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# 17<sup>th</sup> **LAWASIA** International Moot

## MOOT PROBLEM 2022

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Organiser of the LAWASIA International Moot Competition

**LAWASIA**  
**2022 MOOT PROBLEM**

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## THE BRASILENSIS SAGA

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### The Home State

1. The Democratic Union of Arkadia is a developing, newly industrialised nation located in Southeast Asia. A former British Colony and presently a member of the Commonwealth, Arkadia has one of the oldest and most complex tropical rainforest systems in the world which houses a plethora of flora and fauna and thence engendering a rich biodiversity. With its tropical climate which sees a regular rainfall of about 2000-2500mm per year and an average annual temperature of 26- 28 C, Arkadia is bestowed upon the optimal condition for planting rubber commercially on a wide scale. As Arkadia is situated on the volcanic belt, it is also home to the ancient Rolly Dolly Volcano, a spiralling volcano located approximately 350km south of Ažuolas, the capital city of Arkadia.
2. As thick smokes belched out of the Rolly Dolly Volcano every year between July and September, the Arkadians would scale the slopes of the volcano to perform rituals and immolate animals as offerings to their deities. The Arkadians believe that the Rolly Dolly Volcano was created by the Arkadian Gods as a reminder to their symbiotic relationship with their land and the environment. As such, the Arkadians have always seen themselves as stewards to the land and display deep reverence for mother nature. According to a 2019 report by the International Monetary Fund (IMF), Arkadia has a GDP valued at USD467 billion which is contributed mainly by its rubber, tourism, and electronics industries.

### The Host State

3. The Republic of Reka, is a mountainous transcontinental state located in Europe with altitudes ranging from 300m to almost 5,500m. Reka is home to the legendary Two Brothers - a duo of snowy mountains comprising of Mount

Nubon and Mount Nugo which are two of the oldest mountains in the region. The Two Brothers is a popular tourist destination which is located approximately 257km north of Póli, the capital city of Reka. Reka is widely regarded as an economic powerhouse as they are the biggest oil producer and exporter, and they house the largest fossil fuel reserve in the world. According to a 2019 report by the International Monetary Fund (IMF), Reka has a GDP valued at USD2.6 trillion which is contributed mainly by its oil and gas exports.

### **The Arkadian Independence**

4. In 1980, Arkadia gained independence from Great Britain and held its first-ever general election whereby Mr Genezisi Provoni, or more commonly referred to as Popo, was elected as Arkadia's first Prime Minister. In no time, Prime Minister Popo and his handpicked cabinet began drawing out a 30-year plan to develop the economy of Arkadia with particular focus on the rubber industry. In order to ensure that the 30-year plan is feasible and would be able to transform the Arkadian economy, Prime Minister Popo sought the assistance of his close friend, Mr Navod Harrapari to contribute his ideas, knowledge and expertise in the development plan. As a backdrop, Mr Harrapari is a national of Malaysia whom Prime Minister Popo met whilst studying economics at Cambridge University back in 1970. Mr Harrapari is the son of a successful rice tycoon in Malaysia and was the director of PariPari Global Paddy Enterprise. He is known for his aristocratic style of leadership, quick decision-making and steadfast pursuit of excellence.
5. On July of 1981, through a joint effort by Arkadia's Ministry of Finance and Ministry of Agriculture, the Ministry of Agriculture Incorporated (MOAI) was established. The purpose of MOAI is to help develop the agriculture industry in Arkadia by allocating government funds directly to companies owned by MOAI. In the same year, Brasilensis Resources Corporation (BRC), a wholly-owned subsidiary of MOAI was established for the purposes of growing, harvesting, and manufacturing natural rubber. Mr Harrapari was appointed as the Chairman of the BRC by Prime Minister Popo. Despite some dissidence from within the conservative nationalist community in Akardia, Prime Minister Popo defended

his decision as he believes that Mr Harrapari would be able to drive the leadership in the BRC and spearhead the development of the Arkadian rubber industry. Prime Minister Popo also trusts that Mr Harrapari's worldwide business and economic influence would be instrumental and necessary in helping the BRC to streamline its operations and investments in rubber related industries around the world.

### **The Genesis of the Arkadian-Rekan Ties**

6. Later in the same year, Prime Minister Popo began forging diplomatic and economic relations with other States including Reka. The move to form an allegiance with Reka was a kick in the teeth for Arkadia's Commonwealth counterparts as Reka is notorious for its authoritarian rules, poor human rights record and involvement in several conflicts with its neighbouring countries. However, Prime Minister Popo had a different view. In a live interview with The Leugen, Arkadia's local news agency, Prime Minister Popo considers it to be strategic and beneficial to have friendly relations with Reka. *'To each their own. I do not wish to dictate how another State should run its operations and hope my decisions would be mutually respected,'* said Prime Minister Popo. His statement received plenty of support from the newly elected President of Reka, Ms Feodora Romanoff who is also the youngest to be elected to the presidential office.
7. On 8.8.1982, Prime Minister Popo and the representatives from Arkadia's Ministry of Foreign Affairs made an official visit to Reka. This was Arkadia's first official visit to a foreign state. Prime Minister Popo's visit to Reka was welcomed with open arms as they were the first Commonwealth nation to have made international relations with Reka during the cold war. During the official visit, the discussion between Prime Minister Popo and President Romanoff touched on building stronger diplomatic relations, cross border investments, tax protection and discount, environmental and human rights commitments, and military support. Subsequently, Prime Minister Popo and President Romanoff signed a Memorandum of Understanding (MOU) that sets out in detail a 5-point commitment agreed between both countries.

8. Arkadia and Reka acceded to the General Agreement on Tariffs and Trade (GATT) in 1984 and 1986 respectively. In 1995, both countries became original members of the World Trade Organization (WTO) and were automatically bound by the General Agreement on Trade in Services (GATS).

### **The 21<sup>st</sup> Century: Arkadian Economic Prosperity**

9. By the start of the 21<sup>st</sup> century, Arkadia had already become the leading producer and exporter of natural rubber. In 2009, Arkadia exported over USD4.2 billion worth of natural rubber to the global market, representing nearly 31% of the world's total rubber exports in that year. According to an article published in the European Rubber Journal (ERJ), Arkadia's remarkable growth and capitalisation of the global rubber market are contributed by an interplay of several important factors such as its tropical climate and the success of the BRC which had grown into an international conglomerate, landing itself on Forbes Fortune 500 in 2010. The ERJ article also credited Arkadia's rapid advancement to its highly innovative R&D program conducted at the Arkadian National Rubber Institute (ANRI), a state-of-the-art research facility located in Ažuolas which utilises Artificial Intelligence (AI) technology.
10. Reka on the hand, continues to benefit from its friendly relations with Arkadia as they are able to import high-quality natural rubber from Arkadia at a lower price compared to other nations.
11. In 2011, President Romanoff and Prime Minister Popo attended the 17<sup>th</sup> United Nations Climate Change Conference (UNFCCC) parties meeting (COP 17) in Durban, South Africa. They were there from the 28<sup>th</sup> of November to the 9<sup>th</sup> of December to participate in a discussion concerning climate change. After one of the meetings, President Romanoff invited Prime Minister Popo for an impromptu lunch. During their lunch table conversation, President Romanoff brought up the idea of a joint partnership between Arkadia and Reka to develop a rubber manufacturing industry in Reka. President Romanoff believed that the industrial expertise and skills of Arkadia will be of assistance to Reka in its

efforts to develop its own rubber industry which would ultimately benefit the Rekan military as it relies on natural rubber supplies to manufacture tyres for, among others, its trucks, tanks, and aircrafts. Given that Reka had provided military support to Arkadia during its early developments and financial support towards Arkadia's goal of expanding its rubber monopoly, Prime Minister Popo happily agreed to the partnership but cautioned that, *'the welfare of any Arkadian people and its companies in Reka should never be compromised'*. President Romanoff responded with a smile.

### **The Arkadia-Reka BIT**

12. In early 2012, while Arkadia and Reka were in the midst of finalising the Arkadia-Reka Bilateral Investment Treaty (BIT), news reports of a border conflict occurring at the Golden Line began surfacing. The Golden Line is the border between Reka and its neighbouring country, Aprósia. It was reported that the border conflict could have risen due to Reka's unwavering ambition of wanting to rebuild the remnants of the Kingdom of Namek, which was formerly made up of Reka, Aprósia and the other Namekian States. The United Nations Secretary-General had warned that the border conflict would most likely escalate into an armed conflict if Reka refuses to de-escalate its military presence along the Golden Line. Many Arkadian people took to Facebook to voice their dissatisfaction against Arkadia entering into an investment partnership with Reka. In view of that and also the fact that the general elections will take place in the same year, Prime Minister Popo decided to postpone the signing of the BIT to a later date until coverage of the situation at the Golden Line softens.
13. Prime Minister Popo did not comment directly on the Golden Line conflict but did make statements ensuring the people of Arkadia that his government's human rights obligations are respected and complied with at all times. Despite that, the establishment of a rubber company in Reka could not be deferred due to several regulatory requirements. Hence, on 17.3.2012, Ambicios Brasiliensis Elastica Pty Ltd (ABE) was incorporated in Reka for the purpose of manufacturing rubber products namely gloves and tyres. The BRC owns 62%



of the shares in ABE whereas Ms Nwantiti Harrapari, the daughter and the sole heir of Mr Navod Harrapari owns the remaining 38%. ABE immediately began its operations.

14. On 1.8.2012, the Arkadia-Reka BIT was finally signed at Ažuolas. Immediately after the signing of the Arkadia-Reka BIT, a joint statement was issued by both countries explaining the underlying purpose of the BIT – to create economic incentives for Arkadian entities to invest their money, skill, and expertise in order to assist in the development of Reka's rubber industry. It was also explained that the BIT will provide protection and tax incentives for foreign investments.
15. An independent international investment report was quoted as saying that the Arkadia-Reka BIT is one of the most sophisticated BIT as it covers the parties' WTO-related obligations, tax and investment protection, environmental obligations as well as the commitment between both countries in developing the rubber industry. Mr Harrapari played a huge role in the formalisation of the Arkadia-Reka BIT, as he managed to convince both parties to select the Kuala Lumpur Regional Centre for Arbitration (KLRCA) as the place of arbitration and London as the seat of arbitration.

### **A Breath of Fresh Air**

16. On 14.9.2012, Prime Minister Popo announced his retirement as Prime Minister of Arkadia thereby ending his political career of over 40 years. Three months later, in December 2012, after a closely fought general elections, Mr Stoppica Oorlog was sworn in as the second Prime Minister of Arkadia. Prime Minister Oorlog is a self-proclaimed human rights activist and had on numerous occasions voiced out publicly against Reka's involvement in border conflicts with its neighbouring countries on his Instagram Story and Twitter. After his appointment, a local Rekan newspaper outlet reported that Prime Minister Oorlog's rise to power was not well received by certain members of President Romanoff's administration and that it may threaten the diplomatic relations between the two countries.

17. In July 2013, President Feodora Romanoff stepped down due to health reasons and made way for a presidential election. By a landslide, Mr R Rogers was elected as the new President of Reka. President R Rogers was Reka's former Minister of Defence. He is known to be a staunch nationalist and would not hesitate to take any steps necessary to protect Reka and preserve its interests. At the Rekan Presidential Inaugural Address, President R Rogers gave his speech and said '*I do solemnly swear that I will faithfully execute the Office of President of the Republic of Reka and I will, to the best of my ability preserve, protect, defend and regain our past glory. Make Reka Great Again!*'.
18. Ever since ABE was established, the company has seen meteoric financial growth. By the spring of 2015, ABE has about 100 active employees and it was reported that ABE has a turnover of USD1.74 billion for the financial year ending 2014.

### **The Discovery of the Purple Synthose**

19. On 1.3.2016, the Reka Institute of Innovation and Technology (RIIT), which is a state-funded entity, announced a ground-breaking discovery which is the invention of a synthetic rubber known as Purple Synthose. According to the RIIT, the Purple Synthose was produced through the polymerisation of the monomer 1, 7-synthione. The RIIT also announced that with proper research and development in place, Purple Synthose has the potential to replace Reka's reliance on natural rubber in less than a decade especially since Purple Synthose's primary component is derived from petroleum extract which is available in abundance in Reka.
20. Three months later, Dr Vooni who is the Director of the RIIT published an article entitled "*Purple Synthose: The Future of Rubber Worldwide*", where she suggested that natural rubber be replaced by Purple Synthose as it is more durable, has better temperature and abrasion resistance, and is inexpensive to produce. Dr Vooni also stated that Purple Synthose would be suitable for making surgical gloves and tyres. President Rogers celebrated the idea but was

advised against pursuing the idea in haste having regards to the friendly relations with Arkadia.

## **Facanha**

21. Towards the end of 2017, Arkadia, together with the assistance of Ms Nwantiti expanded its rubber industry and the BRC's influence to the People's Republic of Facanha. The BRC and Ms Nwantiti then set up a company in Facanha known as the Facanha Rubber Company (FRC). This time, Ms Nwantiti was made the majority shareholder allowing her to have absolute control over its subsidiary in Facanha. The natural rubber harvested in Facanha would be exported to other countries including Reka.
22. Sometime in mid-2018, reports of Reka engaging in armed conflicts and funding insurgencies in neighbouring nations surfaced particularly at the Golden Line. Prime Minister Oorlog when asked during a live interview with a local news agency refused to comment on the Golden Line conflict directly. He however made several statements on his Facebook and LinkedIn ensuring the people of Arkadia that the country's international human rights obligations are respected and that *'Arkadia would not tolerate any form of war'*.
23. A few days later, whilst President Rogers was walking into the presidential office for a security meeting, a small group of protestors heckled him with "Stop War!" chants. In that moment, President Rogers was caught on camera telling his deputy *'there is nothing to shout about'*.

## **Difficult Times**

24. Towards the end of 2019, a deadly virus originating from the Island of Choroba, terrorised the entire world. The virus, known as Beebop-19, is a direct disease transmission which spreads through direct contact with an infected person. The microbes are passed from one to the other through the palms and can also be transmitted by indirect contact with an infected person's personal items. The noticeable symptoms include lesions and rashes appearing on the palms of the infected person. The Beebop-19 disease is highly infectious and deadly. It has

pushed countries around the world to go into complete lockdown. Businesses around the world were therefore disrupted as everyone had to remain indoors.

25. Large scale research around the world began taking place with many attempts to establish barriers to decrease or eliminate the microbe in the environment. A month later, researchers found that the best way to interrupt and slow down the transmission of Beebop–19 was through the wearing of protective gloves. After countless clinical trials, gloving was proved to be effective at preventing the transmission of Beebop–19. Following this discovery, the demand for protective rubber gloves surged at a phenomenal rate.
26. By March 2020, the phenomenal surge in rubber demand has caused a global shortage of natural rubber supply. Following that, the Governor of Arkadia's Central Bank warned the Oorlog's administration not to be *'too happy since we might just run out of latex. Don't forget, Arkadia's economy is mostly reliant on its rubber industry, hence any disruption to it could bring dire effect on its economy as a whole'*. Recognising the high global demand for its rubber gloves, Prime Minister Oorlog imposed a restriction on the overall production of its rubber gloves and increased their prices.
27. Around the same time, an independent global campaigning network, GreenIsGood noticed a sharp increase in natural rubber production in Arkadia. In a statement issued by GreenIsGood, it was stated that *'the intensive tapping by Arkadia to extract higher latex yields may be unsustainable and could shorten the lifespan of rubber trees. Intensified tapping may be destructive to its environment. We hope that Arkadia maintains an environmental friendly conduct to prevent a lasting impact on the environment'*.

### **Make or Break**

28. The shortage of natural rubber supply proves to be a big problem for Reka as thousands of people are dying due to the virus. Alarmed with the catastrophe that may befall Reka, President Rogers immediately instructed RIIT to pursue the production of synthetic rubber gloves. Despite RIIT's warnings that there will be production, research and financial constraints to manufacture the

synthetic rubber gloves in a short amount of time, President Rogers pledged that Reka will do whatever it takes to ensure its people are equipped with the proper medical tool to fight the disease. RIIT proceeded to produce the synthetic rubber gloves despite being only at its early stages of research. Following this, Arkadia's Minister of Agriculture requested President Rogers to reconsider such a "*hasty move*" as it will hurt the relationship between the two nations.

29. President Rogers' decision quickly proved to be successful as they were able to mass produce the synthetic rubber gloves for its people. Reka took that opportunity to export its manufactured gloves to other countries at an affordable price.
30. Within months, the sudden switch had caused the ABE and Arkadia to suffer huge financial losses resulting in shortage of funds to combat the deadly Beebop-19 virus. This is especially since all other sectors were down or if at all, operating at the bare minimum.

### **Breaking Point**

31. On 9.11.2020, the conflict between Aprósia and Reka came to a breaking point. Following that, President Rogers declared a special military operation in Aprósia and invaded Aprósia. The world leaders including the UN Human Rights Committee strongly condemned Reka's invasion of Aprósia. After being pressed by opposition parties in the Arkadian Parliament, Prime Minister Oorlog issued a statement and criticised Reka's full-scale military intervention in Arkadia.
32. The participation of Prime Minister Oorlog in the string of criticisms against Reka's invasion was supported by other states and has resulted in several countries around the world imposing sanctions against Rekan imports. Angered at the purported betrayal of friendship, thousands of Rekans demonstrated outside of the Arkadian embassy in Reka. With sanctions coming from all corners, Reka had started to feel the impact of its decision.

33. Despite the initial high demand for its synthetic rubber gloves, sometime in January 2021, Reka began to suffer massive financial loss due to the worldwide boycott. President Rogers accused the Arkadian government of retaliating in pure jealousy due to the exigencies of its synthetic rubber gloves that has caused financial constraints on Arkadia.
34. The financial difficulties faced by Reka have resulted in the shutting down of businesses, unsustainable bank moratoriums and high unemployment rate. Following this, the Rekan government established a Task Force comprising of highly qualified Ministers from President Rogers' administration to come up with solutions to resolve the financial crisis plundering Reka.
35. After thorough investigation, the Rekan Task Force found that there are some irregularities in relation to Rekan's taxation system. A paper was tabled in the Rekan Parliament showing how foreign companies took advantage of the tax loophole and paid lesser taxes compared to the local Rekan companies. The report was later leaked by an unknown government official to the press. The leaked report stated that between 2012 and 2021, the earnings made by foreign companies like ABE were astronomical and unlawful. This discovery has sparked an unnecessary outcry among the Rekans.
36. Three months later, in a sudden turn of events, Reka announced that it will impose a retrospective windfall tax, going back as far as 2017, against all foreign companies in Reka. Hours later, President Rogers tweeted a cryptic message on Twitter *'life is tough, people are dying and yet they are reaping our soil. "Dobby" has disrespected the hand that fed him before...simply ugly'*. After assessments were made by the Rekan revenue authorities, a tax assessment of USD5.7 billion was imposed on ABE.
37. As Arkadia only began to gradually return to a semblance of normalcy at that time, neither ABE nor BRC was able to finance or provide bailouts on the tax imposed. The Chairman of the BRC also turned to Ms Nwantiti for financial assistance but to no avail. Ms Nwantiti simply said the fine was just too much for them to bear. This resulted in the Rekan revenue authorities initiating

winding-up proceedings against ABE in July 2021. On the same day, the Chairman of BRC wrote to Prime Minister Oorlong requesting that the Government of Arkadia intervene to protect Arkadian's pride and interest.

### **Initiation of WTO Proceedings**

38. In August 2021, whilst the winding-up proceedings were ongoing, Arkadia had formally requested consultations with Reka pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO. Government officials from both countries met but were unable to resolve the dispute amicably. Arkadia then requested the establishment of a panel pursuant to Article 6.2 of the DSU on the basis that the tax assessments were a protectionist form of trade restriction.
39. During the same period, ABE's litigation team applied for a stay of the winding-up proceedings on the basis that the WTO proceedings were ongoing but were rejected by the High Court of Reka. ABE's litigation team then appealed to the Court of Appeal and subsequently to the Reka's Supreme Court of Justice but to no avail. Not long after, ABE was wound-up and its assets were put on auctioned by the Rekan Government.
40. In a surprise move, the auctioned ABE was later acquired by Synthose Corporation, an entity wholly owned by the RIIT. Synthose Corporation was established back in May 2020 as a result of the then high demand for protective gloves.
41. Dissatisfied, BRC Chairman immediately posted on his personal Facebook page stating that the BRC, being a majority shareholder, was duly affected by the acquisition of the ABE by Synthose corporation. He said '*This is an abomination and a day light robbery of Arkadian assets and investments*'. A follower of his Facebook account then commented on his post asking if the BRC is going to take any actions. BRC Chairman responded to the comment by saying '*still thinking about it*' but later deleted the comment.

42. In September 2021, The Pacific Times, an international and independent group of journalists had reported that the high demand for rubber gloves had pushed Arkadia to impose aggressive measures to mass produce raw materials necessary for the production of protective gloves. It was reported by at least 2 other news portals that such mass production in Arkadia have left a massive wound on its natural tropical rainforest. Following that, the European Union (EU) announced that they are investigating such discouraging treatment and will contemplate banning natural rubber imports from Arkadia. The announcement by EU caused panic within Arkadia as a ban would certainly plunge the BRC and Arkadia into further financial crisis.
43. Following the publications of the reports and announcement by the EU, an estimate of 500 Arkadian rubber tappers gathered at the Rolly Dolly Volcano to protest against the harm done on its environment. The spokesperson, Mr Deyh said that the injury caused to the tropical rainforest would anger the Arkadian Gods and could lead to an eruption of the Rolly Dolly Volcano. As such, Mr Deyh made a public call that *'the Arkadians should never forget its roots and the symbiosis between the Arkadians and the environment. May God help us all...'*.

### **Initiation of AIAC Proceedings**

44. Subsequently, in December 2021, the BRC invoked Article 9 of the Arkadia-Reka BIT to initiate arbitration proceedings against the Government of Reka at the Asian International Arbitration Centre (AIAC) which replaced the KLRCA in 2018. The BRC had paid the security deposits and the necessary fees under the AIAC Rules 2021 to the AIAC. The BRC claimed, *inter alia*, for the following:
- a) That the imposition of retrospective tax assessment against ABE is an unlawful expropriation of BRC's asset;
  - b) In any event, the imposition of retrospective tax assessment against ABE is a discriminatory practice, not in conformity with Reka's national treatment obligations and in breach of the fair and equitable treatment principle under the Arkadia-Reka BIT;



- c) A total of USD45 billion in damages and loss of future profits be paid due to the imposition of such retrospective tax.
- 45. President Rogers publicly objected to the institution of arbitration by the BRC stating that there is a parallel proceeding wherein the matter is being heard before the WTO and BRC's act of initiating the arbitration is a form of forum shopping and an attempt to reap Reka's finances in a bid to counter a potential financial crisis.
- 46. In response to Arkadia's claim, Reka stated as follows:
  - a) That the Arbitral Tribunal has no jurisdiction to adjudicate over the matter as a similar claim of similar nature is pending before the WTO where jurisdiction is compulsory;
  - b) That the imposition of retrospective tax assessment does not constitute an unlawful expropriation of BRC's assets. If at all, such imposition is justified.
- 47. In a brief response, the BRC stated that the Arkadia-Reka BIT was designed to protect the interest of Arkadian companies such as the ABE. For that reason, the Arbitral Tribunal should have jurisdiction to hear the matter.
- 48. In February 2022, in light of EU's potential ban, Reka was preparing a joinder application to join Ms Nwantiti as a party to the proceeding. However, a poison letter was released by a former employee at the FRC alleging Ms Nwantiti had been involved in a series of corrupt practices and abuse of powers. Ms Nwantiti was also alleged to have used her position as Chairman of the company to sexually harass her subordinates at the company. Not long after, Ms Nwantiti was arrested by the authorities in Facanha. She was later implicated in a tax evasion case and a worldwide Mareva Injunction was granted by the Facanha King's Court pending full and final determination of her case.

49. In view of the circumstances, on 12.2.2022, Reka instead applied to join Arkadia as a party to the arbitration proceedings on the basis that BRC would not be able to finance itself due to the losses it had already suffered and the imminent loss due to a potential ban by the EU. There were rumours going around on TikTok that the joinder application was just a delay tactic deployed by Reka in hopes that the proceeding before the WTO will be concluded and the ban by the EU will quickly materialise thereby leaving the BRC with no choice but to withdraw from the arbitration. President Rogers then issued a statement denying that rumour and also said that Reka cannot be liable as the retrospective windfall tax was necessary to safeguard its security and national interest.

### **The End Game**

50. Pursuant to Article 9 of the Arkadia-Reka BIT and the AIAC Rules 2021, a panel was constituted at the Asian International Arbitration Centre (AIAC). For the Hearing, Parties are requested to present arguments on the following issues:
- I. Whether the Arbitral Tribunal has jurisdiction to adjudicate over the BRC's claims following the proceeding before the WTO;
  - II. Whether Arbitral Tribunal should grant Reka's request to join Arkadia as a party to the proceeding;
  - III. Whether Reka's imposition of retrospective tax assessment constitute an unlawful expropriation of BRC's assets and inconsistent with Reka's obligations under the Arkadia-Reka BIT; and
  - IV. Whether Reka's imposition of retrospective tax assessment is justified to safeguard its national and security interest.

**BILATERAL INVESTMENT TREATY**

**BETWEEN**

**THE DEMOCRATIC UNION OF ARKADIA**

**AND**

**THE REPUBLIC OF REKA**

dated this

*1<sup>st</sup> April* 2012

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## **PREAMBLE**

The Government of Arkadia and the Government of Reka (hereinafter referred to as "the Parties"),

**REINFORCING** the longstanding traditional ties of friendship and cooperation between them;

**BUILDING** on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization and its Covered Agreements, and other multilateral, regional and bilateral agreements to which they are both parties;

**RECOGNISING** the important role and contribution of business and the need to further promote and facilitate cooperation and utilisation of the greater business opportunities provided by this Agreement;

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

**SEEKING** to establish clear and mutually advantageous rules governing their trade of goods and services and further liberalise and expand bilateral trade and investment;

**PROMOTING** a transparent business environment that will assist enterprises in planning effectively and using resources efficiently;

Have agreed as follows:

### **Article 1 Objectives and Scope of Application**

1. The objectives of this BIT are to promote closer integration between the economies of the Parties through:
  - (a) the reduction and/or elimination of customs duties on trade in goods between the Parties;
  - (b) the establishment of multilateral framework of principles and rules for trade in goods and services with a view to the expansion of such trade under conditions of transparency;
  - (c) facilitating trade in goods and services between the Parties;
  - (d) promoting economic corporation, partnership and growth of all Parties.
2. To protect the interests of both Parties and their respective investor(s).

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

## **Article 2**

### **Fairness and Transparency**

1. Each Contracting Party shall ensure that its laws, regulations, judicial decisions, policies, procedures, and administrative rulings of general application with respect to any matter covered by this BIT are promptly published or made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them. Whenever possible, such instruments will be made available through the internet in English.
2. Each Contracting Party undertakes to implement its laws, regulations, judicial decisions, policies, procedures, and administrative rulings of general application in a fair, reasonable, just and transparent manner.

## **Article 3**

### **Rule of law**

1. The Contracting Parties shall guarantee the principles of good administrative behaviour, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this BIT.
2. Each Contracting Party shall ensure that investor(s) have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi-judicial or administrative tribunals or procedures for the purpose of prompt review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law.
3. As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

## **Article 4**

### **Expropriation**

1. Neither Contracting Party shall nationalize or take any other measures depriving, directly or indirectly, the investor(s) of the other Contracting Party of their investments, unless the following conditions are complied with:

- (a) the measure is taken in the public interest;
  - (b) the measure is taken under due process of law;
  - (c) the measure is taken in a non-discriminatory manner; and
  - (d) the measure is taken against prompt, adequate and effective compensation.
2. Direct expropriation occurs when an investment is nationalised or otherwise directly taken through formal transfer of title or outright seizure.
3. Indirect expropriation occurs if a measure or a series of measures of a Contracting Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.
4. The determination of whether a measure or a series of measures by a Contracting Party, in a specific factual situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, amongst other factors:
- (a) the economic impact of the measure or series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
  - (b) the duration of the measure or series of measures by a Contracting Party; and
  - (c) the character of the measure or series of measures, notably their object and context.
5. The affected investor(s) or its Home State shall have the right, under the law of the expropriating Contracting Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.
6. Except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity, do not constitute indirect expropriations.

7. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements.

#### **Article 5** **National Treatment**

Each Party shall accord to investor(s) of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment that is no less favourable than that it accords, in like circumstances, to its own investors and investments.

#### **Article 6** **Most-Favoured-Nation Treatment**

Each Party shall accord to investors of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment no less favourable than that it accords, in like circumstances, to investors and investments in its territory of investors of any non-Party.

#### **Article 7** **Minimum Standard of Treatment**

1. Each Party shall accord:
  - (a) "fair and equitable treatment" requires each Party not to deny justice in any legal or administrative proceedings;
  - (b) "full protection and security" requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the investment; and
  - (c) the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.
2. A determination that there has been a breach of a separate international agreement, does not establish that there has been a breach of this BIT.



## **Article 8**

### **Security Exceptions**

Nothing in this BIT shall be construed:

- (a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interest;
- (b) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interest;
- (c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

## **Article 9**

### **Request for Establishment of Arbitral Tribunals**

- 1. The Complaining Party may request the establishment of an arbitral tribunal to consider a dispute arising under this BIT.
- 2. Where a request is made pursuant to paragraph 1, an arbitral tribunal shall be established in accordance with Article 10 (Establishment and Reconvening of Arbitral Tribunals).
- 3. Any dispute arising out of or in connection with this BIT, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration administered by the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in accordance with the rules of the institution as when the request is made.
- 4. The seat of the arbitration shall be Sydney, Australia.
- 5. The language of the arbitration shall be English.

## **Article 10**

### **Establishment of Arbitral Tribunals**

- 1. An arbitral tribunal requested pursuant to Article 9 (Request for Establishment of Arbitral Tribunals) shall be established in accordance with this Article.
- 2. Unless the Parties otherwise agree, the arbitral tribunal shall consist of three arbitrators.

3. All arbitrators shall:
- (a) have expertise or experience in law, international trade, other matters covered by this BIT, or the resolution of disputes arising under international trade agreements;
  - (b) be chosen strictly on the basis of objectivity, reliability, and sound judgement;
  - (c) be independent of, and not be affiliated with or take instructions from, either Party;
  - (d) not have dealt with the matter in any capacity; and
  - (e) disclose to the Parties, information which may give rise to justifiable doubts as to their independence or impartiality.
4. Unless the Parties otherwise agree, arbitrators shall not be nationals of a Party. In addition, the chair of the arbitral tribunal shall not have his or her usual place of residence in the territory of a Party.


#### **Article 11 Confidentiality**

Unless otherwise provided in this Agreement, each Party shall undertake, in accordance with its laws and regulations, to observe the confidentiality of information provided by the other Party.

#### **Article 12 Amendments**

The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures and on such date as the Parties may agree.

**IN WITNESS WHEREOF**, the undersigned, being duly authorised by their respective Governments, have signed this BIT.



**For the Government of Arkadia**



**For the Government of Reka**