winter decline was more than Vemma, which was accustomed to constant demand from business travellers in Bonooru, had expected.

31. Citing these losses, representatives of Mekar Airservices cautioned that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and hedge the liability of additional financing. Conversely, Vemma's representatives on Caeli's board continued to project optimism based on the airline's 2013 earnings. In the first quarter of 2014, the board decided to increase the number of Caeli's international routes to offset the losses incurred regionally during the fall-winter season. Vemma hoped that the profitability of cross-continental routes during the high-demand season would generate the additional resources needed to maintain the part of the fleet that was not used during particular periods.

32. In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (CEPTA). The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.

33. In June 2014, oil prices around the globe crashed to a five-year low due to steadily rising supply from non-CEPO countries.[2] Caeli Airways turned a net profit over the whole year for the first time since its acquisition. Its fall-winter losses, while far lesser than those incurred in 2013, were particularly concentrated in the high-traffic routes between Bonooru and Mekar, where regional competitors offering low-fare flights emerged quickly. A podcast published by *Phenac Business Today* (**Annex VII**) suggested that Caeli Airways should cut back its operation on these routes.

[2] According to the CEPO Secretary-General, these prices "have already hit bottom. We do not see the possibility of further decline and are even preparing for a strong uptick in prices in the near future".

34. Data released by Caeli Airways for 2014 indicated that while its low pricing did now allow it to turn as large a profit on each passenger as compared to its competitors, it received a much higher footfall. Caeli recorded a consistently high load factor over the course of the operating year by combining high employee and aircraft productivity with low unit costs. Additionally, it captured market share lost by its Mekari counterparts that saw the benefits of cheap fuel being eaten away by their risky hedging strategies. As opposed to Caeli Airways' predecessor, which had carried about 15-20% of passengers flying to and from Mekar, now approximately 35% of all Mekari citizens flew the cheaper Caeli Airways. Continuing decline in fuel prices over 2015 allowed Caeli to shore up even greater profits.

35. While board representatives from Mekar Airservices preferred injecting these profits into outstanding debt and improving financial health, Vemma's representatives preferred fleet expansion and slashed airfares. At the end of 2015, Caeli placed orders for 45 Boeing 737 MAX aircraft and increased flying hours of its older aircraft, whose operational expenses were reduced in the wake of plummeting oil prices. It invested its earnings, as well as a new credit line, into two strategic programmes to consolidate its consumer base. The first was a frequent-flyer programme, which allowed flyers to exchange accumulated points for free or enhanced services, and even benefits at supermarkets and gas stations. The second was a corporate-discount scheme offered to small and mid-sized enterprises. By June 2016, Caeli became the only consistently profitable carrier on over half the routes to and from its base airport, Phenac International.

36. Caeli's rapid expansion drew the attention of the CCM, which launched a *suo moto* investigation into its activities ('*the First Investigation*'). In its press release dated 9 September 2016, the CCM indicated its intention to investigate whether Caeli had adopted predatory pricing strategies with the aim of hindering competition on the domestic market. At the time of the investigation, Caeli enjoyed a 43% market share in Mekar. CCM Vice-President Iroh Iwamatsu explained the decision in a circular as follows: "when considered in conjunction with its Moon Alliance partner, Royal Narnian, Caeli's market share exceeds 54%. We believe it is appropriate to consider this composite market share given the evidence of preferential secondary slot-trading between the Royal Narnian and Caeli. We are also concerned that foreign subsidies received by Vemma under the Horizon 2020 programme enabled Caeli's predatory pricing strategies. In this light, proactive action is necessary: we cannot wait for Caeli to drive out smaller competitors to take corrective steps."[3] To date, the CCM has not investigated any other airlines alliance members active in Mekar, alone or in combination.

37. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future. These airline caps were set reasonably above the rates Caeli Airways charged on set routes. A statement released by the airline on its website referred to the CCM's approval decision of March 2011 and noted "the CCM has never indicated any anti-competitive concerns arising from low or mid-level cooperation among Moon Alliance members. There is no reason that it should suddenly factor in these members to determine Caeli's market share in Mekar." While it also objected to the CCM's investigation

[3] Until 2015, the CCM maintained that "[w]here foreign subsidies take the form of financial flows facilitating acquisitions of Mekari companies or where they directly support the operation of a company in the Mekari, or facilitate bidding in a public procurement procedure, there appears to be a regulatory gap." In July 2016, CCM released a White Paper wherein it noted that "the disciplines of the amended MRTP Act concerning 'Agreements or Arrangements that Prevent or Lessen Competition Substantially' are wide enough to envisage market-disruptive agreements between two enterprises operating in Mekar, one of whom is a state-owned enterprise providing financial contribution to the other".

into subsidies received under the Horizon 2020 Scheme, Caeli cooperated with the CCM at every step. It did not protest the airfare caps, and there is no evidence the caps hurt its profitability in 2016.

38. In December 2016, a consortium of small regional airlines in Greater Narnia, led by one of their Mekari members, brought another complaint before the CCM, alleging that Caeli "launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalising on its undercutting policies and the privileges it enjoyed at Phenac International Airport". According to these companies, Caeli's actions made it nearly impossible for them to penetrate the market linked to Phenac International, which effectively became a "fortress hub" for Caeli. The CCM launched another investigation into Caeli's business activities focusing specifically on price undercutting on certain routes to and from Phenac International ('*The Second Investigation*'). Caeli Airways maintained that it did not enjoy any dominance on these short-distance routes, since it was competing with train, car, and bus journeys rather than the said regional airlines alone. Caeli also stressed that most of its business was on long-haul routes from Phenac International, which these regional airlines were not flying.

39. Meanwhile, starting in late 2016, the Mon began to nosedive. While economists disputed the predominant cause of the Mon's fall, most often cited reasons included shaky investor sentiment, State interference with the central bank, and tariff threats from trading partners. High foreign-currency debt also resulted in Mekar running deficits in both its fiscal and current accounts. By March 2017, a currency crisis ensued in Mekar. Simultaneously, increasing inflation led to a surge in costs of everyday items and reduced consumer spending power. The IMF emphasised "the need to establish credibility in the [local] currency to avoid a debilitating economic situation".

40. As of July 2017, Caeli was unable to secure a steady stream of revenue. It requested meetings with Mekar's Secretary of Civil Aviation to seek permission to denominate its airfare in US dollars instead of the Mon till the crisis abated. In their letter, representatives of Caeli stressed that without the approval, the airline would not be able to maintain sustainable revenues during the less profitable winter season, when most of its customers were Mekari citizens rather than summer tourists. It also pointed to the need for regular cash flow to maintain its fleet and pay interest under its leasing contracts and debts. Having received several similar requests, Mekari authorities approved the denomination of airfare in US dollars for all airlines operating in its territory in October 2017.

41. With the economy in freefall, the LPM was elected back to an overwhelming parliamentary majority in November 2017. The LPM's campaign blamed the "crisis of catastrophic proportions" on the privatisation program and vowed to return the country to the Mekari people. In December 2017, as the macroeconomic situation in Mekar continued to deteriorate, the new government approved various acts authorizing bailouts to State-owned or controlled corporations, especially in the hydrocarbon sector. It also shelved large parts of its ongoing privatisation programmes and multiple enterprises in the tourism sector were re-nationalized. Additionally, many foreign investors pulled out of Mekar's market.

42. On 30 January 2018, with a view to stabilise its currency, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in Mon; this nullified the short-lived exemption granted to airlines. The Deputy Chairman of Caeli Airways' board of directors, senior director of Vemma, protested this

change. He called for an urgent meeting between the representatives of Vemma, Mekar Airservices Ltd. and Mekar's Secretary of Civil Aviation, stating:

> "Airlines cannot survive when forced to accept customers who are using a rapidly deteriorating currency. Our customers are not like those who buy a sandwich at a local restaurant; ours book their flights often several months in advance of their travels. If Mekari citizens can book a flight for a price in Mon, then by the time that flight takes off, this currency will be worth far less to our business. However, we will still be forced to pay the rising oil and food prices for that flight the day of, now for much more Mon. This will damage the viability not just of Caeli Airways, but all airlines operating in Mekar."

43. Caeli also requested the CCM to remove the interim airfare caps imposed on it in September 2016. With ticket prices now denoted in Mon, Caeli emphasised the need to raise its fares with rising inflation. Moreover, the airfare caps set by CCM were pegged to Mekar's official inflation rate calculated by the Central Bank, released each year in December. Caeli representatives felt this was insufficient as inflation had been increasing exponentially over the previous months and by the end of 2018 could be much higher than anticipated by the December 2017 statistic. The CCM denied Caeli's request, reasoning that the interim measures could not be removed until its investigations were complete, and that interference with inflation rates was beyond its competence. On 8 March 2018, Caeli's board voted to seek judicial review of the CCM's airfare caps. They sent multiple letters to the Central Bank to revise the inflation rates, to which it received responses directing it to the Central's bank long-standing policies of not responding to individual corporate requests.

44. While Caeli's claim against the CCM was registered on 27 March 2018, a hearing on interim measures was scheduled only in April 2019 due to a high volume of cases stemming from the economic crisis. Caeli's lawyers urged for an immediate hearing to secure a stay on airfare caps. In its motion, Caeli Airways stressed the dire financial situation it faced, which it could not have foreseen when the airfare caps were implemented. The Court Registrar rejected the request for a separate hearing on interim measures:

> "Several parties have appeared before this Court seeking immediate redressal. However, the Court does not have the resources to make this possible. Moreover, we continue to prioritise criminal matters due to their far-reaching consequences."

45. By the end of August 2018, the CCM concluded its First Investigation into the commercial activities of Caeli Airways and issued a voluminous report on the results of the investigation. The CCM report found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. The report also noted that the subsidies received by Vemma under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs. Accordingly, the CCM imposed a total penalty of MON 150 Million on Caeli. The CCM also decided to keep the airline caps in place pending the Second Investigation. Representatives of Caeli unsuccessfully tried to secure meetings with the CCM enforcement directorate to delay the imposition of the fines.

46. Over the course of the next few months, Mekar attempted to alleviate some of the airline industry's concerns. On 25 September 2018, the President passed Executive Order 9-2018 (**Annex VIII**), granting subsidies to airlines for each Mekari citizen travelling on board. The Order vested discretion with respect to grant of subsidies to the Secretary of Civil Aviation. Caeli Airways' application for subsidies under this Order was rejected by the Secretary, who did not indicate the reasons for the dismissal. Foreign airlines such as Star Wings and JetGreen,

both owned by holding groups from Arrakis, received subsidies under this program despite having received subsidies from their home States greater than Vemma received under the Horizon 2020 programme. In an interview on 17 October 2018, Mekar's deputy Minister of Transportation rationalised that:

> "Whether our government gives taxpayers money to one company or another is strictly up to our Congress. In any case, authorities worldwide have recognized that State-owned companies have unique advantages over other companies that enable them to outcompete privately-owned firms. It would be unfair to grant certain State-owned companies even more of an advantage in our airline market to the detriment of our people."

47. Caeli Airways was one of the only two airlines owned in any significant part by a foreign government operating in Mekar at the time, the other being the wholly government-owned Larry Air. Neither received subsidies under Executive Order 9-2018.

48. Meanwhile, oil prices in 2018 rose to the highest since 2013 as a result of global sanctions on two major oil-producing nations. This left Caeli Airways in a state of deeper financial distress, especially due to its continued operation of old aircraft until this time. Its regional operations also suffered when Mekar decided to ground all Boeing 737 MAX aircraft in its airspace. This decision was taken following an accident on 29 October 2018 when a 737 MAX crashed after take-off from Jakarta, killing all 189 on-board. No other country grounded Boeing 737 MAX aircraft until March 2019, following a second crash which was confirmed to be based on the same technical failure as the first crash.

49. On 1 January 2019, the CCM completed its Second Investigation into Caeli. Its report concluded that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. Specifically, it was found to have abused its dominant position to extract significant additional privileges in terms of airport service fees from Phenac International Airport, which allowed it to undercut ticket fares and eventually push other competitors off the market consisting of routes to and from Phenac International. Moreover, Caeli's exclusionary strategy was inferred from the fact it had introduced excessively low prices only on routes to and from Phenac International and that its strategy could only run competitors out of the market, without helping Caeli gain new customers or increase revenues. Consequently, a fine in the amount of MON 200 million was imposed on Caeli Airways. The CCM also decided to continue to impose airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in, were to fall below 40%. While this market share stood at 42% at the time, Caeli continued to incur significant losses on the routes it operated.

50. Caeli countered that the privileges cited by the CCM in its report were part of the original privatisation package, which the CCM had approved in March 2011. On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. Caeli asked that this appeal be joined with the April 2019 hearing on the airfare caps. The registrar denied this request on 26 January 2019, reasoning that "the April 2019 hearing shall remain solely concerned with the airfare caps. The CCM has requested time to respond to Caeli's notice, which must be afforded to protect its due process rights. As is required under Mekari law, any fines cannot be enforced pending Court review. Therefore, this is hardly an immediate concern." The registrar subsequently scheduled an initial hearing on the Competition Authority's fines for May 2020.

51. Facing the risk of insolvency, Caeli Airways applied for a 200 million USD loan to the State-controlled bank of Mekar, First National Phenac, in order to be able to service its other

debts. On 8 February 2019, the bank offered a credit line at an inflated interest rate. In a letter addressed to Caeli, the Chairman explained that this decision was premised on the CCC+ rating assigned to Caeli by the Investment Information and Credit Rating Agency ("IICRA") earlier that month.[4] In turn, the IICRA memorandum explaining its rating decision noted that it had taken into consideration "risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM". Caeli refused this loan.

52. From 25 April 2019 to 27 April 2019, Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps. Justice VanDuzer reserved his judgment for a written decision to be delivered on a subsequent date.

53. Repeated requests from the deputy CEO of Vemma and a member of Caeli's board Ms. Yue Beifong for private meetings with the Secretary for Civil Aviation and stronger aid measures were rejected. From May through June 2019, Caeli Airways was forced to shut down several loss-making routes, return aircraft to their lessors following the breakdown of sale and leaseback deals, lay off 30% of its staff, cancel existing purchase orders, and ground large parts of its fleet. Various cost-cutting measures employed in this time such as extra charges for baggage and refreshments also hurt Caeli Airways' popularity. Aviation Analytics, a leading international quarterly, pinned Caeli's fate on enthusiastic overexpansion and the unforeseen financial situation in Mekar (**Annex IX**).

54. On 15 June 2019, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them. A passage from the decision explaining this conclusion read:

> "While this Court may not agree with the Competition Commission's rationale, the Court finds that the decision reached by the Commission was within a range of potentially reasonable conclusions given the facts before it. The Court also takes note of the previous conduct of the party seeking the temporary injunction. It is mindful of the large market share that the Applicant enjoys in Mekar, which would allow it to recover quickly in the aftermath of the economic crisis. Hence, on a balance of convenience, the Court declines to grant an interim removal of the airfare caps applicable to the Applicant.
>
> Further, the Court has considered the Applicant's *prima facie* case on the merits in its examination of this request for temporary injunction. It does not foresee the possibility of arriving at a different final decision. Therefore, to save the precious resources of our courts, and to avoid the parties waiting in anticipation, the Court also dismisses the merits of the Applicant's appeal at this point."

Under Mekari law, Caeli Airways has no further appeal.

55. By the third quarter of 2019, Caeli's market share in Mekar dropped below 40%, with its operations on most routes generating deep losses. The CCM lifted the applicable airfare caps in October 2019.

56. Despite this decision, at the November 2019 meeting of Caeli Airways' board, representatives of Vemma announced their intention to sell their stake in Caeli Airways, given the burgeoning liabilities of the enterprise. Vemma secured an offer from Hawthorne Group LLP, a Sinnoh-based private equity firm with stakes in numerous low-cost airlines, for Vemma's entire

[4] IICRA is a governmental credit rating agency tasked with assessing creditworthiness of State-owned or State-related enterprises in Mekar.

stake in Caeli Airways. In a notice dated 9 December 2019 (**Annex X**), Vemma communicated the terms of this offer to representatives of Mekar Airservices.

57. In its response dated 17 December 2019, Mekar Airservices rejected the offer, deeming the price offered to be artificially inflated and not an arm's length commercial price. It noted that "the right to offer the shares at 'the price proposed by a *bona fide* third-party purchaser' does not extend to offering them at a price proposed by the Hawthorne Group or its affiliates, which are associated to Vemma Holdings through the Moon Alliance." After failed negotiations between the two parties, Mekar Airservices filed a request for arbitration on 11 February 2020 with the Sinnoh Chamber of Commerce's ("SCC") Arbitration Institute under the SCC Arbitration Rules (**Annex XI**) and Article 48 of the Shareholders' Agreement. It requested the tribunal to find that Vemma had failed to secure a *bona fide* third party offer under Article 39 of the Shareholders' Agreement.

58. Upon the parties' failure to agree upon a sole arbitrator, the SCC Secretariat appointed 78-year-old Mr Rett Eichel Cavanaugh to adjudicate the dispute. Mr Cavanaugh, a Gopongan national, is a renowned scholar in the arbitration sphere. Following a fast-track arbitration procedure, the sole arbitrator rendered an award in favour of Mekar Airservices on 9 May 2020. The award declared that the Hawthorne Group's offer in respect of Vemma's shares in Caeli could not be considered as one received from a "*bona fide* third party" due to its "affiliation" with Vemma via the Moon Alliance.

59. Over the next few weeks, multiple publications emerged in paywall-secured arbitration reports that had obtained access to the award, heavily criticizing Mr. Cavannaugh's legal reasoning. Concurrently, Mekar Airservices filed an application before the High Commercial Court of Mekar, seeking recognition and enforcement of the award.

60. A report released on 14 June 2020 by the Centre for Integrity in Legal Services ("CILS") (**Annex XII**), a non-profit organisation in Mekar, alleged that Mr. Cavannaugh had received bribes from representatives of Mekar Airservices to render a favourable decision. CILS leaked several sensitive case materials to the press, including correspondence between Vemma and the SCC Secretariat, in which Vemma opposed the Secretariat's appointment of Mr. Cavannaugh on the grounds that he had previously acted as arbitration counsel for various Mekari State entities. Additionally, CILS released an audio-recording as part of its leaks, allegedly capturing a conversation between Mr. Cavannaugh and a senior official from Mekar Airservices, with the former accepting a bribe offered by the latter. In a press release that immediately followed publication of the 14 June 2020 CILS report, Mekar Airservices strongly denied bribery allegations and authenticity of the recording produced by CILS. Vemma filed for the set aside the award of 9 May 2020 at the court in Sinnoh.

61. On 1 August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the award (**Annex XIII**) pursuant to Vemma's application. The judge found that "failure to set aside the award would contravene the objective of combating bribery" and, therefore, would be contrary to the public policy of Sinnoh. The Supreme Arbitrazh Court is the first and only instance in relation to the set aside proceedings. The 1996 Arbitration Act applicable to its proceedings is largely based on UNCITRAL Model Law.

62. Nonetheless, Mekar Airservices sought to enforce the 9 May award before the High Commercial Court of Mekar. On 23 August 2020, the Court issued a ruling recognizing and enforcing the 9 May 2020 award in Mekar (**Annex XIV**). Vemma appealed the judgment before the Superior Court of Mekar, arguing that the award could not be enforced once it was set aside

at the seat of the arbitration. On 25 September, the Superior Court dismissed Vemma's appeal (**Annex XV**).

63. Vemma's efforts between February and September 2020 failed to yield another buyer for its shares. As a result, Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD. Simultaneously, it filed a notice of arbitration against Mekar on 15 November 2020 to seek compensation for its losses under the CEPTA.

64. With Vemma's departure, the market share of Caeli in Mekar dropped below 30%. Taking note of the same and recognising that the latter was on the verge of bankruptcy, the CCM authorised the Ministry of Civil Aviation under the "public interest" exception of the MRTP's rules on state aid, to infuse capital in Caeli and forego fines due to the CCM until such time as its financial recovery was complete, for which it received approval from CCM. Under Mekar Airservices, Caeli dropped its appeal against the decision of the CCM-imposed fines, hearings in respect of which were held in May 2020, but a written decision was never released. By the end of April 2021, Mekar Airservices successfully negotiated restructuring deals with the two largest banks in Mekar. Further, Caeli Airways was also granted tax breaks for the following years, pursuant to an order from Mekar's Tax Authority.

65. Meanwhile, Vemma's losses on its investment in Caeli significantly hurt its financial standing and it contemplated scaling back the services offered by Royal Narnian to compensate. When news of Vemma's plans to minimise Royal Narnian's services broke in Bonooru, protests erupted on several islands. Opposition parties in Bonooru's government began demanding action by the State to secure the citizens' rights under Article 70. Under civil and political pressure, Bonooru implemented a bail-in program through the Airways Infrastructure Rescue Act on 2 March 2021, allowing it to purchase increased shares in Vemma. Bonooru increased its shareholding in Vemma to 55%, following which Vemma underwent large-scale restructuring: its board of directors was replaced with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar.

66. Both Bonooru and Mekar are parties to the Vienna Convention on the Law of Treaties, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The arbitration laws of Bonooru and Mekar are based on UNCITRAL Model Law.

ANNEX I

Constitution Act of Bonooru, 1947

Preamble

Whereas Bonooru is founded on the Supremacy of the Rule of Law

…….

Article 70

Mobility Rights

Recognizing the unique geography of Bonooru -

(1) Every citizen of Bonooru has the right to enter, remain in, and leave its territory;

(2) Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands;

(3) Section 70 is subject to limitations that are minimally impairing and justified in a free society.

ANNEX II

Constitutional Court of Bonooru on Mobility Rights (excerpts)

The National Ferry Workers Union (Appellant)

v

Bonooru (Minister of Transportation) (Respondent)

CCB Case No. 1964-08

[...]

Article 70 of the *Constitution Act, 1947*

[23] The National Ferry Workers Union asserts that the government is under a positive obligation to fund ferry transport free of charge between the islands of Kyoshi and Xeroxas. Both parties agree that the Constitutional Court has to date, not found such positive obligations inherent in Article 70. Each side has pointed the Court's attention to lower courts that have ruled in both directions on this matter.

[24] While it is true that the government has typically provided this service free of charge, we are unpersuaded that it has an obligation to do so in perpetuity. Citizens of both islands can still travel between the two. The government has not instituted any barrier that would prevent travel.

[25] However, the Court is persuaded that there is a positive component to Article 70, even if that obligation is not infringed here. By including the words "shall ensure" in the Constitution, the drafters signalled their intention not only to protect citizens of Bonooru from government interference, but also to have the government provide them a right that is easily denied by our country's unique geography. This does not mean though that all travel within, and outside, Bonooru must be provided free of charge as would be the logical end of the Applicant's argument.

[26] Ferry services will be provided, at what the Court is persuaded, is a modest and affordable fee. No significant barrier is raised against citizens' mobility rights that cannot be justified under Section 70(3).

[27] The Court therefore dismisses the Applicant's argument that Section 70 has been violated.

ANNEX III

Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts)

The People's Council of the Island of Kyoshi (Appellant)

v

Bonooru (Attorney General) (Respondent)

CCB Case No. 1981-17

[...]

The Alleged Violation of Article 70 of the *Constitution Act, 1947*

[55] The Court finds no violation of Article 70. The government's privatisation of Bonooru Air does not violate the mobility rights guaranteed to the people of Bonooru.

[56] As this Court has previously established, Article 70 imposes positive obligations on the State to enable citizens' mobility through the archipelago. That applies not only to boat travel as in *National Ferry Workers Union v Bonooru (Minister of Transportation)*, CCB Case No. 1964-08, but also to air travel. While travel through waterways was the dominant means to connect Bonooru's disparate communities at the time its Constitution was drafted, airlines now largely fill the role ferries once did. As a result, air travel serves a unique purpose in Bonooru compared to other nations around the globe. Without modern air travel, most of our citizens could not move between our islands or even leave the islands for another nation.

[...]

[59] In conclusion, the Court is not convinced that the privatisation of Bonooru Air impedes the achievements of the State's positive obligation. The Court is satisfied that the government has ensured that there are protections for our citizens' access to mobility. The provisional Memorandum of Association of Vemma Holdings Inc., the primary successor to BA Holdings, ensures that Royal Narnian will continue to operate routes to remote communities. The airline, as the flag carrier, will also continue to enjoy subsidies under Bonoori law for flights offered on routes of significance to mobility of disparate communities. Combined with Bonooru's continued, although minority, participation through Vemma Holdings Inc., we are sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit.

[60] This action is dismissed.

ANNEX IV

Memorandum of Association of Vemma Holdings Inc.

1. The registered name of the company shall be Vemma Holdings Inc. ("Company").

2. The registered office of the Company shall be 4, Navalny Drive, 0934 Szeto, Bonooru.

3. The objectives for which the Company is established are:

a) To establish and continue business as a national airline and air transport undertaking, to provide air transport services for passengers and cargo, to carry out all other forms of aerial work, and to carry on any other trade or business which is calculated to facilitate or is auxiliary to or associated with such business;

(…)

c) To construct, equip, maintain, work, purchase, let or hire aircraft and/or hovercraft for the carriage of passengers or freight;

(…)

f) To obtain all licences and authorizations necessary for the aforementioned purposes;

g) To apply for and take up or acquire by way of exchange or otherwise and to hold or sell and dispose of the shares or securities of any other company carrying on or about to carry on business and amalgamate with any such other company or companies;

h) To assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities;

[...]

l) To acquire by subscription, purchase or otherwise and to accept and take, hold, or sell shares or otherwise and to accept and take, hold, or sell shares or stock in any company, society or undertaking the objectives of which are similar to those of this Company in whole or in part.

m) To enter into and carry into effect arrangements for joint working in business or for sharing profits or for amalgamating with any other company or any partnership or person carrying on business within the objects of this Company;

[...]

p) To establish, promote and otherwise assist any company or companies for the purpose of furthering any of the objectives of this Company;

q) To establish or promote the establishment or promotion of any other company whose objectives have been calculated to advance directly or indirectly the objectives or interests of this Company and to acquire and hold shares, stocks, securities, or any other obligations of any such company;

[...]

Each sub-clause shall be construed independently of the other sub-clauses hereof and none of the objectives mentioned in any sub-clause shall be deemed to be merely subsidiary to the objectives

mentioned in any other sub-clause or to be in any way limited or restricted by reference to or inference from the terms of any other sub-clause.

[...]

4. The share capital of the Company is BAK 740,160,020. It is divided into 740,160,020 shares, each with a nominal value of BAK 1, with power to the Company to increase or reduce the said capital and to issue any part of its capital, original or increased, subject to the conditions laid down in the Articles of Association of the Company and the laws and regulations in force in Bonooru.

5. The signatories of this Memorandum shall subscribe to the capital of the Company in the amount of 544,096,025 (Five Hundred Forty-Four Million Ninety-Six Thousand and Twenty-Five) shares. The remaining shares, amounting to 196,063,995 (One Hundred Ninety-Six Million Sixty-Three Thousand Nine Hundred Ninety-Five) shares may be offered for public subscription in accordance with the provisions of the Articles of Association.

[...]

We, the several persons whose names, addresses and descriptions are subscribed, apply for the registration of the Company under Section 7 of the Companies Act and take the number of shares in the capital of the Company set opposite our respective names.

Name, address, description of subscriber	Number of shares	Signature
[Intentionally omitted]	*[Intentionally omitted]*	*[Intentionally omitted]*
Ministry of Transport and Tourism PO BOX 7878 SZETO	222,048,006	

Articles of Association of Vemma Holdings Inc.

[...]

7. From the date on which the Articles of Association come into effect, the Articles of Association constitute a legally binding document regulating the Company's organisation and activities, as well as the rights and obligations between the Company and each shareholder and among the shareholders.

8. The Articles of Association are binding on the Company and its shareholders, directors, supervisors, president, vice-presidents, and other senior officers; all of whom may, according to the Company's Articles of Association, assert their rights in respect of the affairs of the Company.

[...]

152. The Company shall establish its Board of Directors, which shall be the Company's decision-making authority.

[...]

152.2. The Board of Directors shall consist of eight (8) directors, including five (5) executive directors, one (1) non-executive director, one (1) independent director and one (1) director representing the employees.

152..3. An executive director is a director who concurrently holds a senior management position in the Company.

152.4. A non-executive director is a non-independent director who does not hold any other position in the Company other than a director position. The Ministry of Transport and Tourism shall nominate one of its officials for the non-executive director position.

152.5. An independent director does not hold any other position in the Company and has no relationship with the Company that might influence his or her independent objective judgement.

152.6. The nominee(s) for the director representing employees shall be elected at the employee representative meetings.

152.7. The Board shall have one (1) Chairman and may have one (1) Vice Chairman.

152.8. The Chairman of the Board of Directors shall be the Company's legal representative. The Chairman of the Board of Directors may concurrently serve as the Company's President.

ANNEX V

Monopoly and Restrictive Trade Practice Act, as Amended 2009

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in Mekar, and for matters connected therewith or incidental thereto.

[...]

CHAPTER III: TRIBUNAL INVESTIGATION

(1) The CCM has the sole competence to initiate an investigation concerning potentially anti-competitive behaviour.

(2) The CCM may open an investigation into behaviour it deems anti-competitive, *suo moto* if the following circumstances are met:

(a) a corporation obtains a market share greater than 50%. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share. The use of discretion should be exceptionally rare;

(b) the corporation poses a unique threat to the competition in a particular market; and

(c) there is evidence the corporation's actions have, or are likely to in the near future, push competitors out of the market.

(3) The CCM shall open an investigation into potentially anti-competitive behaviour of a Corporation where:

(a) a complaint it brought to the CCM by a direct competitor in the market; and

(b) the corporation has at least a 10% market share.

(c) The CCM must consider whether sufficient evidence is brought by the direct competitor before exposing a corporation to a potentially costly investigation.

(4) If an investigation is opened, the investigation shall be conducted as follows:

[...]

(d) the Tribunal shall have the power to impose any interim and final remedy it deems just under Mekari law, including fines, the forced sale or assets, or other measures to bring a corporation in line with this Act. For this purpose, it may impose any behavioural or structural remedies which are proportionate to the infringement committed and only to the extent necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy;

(e) in cases of urgency due to the risk of serious and irreparable damage to competition, the Tribunal, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures for preventive purposes. Such a decision shall apply for a specified period of time and may be renewed insofar this is necessary and proportionate; and

(f) the Tribunal shall preference compliance with the Act over punitive measures.

CHAPTER IV: OFFENCES

Abuse of Dominant Position

Definition of anti-competitive act

For the purposes of the following section, anti-competitive act, without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

[...]

(h) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Prohibition where abuse of dominant position

Where, on application by the Commissioner, the Tribunal finds that:

(a) one or more persons substantially or completely control, throughout Mekar or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Aggravating or mitigating factors

In determining the amount of an administrative monetary penalty, the Tribunal shall consider any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made;

(f) whether the practice is a result of superior competitive performance; and

(g) any other relevant factor.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

If the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order:

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Factors to be considered

In deciding whether to make the finding referred to in the preceding paragraph, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

(b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(c) any barriers to entry into the market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

(d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);

(e) the extent to which effective competition remains or would remain in the market;

(f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;

(g) the nature and extent of change and innovation in any relevant market;

(h) consumer welfare and public interest; and

(h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

Evidence

The Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

ANNEX VI

Caeli Airways

Shareholders' Agreement relating to Caeli Airways

Mekar Airservices Ltd. (1)

Vemma Holdings Inc. (2)

Caeli Airways JSC (3)

SHAREHOLDERS' AGREEMENT

Relating to Joint-Stock Company Caeli Airways

This Agreement, made and entered into this 29th day of March, 2011

BETWEEN

Mekar Airservices Limited

6 Brezhnev Sq

Phenac, Mekar

8A7 86

AND

Vemma Holdings Incorporated

4 Navalny Drive,

Szeto, Bonooru

0934

AND

Caeli Airways Joint-Stock Company

47 Gagarin St,

Phenac, Mekar

8A7 87

[...]

WHEREAS the present distribution of the Company's shares is as follows:

Mekar Airservices Limited	30 000 Ordinary Shares
Vemma Holdings Incorporated	170 000 Ordinary Shares

[...]

Section V

Buyback right and right of first refusal

[...]

Article 39

Right of First Refusal

1. During the term beginning on the date of expiry of the Buyback Period in Section 1 of Article 37 of the Agreement and ending on the date of < … > (the "Right of First Refusal Period"), Vemma Holdings shall not, directly or indirectly through an affiliate, enter into any agreement or consummate any transaction relating to disposal of shares in the Corporation with any Person other than Mekar Airservices (a "Third-Party Transaction") except in compliance with the terms and conditions established in this Article.

(a) If, at any time during the Period enshrined in paragraph 1 of this Article, Vemma Holdings receives a bona fide written offer for a Third-Party arm's length Transaction that Mekar Airservices desires to accept (each, a "Third-Party Offer"), Vemma Holdings shall within thirty (30) days following receipt of the Third-Party Offer notify Mekar Airservices in writing (the "Offer Notice") of the identity of all proposed parties to such Third-Party Transaction and the material financial and other terms and conditions of such Third-Party Offer (the "Material Terms"). Each Offer Notice constitutes an offer made by Vemma Holdings to enter into an agreement with Mekar Airservices on the same Material Terms of such Third-Party Offer (the "Right of First Refusal Offer").

(b) At any time prior to the expiration of the 30 (thirty) - day period following Mekar Airservices' receipt of the Offer Notice (the "Exercise Period"), Mekar Airservices may accept the Right of First Refusal Offer by delivery to Vemma Holdings of a binding letter of intent containing the Material Terms provided, however, that Mekar Airservices is not required to accept any non-financial terms or conditions contained in any Material Terms that cannot be fulfilled by Mekar Airservices as readily as by any other Person.

(c) If, by the expiration of the Exercise Period, Mekar Airservices has not accepted the Right of First Refusal Offer, and provided that Vemma Holdings has complied with all of the provisions of Section 1 of this Article, at any time during the 45 (forty-five) - day period following the expiration of the Exercise Period, Vemma Holdings may consummate the Third-Party Transaction with the counterparty identified in the applicable Offer Notice on Material Terms that are the same or more favourable to Mekar Airservices as the Material Terms set forth in the Offer Notice. If such Third-Party Transaction is not consummated within such 45 (forty-five) - day period, the terms and conditions of Section 1 of this Article will again apply and Vemma Holdings shall not enter into any Third-Party Transaction during the Right of First Refusal Period indicated in Section 1 of this Article without affording Mekar Airservices the right of first refusal on the terms and conditions of Section 1 of this Article.

(d) For the avoidance of doubt, the terms and conditions of Section 1 of this Article apply to each Third-Party Offer received by Vemma Holdings during the Right of First Refusal Period.

[...]

Section VII

Article 48

Dispute Settlement

[...]

3. Any dispute, controversy, or claim arising out of or in connection with this Agreement, or the breach, termination, or invalidity thereof, shall be finally settled by international arbitration administered by the Sinnoh Chamber of Commerce Arbitration Institute.

a. The seat of arbitration shall be Sinnograd, Sinnoh.

b. The language to be used in the arbitral proceedings shall be English.

c. The arbitral tribunal shall be composed of a sole arbitrator.

4. Except as may be required by law applicable to the Agreement, neither the Parties nor the arbitrator may disclose the existence, content, or results of any arbitration without the prior written consent of both Parties, unless to protect or pursue a legal right.

[...]

ANNEX VII

Phenac Business Today Podcast Transcript, 17 November 2014

Phenac Business Today bt

Host: Welcome back to all our listeners here in Mekar and across Greater Narnia. My guest today is Ms. Misty Kasumi. Misty is a former high-ranking employee within Bonooru's Ministry of Tourism. Four years ago, she left Bonooru and now works here in Phenac as a Professor of Economics at the University of Phenac. Welcome Misty.

Misty: Thank you for having me.

Host: We've brought her in to talk about one of the hottest companies in Mekar at the moment, Caeli Airways. Since the privatisation of Caeli Airways, it has become…somewhat of a star company here on Mekar…

Misty: Certainly! I've even heard many people point to it as an example of why privatisation has been a success here in Mekar.

Host: Well, it seems you are ready to get right into things!

Misty: I am! I've been doing a lot of research on the investments Bonoori corporations have been making as part of the Caspian Project, and Caeli is a very interesting one.

Host: So, you're on board with the hype around Caeli? Is it the next Emirates?

Misty: I don't know if I would go that far. Certainly, the growth rate has been staggering. I cannot take that away. But there is still room for improvement on the business model.

Host: Improvement? I'm interested in what you think is being done wrong. Obviously, things seem to be going quite well. And with Vemma running Caeli with years of experience in Royal Narnian, things seem destined to succeed.

Misty: I would say things look very likely to succeed. However, there are two things I want to bring to your attention. First, the global airline market is propped up by low fuel prices at the moment. Caeli Airways has benefitted from this to some degree. Do I think if the oil prices go up, Caeli will fail? No. But certainly the rapid growth is a risk.

Host: So, you're saying you think if prices go up, Caeli Airway's growth will slow?

Misty: Maybe. There are lots of airlines right now only propped up by these low oil prices. It is entirely possible prices going up could be a blessing for Caeli Airways. If they can remain steady then some competitors may go under, as has historically been a trend when oil prices rise. In that situation, Caeli Airways could hike their prices with a lack of competition and make even more

profit. But there are other concerns, which is the second point I wanted to make. Coming from Bonooru I'm well aware of how our corporations can be….different.

Host: Different how so?

Misty: Different in that corporations tend to not be fully independent. Or sometimes independent at all, from the government. It is a well-known fact that even Royal Narnian receives quite a lot of state aid, which is part of the reason it is so profitable. If you look at Caeli Airways' flight patterns, significant resources are put into flights between Mekar and Bonooru.

Host: That must be nice for you!

Misty: Yes (*laughs*) it certainly makes going home to see family easy. But these routes are actually not profitable for Caeli Airways. You need to contextualize Vemma's investment in the context of Bonooru's Caspian Project and the Horizon 2020 scheme. There's no way of knowing for sure, as Bonooru and Vemma would never admit this, but these routes seem to more benefit Bonooru than Vemma or Caeli.

Host: So you think there is something shady going on here?

Misty: Well….maybe. Yes and no. It could be a long-term strategy by Vemma to grow a market. Or it could be some sort of closed-door deal, arrangement, whatever…. with Bonooru where Vemma ensures that Caeli Airways flies these routes to benefit Bonooru. I still have connections in the Bonoori Government, but I haven't heard of any officials telling Vemma to invest in Mekar. I think we all know that Bonooru wants more integration and control in our region. That being said, all of this is speculation. I have seen some of these types of things while I was living and working in Bonooru….but I can't say for sure. And can't leak confidential information I have from when I was an employee obviously.

Host: Hmmmm, I see.

Misty: Oh, and a third point actually. Apologies.

Host: No! Please go ahead, this is all very interesting.

Misty: Caeli Airways' business model is based around undercutting competition with low prices. That's not a good long-term model, although maybe it is a good long-term outlook to be using it now. Caeli Airways can't afford to keep its profit margins on each customer so low. If the number of consumers were to drop, or if costs of operating were to rise. Although if Caeli Airways builds goodwill and brand recognition in Mekar, then that will certainly serve it well in the long run where they could then afford to raise prices slightly.

[...]

ANNEX VIII

Executive Order 9-2018

To provide emergency assistance and health care response for individuals, families, and businesses affected by the 2017 economic crisis. [...]

CHAPTER 31

AIR SERVICES

SEC. 3101. EMERGENCY RELIEF THROUGH LOANS AND LOAN GUARANTEES

(a) IN GENERAL. —Notwithstanding any other provision of law, to provide liquidity to eligible businesses related to losses incurred as a direct result of the 2017 crisis, the Secretary of Civil Aviation is authorized to make or guarantee loans to eligible businesses that do not, in the aggregate, exceed MON 230,000,000,000 and provide the subsidy amounts necessary for such loans and loan guarantees in accordance with the provisions of the Credit Reform Act of 2004.

(b) Distribution of Loans and Loan Guarantees. —Loans and loan guarantees made pursuant to subsection (a) shall be made available to eligible business as follows:

(1) Not more than MON 150,000,000,000 shall be available for passenger air carriers.

(2) Not more than MON 80,000,000,000 shall be available for cargo air carriers.

(c) Loans and Loan Guarantees. —

(1) IN GENERAL. —The Secretary shall review and decide on applications for loans and loan guarantees under this section and may enter into agreements to make or guarantee loans to one or more obligors if the Secretary determines, in the Secretary's discretion, that—

(A) the obligor is an eligible business for which necessary credit is not reasonably available at the time of the transaction;

(B) the intended obligation would not skew market conditions in favour of one or more enterprises;

(C) the intended obligation by the obligor is prudently incurred; and

(D) the loan is sufficiently secured.

SEC. 3102. CONTINUATION OF CERTAIN AIR SERVICE.

The Secretary of Civil Aviation is authorized to require, to the extent reasonable and practicable, an air carrier receiving loans and loan guarantees under section 3101 to maintain scheduled air transportation service as the Secretary of Civil Aviation deems necessary to ensure services to any point served by that carrier before September 25, 2018. When considering whether to exercise the authority granted by this section, the Secretary of Civil Aviation shall take into consideration the air transportation needs of small and remote communities.

ANNEX IX

Aviation Analytics June 7, 2019

Our readers will likely be aware that Caeli Airways, once a shining star in the global aviation market, has been downsizing its operations. So, what happened? And what could have been done differently? That's what we hope to explore today.

When Vemma acquired Caeli Airways back at the start of the decade, the honeymoon period was better than industry experts anticipated. Vemma, for the past 20 years or so, has been quite successful globally with Royal Narnian and other investments. Caeli's success should not have been that big a surprise. But the rapid rise of Caeli Airways to a peak valuation of 1.1 Billion is quite impressive.

Vemma has near assurances that Bonooru would step in if anything bad were to happen to its prized national-carrier's owner. With that in mind, it is no wonder Vemma has taken bold, and often risky, investments in distressed airlines worldwide. These types of investments sometimes pay off big, as seen with Caeli's previously sky-high valuation. But as we wait, Bonooru has not stepped in to save Caeli when that strategy turned sour. Although, it has been reported widely that behind-the-scenes, Bonoori officials are putting pressure on Mekar, especially by holding the Caspian Project related expansion hostage.

The rapid expansion of Caeli Airways was ill-advised. Almost any industry expert would agree. Caeli benefited from low oil prices, like many other airlines, who are now facing the realities of rising fuel prices and having to shut down. Perhaps if Caeli Airways had focused on its debts, this situation would not have occurred. Although, it is hard to blame a company for its failure to predict often unpredictable commodity prices.

It would also be hard for Caeli Airways, which is partially owned by Mekar, to predict that Mekar's administrative bodies would act so harshly. The investigations by Mekar's competition authorities raise concerns for our industry as a whole. Consider the Competition Authority's use of the Moon Alliance to justify serious fines for unfair business practices. Our industry has long fought for the reality that airline alliances are not cartels or monopolies. Yet, the CCM seemed to arbitrarily disagree.

Caeli's downfall, realistically, resulted from multiple factors. Piecing together what is really to blame will take time. But as it stands, it is sad to see an industry giant suffer.

ANNEX X

Right of First Refusal Offer Notice

To: Mekar Airservices Limited
6 Brezhnev Sq
Phenac, Mekar
8A7 86

From: Vemma Holdings Incorporated
4 Navalny Drive
Szeto, Bonooru
0934

RE: Your right of first refusal under the Shareholders' Agreement relating to Joint-Stock Company Caeli Airways between Mekar Airservices Ltd., Vemma Holdings Inc. and Caeli Airways JSC (the "Shareholders' Agreement"), which was signed and entered into force on March 29, 2011.

We, Vemma Holdings Incorporated, wish to enter into a share-purchase agreement with Hawthorne Group LLP for the sale of 170 000 (one hundred seventy thousand) Ordinary Shares in Caeli Airways JSC for a consideration of USD 600 million paid in cash.

In accordance with Article 39 of the Shareholders' Agreement, before we can enter into the Proposed Agreement, we are obliged to offer you, Mekar Airservices Ltd., the opportunity to enter into an agreement with us on the same material terms as the Proposed Agreement.

The material terms of the Proposed Agreement are:

[...]

Section 3. PURCHASE PRICE.

3.1 The Purchase Price is USD 600 million, which shall be satisfied by the Buyer by:
(a) paying USD 600 million in cash on Completion, such payment to be made in accordance with Clause 3.2.

3.2 All payments to be made to the Seller under the Proposed agreement shall be made in MON by electronic transfer of immediately available funds to the Seller's Solicitors, Choudhary & Partners LLP, who are irrevocably authorised by the Seller to receive the same. Payment in accordance with this clause shall be a good and valid discharge of the Buyer's obligation to pay the sum in question and the Buyer shall not be concerned to see the application of the monies so paid.

[...]

This notice constitutes a binding offer to you to enter into the Share-Purchase Agreement for the purchase of 170 000 (one hundred seventy thousand) Ordinary Shares in Caeli Airways JSC with us on the above terms.

This offer is open for acceptance until 23:59 GMT on 7 January 2020. If we have not concluded a binding agreement by such time, this offer shall lapse, and we shall be entitled to conclude the Proposed Agreement with Hawthorne Group LP.

You may accept this offer by forwarding to us at the above address a signed copy of this notice or a binding letter of intent containing the above terms.

SIGNED: Rachelle Bader Ginsburg (Chief Executive Officer of Vemma Holdings Inc.)
DATE: 9 December 2019

For and on behalf of Vemma Holdings Inc.

ANNEX XI

Arbitration Rules of the Sinnoh Chamber of Commerce (effective 28 December 2017)

[...]

Article 20

Appointment of Arbitrators

(a) The parties may agree on a procedure for appointment of the Arbitral Tribunal.

(b) Where the parties have not agreed on a procedure, or if the Arbitral Tribunal has not been appointed within the time period agreed by the parties or, where the parties have not agreed on a time period, within the time period set by the Board, the appointment shall be made pursuant to paragraphs (c)–(f).

(c) Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given 10 days to jointly appoint the arbitrator. If the parties fail to appoint the arbitrator within this time, the Secretariat shall make the appointment.

[...]

Article 31

Challenge of Arbitrators

(a) A party may challenge any arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed by the parties.

(b) A party may challenge an arbitrator it has appointed, or in whose appointment it has participated, only for reasons it becomes aware of after the appointment was made.

(c) A party wishing to challenge an arbitrator shall submit a written statement to the Secretariat stating the reasons for the challenge, within 15 days from the date the circumstances giving rise to the challenge became known to the party. Failure to challenge an arbitrator within the stipulated time constitutes a waiver of the party's right to make the challenge.

(d) The Secretariat shall notify the parties and the arbitrators of the challenge and give them an opportunity to submit comments.

(e) If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board shall take the final decision on the challenge.

ANNEX XII

14 June 2020 Centre for Integrity in Legal Services Report

Summary of findings

1. In the wake of serious criticisms of the highly controversial award rendered in the dispute between Vemma Holdings Inc. and Mekar Airservices Ltd. by the sole arbitrator Mr Rett Eichel Cavannaugh on 9 May 2020, CILS obtained access to materials that contain irrefutable evidence of the Gopongan arbitrator, commonly known as "*the Nefarious REC*", accepting a bribe in an unspecified amount from Mekar Airservices, the Claimant in aforementioned dispute.

2. The materials, which constitute the contents of this Report, include the transcript of the leaked audio recording of a conversation that took place in the beginning of April 2020 between Mr Cavannaugh and an unidentified representative of Mekar Airservices (**Annex I of the Report**). The contents of the recorded conversation indicate that the sole arbitrator agreed to receive a kickback from the Claimant in return for rendering the award in its favour in clear terms. It appears that explanation for the bizarre legal reasoning which has been subject to ample discussion within the legal community over the past month is finally here.

3. Being a non-profit organization, the goal of which is to promote transparency of litigation and arbitration, as well respect for and protection of due process rights not only in Mekar but across all of the Greater Narnian region, CILS is compelled to release the materials currently in its possession, together with the report of three independent experts based in Goponga and Mekar who have confirmed that the voice on the recording is indeed that of Mr Cavannaugh (**Annex III of the Report**). The immutable credentials of each of these experts are also appended to this Report (**Annex IV of the Report).**

4. The materials also include leaked correspondence between the Respondent in the arbitration with the Secretariat of SCC, in which Vemma fervently opposes appointment of *Nefarious REC* as the sole arbitrator upon discovering that he was appointed by the Secretariat (**Annex II of the Report**). In its correspondence with the Secretariat, Vemma lays out extremely convincing arguments against appointment of the Gopongan arbitrator (which, in the opinion of CILS, should normally lead to immediate decision by the administering institution to dismiss the arbitrator). The subsequent decision of the Board of the SCC, pursuant to Vemma's challenge of the arbitrator, to dismiss the challenge to the appointment of Mr Cavannaugh is thus of great concern.

ANNEX XIII

Supreme Arbitrazh Court of Sinnograd Ruling

Neutral Citation Number: [2020] SACS 2058

CASE NO: CO/1052/2020

IN THE SUPREME ARBITRAZH COURT OF SINNOGRAD

Date: 1 August 2020

Before

LORD JUSTICE SINGH

And

MR JUSTICE HOLGATE

Between

Vemma Holdings Inc. [Claimant]

-and –

Mekar Airservices Ltd. [Defendant]

APPROVED JUDGMENT

Introduction

1. This is an application submitted by the Claimant, Vemma Holdings Inc., to set aside the arbitral award rendered on 9 May 2020 by the Tribunal comprised of the sole arbitrator Mr Rett Eichel Cavannaugh in favour of the Defendant, Mekar Airservices Ltd. (hereinafter "the award") on the basis of Articles 34(2)(a)(iv) and 34(2)(b)(ii) of the Arbitration Act of the Principauté de Sinnoh (hereinafter "the Arbitration Act").
2. The award finds that the offer to buy the majority stake of the Claimant in Mekari airline Caeli Airways JSC made by the third-party buyer, Hawthorne Group LLP, does not constitute a "*bona fide* written offer for a Third-Party arms-length Transaction" pursuant to Article 39(1)(a) of the Shareholders' Agreement relating to Joint-Stock Company Caeli Airways signed between the Claimant, the Defendant and Caeli Airways JSC on March 29, 2011.
3. Vemma advances two grounds for the set aside enshrined in Articles 34(2)(a)(iv) and 34(2)(b)(ii) of the Arbitration Act. First, the Claimant submits that the award should be set aside owing to the fact that the composition of the arbitral tribunal (the sole arbitrator), was contrary to the agreement of the parties. The Claimant stresses that it objected to the appointment of the sole arbitrator due to his perceived impartiality, Mr Rett Eichel Cavannaugh, and subsequently challenged his appointment.

   Second, and in reality, the Claimant's principal case before this Court, is the invocation of public policy ground for set aside of the award in 34(2)(b)(ii) of the Arbitration Act. Vemma posits that on 14 June 2020 irrefutable evidence indicating that Mr Cavannaugh accepted

bribes was leaked by a non-profit organization based in Mekar, the Centre for Integrity in Legal Services (hereinafter "CILS"). The Claimant relies heavily on the report of the independent expert appended to the CILS publication, in which the expert confirms authenticity of the recording and that the voice on of a man purportedly accepting bribe is that of Mr Cavannaugh. [...]

4. Mekar Airservices contends that the Claimant cannot rely on Articles 34(2)(a)(iv) of the Arbitration Act to set aside the award given that the appointment of the sole arbitrator was made by the Sinnoh Chamber of Commerce (hereinafter "SCC") Secretariat in line with provisions of the SCC Arbitration Rules, and the challenge of Mr Cavannaugh submitted by Vemma was duly dismissed by the Board of SCC. [...]

5. The Defendant vehemently denies both authenticity of the CILS report relied on by the Claimant and argues that this Court cannot rule on whether the bribery had actually taken place. [...]

6. One of the central issues before this Court is what weight, if any, can be given to the evidence submitted to the Court by the Claimant indicating corrupt behaviour on the part of Mr Cavannaugh in discharging his functions as the sole arbitrator. [...]

7. Another consequential issue that arises before this Court is whether, in the event that the Court finds that it cannot rule if the act of bribery had in fact occurred, under the existing circumstances the failure to set aside the award would contravene Sinnoh's public policy.

8. The Court further acknowledges that the parties are in dispute on the matter of whether Articles 34(2)(a)(iv) of the Arbitration Act may be invoked in the situation where appointment of the sole arbitrator was unsuccessfully challenged before the Board of the arbitral institution. [...]

9. Articles 34(2)(a)(iv) and 36(2)(b)(ii) of the Arbitration Act of the Principauté de Sinnoh read as follows:

Article 34. Application for setting aside as exclusive recourse against arbitral award

[...]

2. An arbitral award may be set aside by the competent court only if:

a) the party making the setting-aside application furnishes proof that:

[...]

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the laws of the Principauté de Sinnoh;

b) the competent court finds that:

[...]

(ii) the award is in conflict with the public policy of the Principauté de Sinnoh.

[...]

10. The Court now turns to the second ground for set aside of the award advanced by the Claimant, namely, that the award is in conflict with the public policy of the Principauté de Sinnoh owing to strong *indicia* of corrupt behaviour on the part of the sole arbitrator who rendered it. [...]

11. The Court has no doubt that internationally recognised persons such as CILS and the experts cited in its Report as neutral and impartial. However, the Court rules on the first element of the Claimant's public policy argument that despite the weight of evidence submitted by the Claimant, including 14 June 2020 CILS Report and the report of the independent experts appended to it, the Court does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place.
12. However, the Court is cognizant that, pursuant to the well-established jurisprudence of this Court, it engages in meticulous review of arbitral awards in the circumstances where corruption is alleged to have taken place in the process of rendering of such awards (see e.g. Michal Enterprises SARL v. Sanders Corporation Inc, No. NG 16/396182). The Court notes that the public policy of the Principauté de Sinnoh has always rested on combatting corruption in any form. While it is not within the mandate of this Court, seized with the application to set aside an arbitral award, to establish whether the sole arbitrator had indeed committed a criminal offence under the legal order of Sinnoh, it is certainly within the mandate of this Court to determine whether failure to set aside the award, thereby making it part of the legal order of Sinnoh, would be in conflict with the objective of combatting corruption.
13. The Court reiterates, in line with its longstanding jurisprudence (see e.g., Crown Services Ltd. v. Magnolia Enterprises SARL, No. MG 21/57132) that in the circumstances when such grave allegations of corruption are levelled against a party to the arbitration or the arbitrator in the set aside proceedings, circumstantial evidence can be relied on by the Court. [...]
14. Having carefully considered the submissions of the parties, the Court finds that the existing circumstantial evidence points strongly in favour of setting aside the award. There are, in the opinion of the Court, grave, precise, and consistent *indicia* that Mr Cavannaugh accepted bribes from the representative of the Defendant. The circumstantial evidence in question was sufficient to shift the burden of proof of the lack of corrupt behaviour on part of the sole arbitrator on the Defendant's side. However, Mekar Airservices failed to discharge it. The Court thus finds that the failure to set aside the award would contravene the objective of combating bribery, which is the cornerstone of the public policy of the Principauté de Sinnoh, and that it would offend basic notions of justice.
15. FOR THESE REASONS, THE COURT:
16. Declares the assertions of the Claimant, Vemma Holdings Inc. made under 36(2)(b)(ii) of the Arbitration Act of the Principauté de Sinnoh to be well-founded;
17. Rules to set aside the award rendered on 9 May 2020.

The Supreme Arbitrazh Court of Sinnograd Judgement of 1 August 2020

Lord Justice Singh CASE NO: CO/1052/2020

Mr Justice Holgate

ANNEX XIV

High Commercial Court of Mekar ruling- 23 August 2020

IN THE HIGH COMMERCIAL COURT OF MEKAR AT PHENAC

FAO(OS) No.285/2020 & CM No.10351/2020

Vemma Holdings Inc……..……Applicant

4 Navalny Drive,
Szeto, Bonooru
0934

versus

Mekar Airservices Ltd……Respondent

6 Brezhnev Sq
Phenac, Mekar
8A7 86

CORAM:

HON'BLE MR. JUSTICE T BUNDY

JUDGEMENT

(…)

4. Section 36 of the Commercial Arbitration Act, based on Article 36 of UNCITRAL Model Law International Commercial Arbitration, reads:

> 36. Conditions for enforcement of foreign awards. –
>
> (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that- (…)
>
> (e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> (2) Enforcement of an arbitral award may also be refused if the court finds that- (…)
>
> (b) The enforcement of the award would be contrary to the public policy of Mekar.

(i) Section 36(2)(b) of the Commercial Arbitration Act

5. The public policy defence under Section 36 of the Commercial Arbitration Act must be construed narrowly. The Superior Court of Mekar has previously affirmed that a high standard must be met for refusing enforcement of an arbitral award on this basis (see ACG Trading v GlenClose International SC/AB/384/2012). This was also the approach of the Court in PTB Mulaney Services v Tendler Bank SC/AB/907/2014, where the Court stated that an award should only be set aside if

upholding "would violate the most basic notions of morality and justice [which] would take a very strong case before such conclusion can be properly reached".

9. The Court recalls the long-standing jurisprudence of the Superior Court of Mekar on this matter. According to the Superior Court, in order to determine whether enforcement of the award would result in giving effect to corruption, it could look into all relevant elements of fact and at law. The Superior Court has also held that strong circumstantial evidence is enough to deny recognition or enforcement, even if those facts did not meet the burden of proof that would be required in criminal proceedings. In this regard, the Superior Court held that relevant circumstantial evidence could include: limited application of judicial mind, limited consideration of evidence on record, an imbalance between the consideration of the two parties' arguments, incomplete reasoning, and the fact that successful allegations of fraud or bribery had previously been made against the same judicial authority.

10. The Applicant's case here rests on the 14 June 2020 report by the Centre for Integrity in Legal Services (CILS) and the alleged leaks that form its basis. We note that the report by the CILS is the only evidence weighing in the Applicant's favour, which is circumstantial at best. Conversely, our perusal of the award of 9 May 2020 suggests that the arbitrator considered both parties' submissions equitably, applied his mind, and arrived at a well-reasoned decision. It is irrelevant that the sole arbitrator did not directly address 45 of the 72 evidentiary documents submitted by the Applicant or that the reasoning is contained in only five paragraphs. The circumstantial and hearsay evidence concerning his bias must be balanced against the final decision, which this Court believes reflects the correct position of law with respect to Right of First Refusal offers.

12. The Applicant makes much of the sole arbitrator's strong language in dealing with its arguments and alleged pre-conceived notions about the case. To us, neither of these averments deserve more than a passing mention. The sole arbitrator's strong words were justified as they aptly reflected the shoddy state of the Applicant's submissions before the arbitrator. Any views expressed during the hearing are only an outcome of the arbitrator having read the parties' submissions before the hearing and formed a provisional view about the case.

13. Finally, we recall that the Mekari Ministry of Home Affairs has recognised CILS as "an entity funded by foreign donations to interfere in Mekar's domestic affairs." The Ministry has frozen CILS' bank accounts until investigations into suspicious foreign funding are complete and designated activities of the organisation illicit under Mekari Law in the interim. It is against Mekar's public policy to give credence to the reports prepared by such an organisation.

14. In this light, the arbitral award cannot be set aside since there are no sufficiently serious, specific and consistent indicia of corruption.

(ii) Section 36(1)(e) of the Commercial Arbitration Act

…

15. Applicant argues that the proceedings before this Court should be suspended until a further arbitration award is rendered at the seat. However, the existence of a final Mekari decision concerning the same object and between the same parties bars the recognition in Mekar of any subsequent judicial decision or arbitral award rendered abroad which is incompatible with it. Hence, the Court is not persuaded that its decision will be influenced by any subsequent awards rendered at the seat of arbitration.

16. The application is accordingly dismissed. No costs are awarded.

ANNEX XV

Superior Court of Mekar ruling- 25 September 2020

2305

IN THE SUPERIOR COURT OF MEKAR AT PHENAC

FAO(OS) No.285/2020 & CM No.10351/2020

2310 Vemma Holdings Inc……..……Appellant

4 Navalny Drive
Szeto, Bonooru
0934

versus

2315 Mekar Airservices Ltd……Respondent

6 Brezhnev Sq
Phenac, Mekar
8A7 86

2320 **CORAM:**

HON'BLE CHIEF JUSTICE S BHASKAR, HON'BLE MR. JUSTICE V SHARMA

JUDGEMENT

1. This application under Section 39 of the Commercial Arbitration Law 1998 impugns the
2325 judgement of the High Commercial Court dated 23 August 2020 dismissing *in limine* the application preferred by the appellant under Section 36 of the Commercial Arbitration Law for setting aside of the Arbitral Award dated 9 May 2020.

2. In light of our recent judgments: (i) Alta Lumina Trading v Linetti Construction Company SC/AB/1619/2020; and (ii) Bey City State Industrial & Infrastructure Development Corporation
2330 Ltd. v Mekar Lines SC/AB/1702/2020, dealing with the scope of interference with an arbitral award under Section 36 and in an appeal under Section 39, we heard the counsel for the appellant in writing.

3. The challenge to the arbitral award, before the learned Single Judge of the High Commercial Court as well as before us is on two grounds. First, it is contended that the enforcement or
2335 recognition of an award tainted by corruption is against the public policy of Mekar. Second, it is contended that the Section 36 of the Commercial Arbitration Law does not allow the recognition or enforcement of awards set aside at the seat of arbitration. In support, the appellant relies on the decision of the Supreme Arbitrazh Court of Sinnograd dated 1 August 2020 setting aside the Arbitral Award.

2340 …

6. The learned Single Judge dismissed the petition under Section 36 of the Commercial Arbitration Law holding that there was no reason to interfere with the award based on hearsay evidence. In

evaluating the application before it, the learned Single Judge began by emphasizing the need to analyse the various international agreements/treaties that Mekar had signed on the subject of enforcing foreign arbitral awards. In arriving at a decision, the learned Single Judge analysed the text and practice under Article V(1)(e) of the New York Conventions and Section 36(2) of the Commercial Arbitration Law (Law No. 9.307/1998), which provides that the recognition of an award can [but not must] be denied where an award is annulled in the country where it was issued.

…

11. We have in *Alta Lumina Trading* supra enforced an international arbitral award set aside at the seat of the arbitration:

> *Considering that a Mekari judge may not refuse enforcement except in those limited cases enumerated in Section 36 of the Commercial Arbitration Act that constitute national law on the matter and on which Alta Lumina has relied;*
>
> *And considering that Section 36 of the Commercial Arbitration Act does not mandate refusal to recognize and enforce an award on the grounds outlined in Article V of the [New York] Convention;*
>
> *Considering finally that the award rendered in Kanto was an international award which by definition was not integrated into the legal order of that country such that its existence continues despite its nullification and that its recognition in Mekar is not contrary to transnational public policy;*
>
> *Recalling, however, that in the event of allegations of serious breaches of transnational conceptions of public policy, the Court shall usually defer to any preceding judicial decisions rendered at the seat of arbitration;*

12. In our view, the dicta in *Bey City State Industrial & Infrastructure Development Corporation* supra on the standard of review under Section 39 of the Commercial Arbitration Law provides guidance:

> "Ordinarily, the Appellate court will refrain from substituting the judgement of the lower court with its own, unless the conduct of the latter has a result so surprising that propriety and competence have to be questioned."

In the present case, our cursory review reveals no such impropriety.

…

18. The use of "may" in the 1958 New York Convention and Section 36 of the Act provides an enforcing court with discretion to recognize an award that has been set aside at its seat, subject to the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the New York Convention. After determining that the Supreme Arbitrazh Court of Sinnograd ignored Mekar Airservices' concerns regarding the veracity of the evidence suggesting corruption, the learned Single Judge held that the recognition of an award that had been set aside for unsubstantiated reasons at the seat was not contrary to the Mekari conception of international public policy.

19. We accordingly do not find any merit in this appeal and dismiss the same.

TREATY BETWEEN THE FEDERAL REPUBLIC OF MEKAR AND THE COMMONWEALTH OF BONOORU FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

SIGNED AT PHENAC, ON 24 AUGUST 1994

The Federal Republic of Mekar and the Commonwealth of Bonooru,

Desiring to intensify economic co-operation between the two States,

Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State, and

Recognizing that an understanding reached between the two States is likely to promote investment, encourage industrial and financial enterprise and to increase the prosperity of both the States,

Have agreed as follows:

Article I

For the purpose of this Agreement:

(a) "enterprise" means any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or government-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association; and a branch of any such entity;

(…)

(d) "investor" means a natural person possessing the citizenship of or permanently residing in one State in accordance with its laws, or any enterprise incorporated or duly constituted in accordance with applicable laws in that State, who makes the investment in the territory of the other State;

(…)

Article II

[...]

(2) Each Contracting Party shall accord investments of returns of investors of the other Contracting Party;

(a) fair and equitable treatment in accordance with principles of international law, and

(b) full protection and security.

[...]

Article III

(1) Each contracting Party shall grant to investments, or returns of investments of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State.

[...]

Article IX

(1) In the event of disputes as to the interpretation or application of the present Treaty, the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship.
(2) If no such solution is forthcoming, the dispute shall be submitted
(a)to the International Court of Justice if both Parties so agree; or
(b)if they do not so agree to an arbitration tribunal upon the request of either Party.
(3) The tribunal referred to in paragraph (2) (b) above shall be formed in respect of each specific case and it shall consist of three arbitrators. Each Party shall appoint one arbitrator and the two members so appointed shall appoint a chairman who shall be a national of a third country.

[...]

Article XI

(1) The present Treaty shall be ratified, and the instruments of ratification shall be exchanged as soon as possible.
(2) The present Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter for an unlimited period unless notice of termination is given in writing by either Party one year before its expiry. After the expiry of the period of ten years, the present Treaty may be terminated at any time by either Party giving one year's notice.
(3) In respect of investments made prior to the date of expiry of the present Treaty, the provisions of Articles I to XI shall continue to be effective for a further period of ten years from the date of expiry of the present Treaty.

DONE at Phenac on the twenty fourth day of August in the year nineteen hundred and ninety-four.

For the Federal Republic of Mekar
Stevie Budds

For the Commonwealth of Bonooru
Ronnie Lee

COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT

BETWEEN

THE COMMONWEALTH OF BONOORU

AND

THE FEDERAL REPUBLIC OF MEKAR

THE COMMONWEALTH OF BONOORU and THE FEDERAL REPUBLIC OF MEKAR, hereinafter referred to as the "Contracting Parties,"

FURTHER strengthen their close economic relationship and bonds of friendship and cooperation between them and their peoples;

CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment;

ESTABLISH a comprehensive agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth;

PROMOTE transparency, good governance, and the rule of law, and eliminate bribery and corruption in trade and investment;

AND,

RECOGNISING the importance of democracy, human rights, and the rule of law for the development of international trade and economic cooperation;

RECOGNISING the differences in their levels of development and diversity of economies;

RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objective, such as public health, safety, environment, public morals, and the promotion and protection of cultural diversity;

HAVE AGREED AS FOLLOWS:

CHAPTER 1 – GENERAL PART

Article 1.1: Name

The short name of this agreement shall be the CEPTA.

Article 1.2: Establishment of the Free Trade Area

The Parties to this Agreement, consistent with Article XXIV of the *General Agreement on Tariffs and Trade 1994* and Article V of the *General Agreement on Trade in Services* which are part of the *Marrakesh Agreement Establishing the World Trade Organization*, hereby establish a free trade area.

Article 1.3: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment, and transparency, are to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

(b) promote conditions of fair competition in the free trade area;

(c) increase substantially investment opportunities in the territories of the Parties;

(d) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

(e) establish a framework for further bilateral, regional, and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Article 1.4: Relation to Other International Agreements

1. The Parties affirm their existing rights and obligations with respect to each other under the *Marrakesh Agreement Establishing the World Trade Organization* and other agreements to which such Parties are party.

2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

Article 1.5: Extent of Obligations

The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by provincial governments.

Article 1.6: Term of the Bilateral Investment Treaty

The Parties hereby agree that the Bilateral Investment Treaty, as well as all the rights and obligations derived from the said Treaty, will cease to have effect on the date of entry into force of this Agreement.

1. Investments made under the 1994 Bilateral Investment Treaty shall be governed by this Agreement starting from the date of entry into force of this Agreement.

2. No investor has the right to bring a claim under the Bilateral Investment Agreement following the entry into force of this Agreement.

…

CHAPTER 9 - INVESTMENT

SECTION A - Definition and Scope

Article 9.1: Definitions

For the purpose of this Chapter:

Centre means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;

Covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter;

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes;*

ICSID Convention means the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington on 18 March 1965;

Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
(f) intellectual property rights;
(g) licences, authorisations, permits, and similar rights conferred pursuant to the Party's law; and
(h) other tangible or intangible, movable, or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

Investor means a Party, a natural person, or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;

For the purposes of this definition, an enterprise of a Party is:

(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
(b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);

Returns means all amounts yielded by an investment or reinvestment, including profits, royalties and interest or other fees and payments in kind;

Article 9.2: Scope

1. This Chapter applies to a measure adopted or maintained by a Party in its territory relating to:
(a) an investor of the other Party;
(b) a covered investment; and
(c) with respect to Article 9.5: Performance Requirements, any investment in its territory.

2. For greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.

3. Claims may be submitted by an investor under this Chapter only in accordance with Article 9.16, and in compliance with the procedures set out in the Articles herein.

SECTION B - Establishment of Investments

Article 9.4: Market Access

1. A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party, on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional, or local level of government, a measure that:

(a) imposes limitations on:

(i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers, or the requirement of an economic needs test;

(ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or

(v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or

(b) restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.

2. For greater certainty, the following are consistent with paragraph 1:

(a) a measure concerning zoning and planning regulations affecting the development or use of land, or another analogous measure;

(b) a measure requiring the separation of the ownership of infrastructure from the ownership of the goods or services provided through that infrastructure to ensure fair competition, for example in the fields of energy, transportation, and telecommunications;

(c) a measure restricting the concentration of ownership to ensure fair competition;

(d) a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban;

(e) a measure limiting the number of authorizations granted because of technical or physical constraints, for example telecommunications spectrum and frequencies; or

(f) a measure requiring that a certain percentage of the shareholders, owners, partners, or directors of an enterprise be qualified or practice a certain profession such as lawyers or accountants.

Article 9.5: Performance Requirements

1. A Party shall not impose, or enforce the following requirements, or enforce a commitment or undertaking, in connection with the establishment, acquisition, expansion, conduct, operation, and management of any investments in its territory to:

(a) export a given level or percentage of a good or service;

(b) achieve a given level or percentage of domestic content;

(c) purchase, use or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from natural persons or enterprises in its territory;

(d) relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment;

(e) restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings;

(f) transfer technology, a production process or other proprietary knowledge to a natural person or enterprise in its territory; or

(g) supply exclusively from the territory of the Party a good produced or a service provided by the investment to a specific regional or world market.

2. A Party shall not condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct or operation of any investments in its territory, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to a good produced in its territory, or to purchase a good from a producer in its territory;

(c) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment; or

(d) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings.

3. Paragraph 2 does not prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory, on compliance with a requirement to locate production, provide a service, train, or employ workers, construct or expand particular facilities, or carry out research and development in its territory.

4. Subparagraph 1(f) does not apply if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a violation of competition laws.

5. The provisions of:

(a) subparagraphs 1(a), (b) and (c), and 2(a) and (b), do not apply to qualification requirements for a good or service with respect to participation in export promotion and foreign aid programs;

(b) this Article does not apply to procurement by a Party of a good or service purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered procurement" within the meaning of Article 17.3 (Scope and coverage).

6. For greater certainty, subparagraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of a good necessary to qualify for preferential tariffs or preferential quotas.

7. This Article is without prejudice to World Trade Organization commitments of a Party.

SECTION C - Non-Discriminatory Treatment

Article 9.6: National Treatment

Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

Article 9.7: Most Favoured Nation Treatment

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

SECTION D - Investment Protection

Article 9.8: Right to Regulate

1. For the purpose of this Chapter, the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity.

2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

Article 9.9: Minimum Standard of Treatment

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitute:

(a) denial of justice in criminal, civil or administrative proceedings;
(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
(c) arbitrary or discriminatory conduct;
(d) abusive treatment of investors, such as coercion, duress, and harassment;
(e) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22.

3. When applying the above fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

4. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.

5. For greater certainty, a breach of another provision of this Agreement does not establish a breach of this Article.

6. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article,

the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

7. The provisions of this Article shall not apply to invoke a more favourable treatment accorded by either Party under bilateral investment treaties or other agreements containing provisions relating to investments signed prior to the entry into force of this Agreement.

Article 9.10: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

contributions to capital;

(a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees;

(b) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) payments made under a contract, including a loan agreement;

(d) payments made pursuant to Article 9.11 (Compensation for Losses) and Article 9.12 (Expropriation and Compensation); and

(e) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of another Party.

4. Notwithstanding paragraphs 1, 2 and 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offences;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

5. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

Article 9.11: Compensation for losses

Each Party shall accord to investors of the other Party, whose covered investments suffer losses owing to armed conflict, civil strife, a state of emergency or natural disaster in its territory, treatment no less favourable than that it accords to its own investors or to the investors of a third country, whichever is more favourable to the investor concerned, as regards restitution, indemnification, compensation, or other settlement.

Article 9.12: Expropriation and Compensation

1. Neither Contracting Party may directly nationalize or expropriate except:

(a) in the public purpose;

(b) in a non-discriminatory manner;

(c) under due process of law; and

(d) against payment of prompt, effective and appropriate compensation. The term appropriate compensation shall neither include losses which are not actually incurred nor probable or unreal profits. For greater certainty, owing to the evolving economic structures of both Contracting Parties, investors are not protected against measures that may be considered to indirectly expropriate an investment.

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

Article 9.13: State Enterprises

1. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Chapter wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions or impose quotas, fees or other charges.

2. Each Party shall ensure that any State enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of the other Party.

Article 9.14: Investment and Environmental, Health and Other Regulatory Objectives

l. The Parties recognize that it is inappropriate to encourage investments by relaxing domestic measures relating to health, environment, or other regulatory objectives. Accordingly, a Party should not waive, relax, or otherwise derogate from, or offer to waive, relax, or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion. or retention in its territory of an investment of an investor.

2. The Parties will endeavour not to derogate from, waive or relax measures as an encouragement for the expansion, retention, or disposition in its territory of an investment of an investor of the other Party. Furthermore, the Parties will endeavour not to offer to derogate from, waive or relax the measures in question as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor of the other Party.

Article 9.15: Subrogation

1. Where a Party or an agency authorised by a Party has granted an indemnity, a guarantee or a contract of insurance against non-commercial risks with regard to an investment by one of its investors in the territory of the other Party and when payment has been made under this indemnity, guarantee or contract of insurance by the former Party or the agency authorised by it, the latter Party shall recognise the rights of the former Party or the agency authorised by the former Party by virtue of the principle of subrogation to the rights of the investor.

2. Where a Party or an agency authorised by a Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or agency authorised by the Party making the payment, pursue those rights and claims against the other Party.

SECTION E - Settlement of Disputes

Article 9.16 – Submission of a Claim to Arbitration

1. If a dispute has not been resolved through mutual agreement, a claim may be submitted under this Section by:

(a) an investor of a Party on its own behalf; or

(b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.

2. A claim may be submitted under the following rules:

(a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;

(b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; or

(c) any other rules on agreement of the disputing parties.

3. In the event that the investor proposes rules pursuant to subparagraph 2(c), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a) or (b).

4. The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall sympathetically consider that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.

5. The rules applicable under paragraph 2 are those that are in effect on the date that the claim or claims are submitted to the Tribunal under this Section, subject to the specific rules set out in this Section.

6. A claim is submitted for dispute settlement under this Section when:

(a) the request under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;

(b) the request under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID; or

(c) the request or notice initiating proceedings is received by the respondent in accordance with the rules agreed upon pursuant to subparagraph 2(c).

7. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.

Article 9.17: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the New York Convention for an “agreement in writing”.

Article 9.18: Selection of Arbitrators

1. Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If a tribunal has not been constituted within a period of 75 days after the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator unless the disputing parties agree otherwise.

4. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 9.16 (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 9.16 (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 9.19: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under Article 9.16 (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

4. A respondent may not assert as a defence, counterclaim, right of set-off or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

5. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve

evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 9.16 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

6. In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any comments and issue its decision or award no later than 45 days after the expiration of the 60-day comment period.

7. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.21 (Final Award) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.20 (Transparency of Arbitral Proceedings).

Article 9.20: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.19 (Conduct of the Arbitration);

(d) minutes or transcripts of hearings of the tribunal, if available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3. Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 28.3 (Security Exceptions) or Article 28.4 (Disclosure of Information).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information according to any schedule set by the tribunal;

(c) a disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the protected information. Only the redacted version shall be disclosed in accordance with paragraph 1; and

(d) the tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that the information was not properly designated, the disputing party that submitted the information may:

(i) withdraw all or part of its submission containing that information; or

(ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply those laws in a manner sensitive to protecting from disclosure information that has been designated as protected information.

6. The UNCITRAL rules on transparency in treaty-based investor-State arbitration shall apply to any international arbitration proceedings initiated against the Commonwealth of Bonooru pursuant to this Agreement. The Federal Republic of Mekar shall duly consider the application of the UNCITRAL rules on transparency in treaty-based investor-State arbitration to any international arbitration proceedings initiated against the Federal Republic of Mekar pursuant to this Agreement.

Article 9.21: Final Award

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination:

(a) monetary damages at a market value, except as otherwise provided for in Article 9.12; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages at a market value and any applicable interest in lieu of restitution.

2. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

4. Subject to paragraph 7 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

5. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention:

(i) 120 days have elapsed from the date on which the award was rendered, and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the rules selected pursuant to Article 9.16:

(i) 90 days have elapsed from the date on which the award was rendered, and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

6. Each Party shall provide for the enforcement of an award in its territory.

7. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a panel shall be established. The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the respondent abide by or comply with the final award.

8. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 9. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

Article 9.22: Committee on Investment

The Parties shall regularly, or upon request of a Party, review the content of this Chapter. The Committee on Investment is hereby established consisting of three members appointed by each party. The Committee on Investment may develop interpretative declarations outlining the scope of these provisions.

[END OF CHAPTER NINE]

...

DONE at Phenac on the fifteenth day of October in the year 2014.

For the Federal Republic of Mekar
Minister of International Trade,
Quinn Giordano

For the Commonwealth of Bonooru
Foreign Minister,
Peter Knowlton

TREATY BETWEEN THE FEDERAL REPUBLIC OF MEKAR AND THE KINGDOM OF ARRAKIS FOR THE PROMOTION AND PROTECTION OF INVESTMENTS.
SIGNED AT ARRAKEEN, ON 16 JANUARY 2006.

THE GOVERNMENT OF THE KINGDOM OF ARRAKIS and THE GOVERNMENT OF THE FEDERAL REPUBLIC OF MEKAR, hereinafter referred to as the "Contracting Parties,"

…
[Preamble purposefully excluded]

…
Article 13 – Compensation and Prompt Payment

If the Tribunal makes a Final Award in favour of the investor, the Tribunal may award compensation. Such compensation shall be equivalent to the fair market value of the investment immediately on the day before the measures inconsistent with the provisions herein were taken by the host State.

Article 14 – Duration and Termination
This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at ARRAKEEN this 16th day of January 2006.

For the Kingdom of Arrakis

_____
Thurfir Hawat
Foreign Minister

For the Federal Republic of Mekar

_____
Ronnie Budds
Foreign Minister