2021 Case

Foreign Direct Investment International Arbitration Moot

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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 Settlement of Investment Disputes Additional Facility Rules, Vemma Holdings Inc.

Jurisdiction

2. By submitting this Notice
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

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 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 or
) 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 acquired an 85% stake in Caeli Airways. Mekar maintained 15% ownership through Mekar Airservices Ltd.

8. Me
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.
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,

Vemma to halt the growth of Caeli Airways. Vemma remained confident in the investment and persisted with its successful strategy.

12.
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

Vemma. Together, these acts and omissions brought the investor to the brink of bankruptcy.

13.

unfairly prejudice Caeli Airways and Vemma.

14. The Co
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
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

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 fitability. Neither this change, nor the refusal to periodically revise the inflation rate could have mitigated any economic crisis in Mekar.

18. which hurt Caeli

    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.

    ts were dismissed prematurely. As a result, Caeli Airways suffered in the interim.

21. 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 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 o

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 (in its report dated 14 June 2020. Mekar

    essence sought to exclude the possibility of a *bona fide*

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 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 *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. ward 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 . 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 alue. Left with an investment that was a drain on

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.
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.
    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

   filed by Vemma Holdings Inc

Jurisdiction

2. The Tribunal does not have jurisdiction to hear the
   dispute constitutes State-to-State arbitration.

3. Since its inception, Vemma has been beholden to Bonooru as the State has historically

   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 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 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--rich province, resulting in a considerable influx of people into the territory from neighbouring agrarian provinces. However, since the decline of t
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 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

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

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

t 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 -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

(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 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

    of its competitors in Mekar did not continuous influx of funds from its home State under the Horizon 2020 Scheme.

16. Final
    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
    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
    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

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

ndard contained in Article 9.21 of the CEPTA.

20. 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. the currency crisis precipitating in Mekar, the Tribunal should find that Mekar has already 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 -advised. Mekar, which continuously warned the Claimant against such an exorbitant approach, cannot be held accountable for nally, 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 -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

       should reduce any compensation awarded 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

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

This first procedural order sets out the procedural rules to which the Claimant and the Respondent

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

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

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

incl

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

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

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

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

Application

hereby applies for leave to file a non-disputing party submission in the Comprehensive Economic Partnership and Trade Agreement (the

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 le 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

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;

§ 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 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

§

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

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

Dear Members of the Tribunal,

Amici respectfully request leave from the Tribunal to submit an amicus curiae brief, in the above-

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

s

advise on the privatisation, liquidation, andw2r 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

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.

tion of the

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

BY THE 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

RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

AMICUS

SUBMISSIONS

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

June 15, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

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 reflects valuable perspectives that merit the Trib
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 *amicus* submission by the external advisors to 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.

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

RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

AMICUS

SUBMISSIONS

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

June 18, 2021

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Dear Members of the Tribunal,

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 Fo , elaborated in Sections [I.], [II.] and [III.] below:

1. CBFI does not file its *amicus* 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

[...]

that submitted by the

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

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

I. AMICUS SUBMISSIONS

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

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.

of Transport and Tourism, regulates all civil aviation. Until 1979, the CAA was also responsible

7. Following losses from the 1973 and 1979 oil shocks, the CAA restructured the state-owned BA -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 *kept for the people* ownership of the

a

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

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.

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 **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.

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 -independence growth. Transparency International has consistently scored Mekar between 30/100 to 36/100 on its corporation

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.
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

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 Cael
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

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, linquishing
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.

led to shifting managerial strategies, im
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-

18. Inefficient government spending became a contentious point in the next midterm elections.

- under the influence of a resurgent CMP -
enacted the Emergency Recovery Act 2009, authorising large-scale privatisation of SOEs and

by 2.8 percent for 2009, the Ministry of Finance released a policy paper designating telecom compa State-owned railway, Mekar Lines, and Caeli Airways as appropriate for privatisation.

19.
Restrictive Trade Practice Act in 2009 (**Annex V**). This amendment envisaged the creation of

directorate. Ms. Moira Rose was appointed as the President of this agency. On the day of her

appointment, her office released

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.
Convention, the proposa
rules favoured developed countries and scepticism towards the foreclosed possibility of

21. Given its precarious financial condition, the privatisation of Caeli Airways took priority in the

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

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-

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,
appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.

23. *inter alia* fleet renewal and expansion, as well as route expansion. Vemma also promised to sign leasing contracts for Boeing 737 aircraft on

Ba [1]

any airline currently operating out of Phenac International, the largest airport in Mekar. This opportunity

24. In addition to being the highest bidder, Vemma was found to have proposed the most financially

-

tender valued at 800 million USD was accepted on 5 January 2011. However, select members

C iin

nsider Mekar

as an investment destination.

25.

participation in the Moon Alliance on 5 March 2011. In respect of the alliance, the CCM noted oon 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. (**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 s 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

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

on into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective

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

    Mekar Airservices cautioned the new Vemma-appointed management against taking an y 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. should be controlled to avoid exorbitant costs associated with maintaining its fleet during

    earnings. In the first quarter of 2014, the b
    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.

According to the CEPO Secretary-
further decline and are even preparing for a strong upti

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

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

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. *suo moto*

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

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

pricing strategies. In this light, proactive action is necessary: we cannot wait for Caeli to drive

[3] To date, the CCM has not investigated any other airlines alliance members active in Mekar, alone or in combination.

37.

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

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

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
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

for them to penetrate the market linked to Phenac International, which effectively became a

activities focusing specifically on price undercutting on certain routes to and from Phenac
The Second Investigation
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

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
stablish credibility in the [local] currency to avoid a debilitating

40. As of July 2017, Caeli was unable to secure a steady stream of revenue. It requested meetings
e 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
of catastrophic
sation 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

42.
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

change. He called for an urgent meeting between the representatives of Vemma, Mekar Airservices Ltd.

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

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

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 , reasoning that the interim measures could not be removed until its investigations were complete, and that interference with inflation rates was

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

that month.[4] In turn, the IICRA memorandum explaining its rating decision noted that it had -standing debts that Caeli has Caeli refused this loan.

52. 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. 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

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:

> 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.
>
> *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 partieB3ɣ,iihoncerning t4e of oo ihonce6(s)9( )] TJET5049(c)4(a) -7 595.32 841.

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

(**Annex XV**).

63. etween 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. of the same and recognising that the latter was on the verge of bankruptcy, the CCM authorised the Min
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

65. s financial standing
and it contemplated scaling back the services offered by Royal Narnian to compensate. When

s government began demanding

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

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

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

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, . re0C31utsstideBonoor,

ANNEX IV

Memorandum of Association of Vemma Holdings Inc.

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

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.

[...]

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 meetinghe director representing employ-97(dire)5(c)4(tor)-98(r)-6(e)4(pre)7(s)-10(e)4(nti)

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.

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

(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 try 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

Share

Mekar Airservices Ltd. (1)

Vemma Holdings Inc. (2)

Caeli Airways JSC (3)

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

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 <
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 - nce 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 Transaction that Mekar Airservices -
following receipt of the Third-
of the identity of all proposed parties to such Third-Party Transaction and the material financial and other terms and conditions of such Third-
constitutes an offer made by Vemma Holdings to enter into an agreement with Mekar Airservices on the same Material Terms of such Third-

(b) At any time prior to the expiration of the 30 (thirty) -
ekar 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-
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.

Caeli Airways. Since the privatisation of Caeli Airways, it has

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!

making as part of the Caspian Project, and Caeli is a very interesting one.

Host: So,

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: I
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, ,

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

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 s
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

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: W -term strategy by Vemma to grow a market. Or it could be some sort of closed-
Vemma ensures that Caeli Airways flies these routes to benefit Bonooru. I still have connections ing 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

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 -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

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 ot 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- . 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 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.

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.

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

-Stock
Company Caeli Airways between Mekar Airservices Ltd., Vemma Holdings Inc. and Caeli

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.

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

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
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

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

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 *the Nefarious REC* cified 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
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 Principauté de Sinnoh
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 *bona fide* written offer for a Third-Party arms-

   -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 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

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

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

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

    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

    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

4 Navalny Drive,
Szeto, Bonooru
0934

versus

6 Brezhnev Sq
Phenac, Mekar
8A7 86

CORAM:

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

strong case before such conclusion can

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 t
fact that successful allegations of fraud or bribery had previously been made against the same judicial authority.

ty in Legal
Services (CILS) and the alleged leaks that form its basis. We note that the report by the CILS is the

perusal of the award of 9 May 2020 suggests
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.

and alleged pre-conceived notions about the case. To us, neither of these averments deserve more than a passing mention. The sole arbitr
shoddy

hearing and formed a provisional view about the case.

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
isation.

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 subsequM7 .871<004D.98 Tm1101(M45BT)o2/F11 W* nBT G[(S)-3s7( )-9982/F11 117217(s)- 12 Tf1 0 (

ANNEX XV

Superior Court of Mekar ruling- 25 September 2020

IN THE SUPERIOR COURT OF MEKAR AT PHENAC

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

4 Navalny Drive
Szeto, Bonooru
0934

versus

6 Brezhnev Sq
Phenac, Mekar
8A7 86

CORAM:

JUDGEMENT

1. This application under Section 39 of the Commercial Arbitration Law 1998 impugns the 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 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 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.

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:

> court with its own, unless the conduct of the latter has a result so surprising that propriety

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 y 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.

1994 BONOORU MEKAR BIT

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:

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;

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

2014 BONOORU - MEKAR CEPTA

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,

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 hieve 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;* (a)

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;

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;

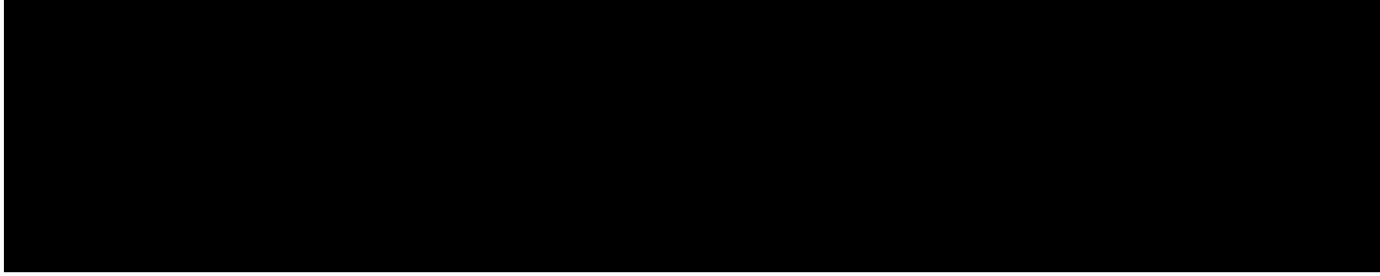
(b) achieve a given level or percentage of domestic content;

(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 e in its ter



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.

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,

evidence in the po 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

(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

2006 ARRAKIS MEKAR BIT

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

[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

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Thurfir Hawat
Foreign Minister

For the Federal Republic of Mekar

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Ronnie Budds
Foreign Minister