1. **BACKGROUND**

1.1. The Republic of Vesper (hereinafter Vesper) and the Federation of Alderaan are two states located in the Ascetic Sea. Vesper has the highest population in the world with approximately 1.3 billion people. Until 1990, Vesper was ruled by the Communist Party and was a unitary-party state. In 1989, a wave of protests sparked off in the Duft Harbour district of Vesper due to the arrest and subsequent harsh sentencing for petty crimes of 20 University students and spread to mainland Vesper. In June 1990, as a result of these protests, (popularly referred to by the media as the ‘flashlight protests’), the Communist Party of Vesper was forced to step down, and on 2nd August 1990, in the first democratically held elections in Vesper, the Final Frontier Party (‘FFP’) came to power. Over the next decade, a number of socio-political reforms were implemented in Vesper by the FFP, and the Youth for Freedom Party (‘YFP’) another major political party which emerged from the flashlight protests and came to power 1998.

1.2. In 2006, Mr. Sam Aragorn, a Vesperan public figure who had gained international fame during the turn of the millennium due to his impassioned support of globalization and the liberalization of the Vesperan economy, led the FFP to a resounding victory in the general elections. Over the course of the next 8 years, through a series of reforms the Vesperan economy was progressively liberalized and its markets opened to foreign investments and trade. In 2008, after two years of lengthy negotiations, Vesper became a member of the WTO. Since then, Vesper has become one of the fastest growing economies of the world. Vesper has also opened-up access to a large majority of its sectors and has entered into many bilateral and regional trade agreements. However, due to its vast population, and the wide economic disparity between the richest and the poorest, Vesper continues to be a developing economy, ranks only 68th globally in the GDP (Nominal) per capita ranking and 75th in the GDP (PPP) per capita ranking in 2019. Predominantly an agrarian economy, the liberalization reforms led to the rapid rise of a flourishing manufacturing and processing sector in Vesper.

1.3. The Federation of Alderaan, came into being as an independent nation state in the year 1998 as a result of the signing of the Treaty of Eastphalia. Prior to 1998, what is now the Federation of Alderaan, was
six separate states – Atalan, Dagobah, Endor, Bernei, Agrabah and Bohemia. These six states attained the status of independent nations in the year 1948, at the end of the Second Great War. In 1970, these 6 states set up a customs union to facilitate the growing trade between them and named it the Union of Alderaan (the UA). The common socio-cultural background, similar and complementary geographical landscape and the functioning of the Alderaan customs union fostered a close relationship between the states. The UA was a founding member of the WTO. The signing of the Treaty of Eastphalia in 1998, was a historic move that brought together the 6 states of the UA as a single federal nation. The new state was called the Federation of Alderaan, and its capital was situated in the city of Eastphalia. The Federation of Alderaan became a continuing successor of the UA in the WTO and took over its seat and obligations.

1.4. The Federation of Alderaan (‘hereinafter Alderaan’) is a developed country, ranking among the top 10 countries globally in GDP (PPP) per capita and GDP (nominal) per capita, and ranking 8th globally in the Human Development Index. Along with a sophisticated financial services sector, Alderaan is home to (a) some of the largest pharmaceutical companies and medical manufacturers globally, (b) a cutting-edge space technology development sector and (c) a some of the oldest automobile manufacturers of the world.

2. **The Healthcare Crises in Vesper**

2.1. In February 2014, in the city of Mithrin in central Vesper, the City Municipal Hospital recorded five patient deaths in one week, all caused by the sudden onset of similar symptoms leading to respiratory failure. In the subsequent 2 weeks, 35 more cases of similar symptoms of acute respiratory distress followed by complete organ failure were recorded in over 5 cities surrounding Mithrin. By April 2014, nearly 350 cases of this disease had been recorded through Vesper. Identified as a strain of avian influenza - ‘H2N19’, the disease was previously unknown in Vesper. Spread through the air, the disease was classified as an epidemic by May 2014, and the Government of Vesper began implementing control measures including mandatory quarantine, subsidization of research into treatment and medication for control, awareness campaigns (including advertising and newspaper campaigning), restriction and quality control measures on poultry farms etc.
2.2. A report published by the National Public Health Organisation of Vesper in August 2014 identified the total number of H2N19 fatalities at over 650. The report identified the lack access to immediate medication and hospitals in central and rural parts of Vesper as the cause of the rapid spread of the virus. In February 2015, a variation of the Tarisflu, a drug developed by Ramin Inc, an Alderaan pharmaceutical company in the early 2000s proved successful in clinical trials in successfully treating the H2N19 virus. The drug was subsequently imported into Vesper and made available to hospitals and clinics across Vesper, to treat the disease which had come to popularly be referred to as S.A.R.F disease.

2.3. The original Tarisflu medication, used to treat other variants of influenza was administered orally. However, due to the rapid onset of the S.A.R.F disease, the oral consumption of Tarisflu was not sufficiently effective in counter-acting the onset of the disease. After making improvements to the medication, and successful testing in clinical trials, Ramin Inc announced that a combination of oral and intravenous administration of three variants of the Tarisflu medication had been successful in treating H2N19. Due to prohibitive costs of transporting the three variants of the Tarisflu medication (which had to be stored at specific temperatures to retain chemical potency), imported Tarisflu was very expensive.

2.4. Despite heavy subsidization by the government of Vesper in making the drug available to hospitals and clinics, the prohibitive cost of importation of the medication and the lack sufficient access to clinics with effective capabilities to administer the drug meant that the SARF disease was not fully eradicated. Cases of S.A.R.F fatalities continued to be recorded in parts of Vesper through 2015.

2.5. In August 2015, three patients under the age of 15 in the city of Calembel in Vesper were diagnosed with the H2N19 disease. The patients, however, did not respond to the administration of the Tarisflu treatment. The treatment, despite being administered as recommended by Ramin Inc, failed to curb the onset of the symptoms and all three patients died within 4 days of being admitted to Millenium Falcon Hospital, one of the largest private hospitals in Calembel. In the next 10 weeks, more than 50 fatalities of children under the age of 15 were reported, who displayed symptoms of the SARF disease but failed to respond to the Tarisflu treatment.
2.6. The Federation of World Health (‘FRW’) an internationally renowned organization coordinating and providing leadership and scientific data on international public health, released a report on the SARF epidemic in Vesper. The report, released on the 29th of October 2015, provided scientific information and data on the H2N19 and noted that three identifiable strains of the H2N19 virus had spread in Vesper in the past year. The report recorded a total of over 2000 fatalities caused by the three identifiable strains of the H2N19 disease. The report noted that children within the age group of 8-15 who were exposed to one particular strain of the H2N19 virus, did not respond to the Tarisflu treatment. The report also projected a rising risk of fatalities in the next half-decade in Vesper due to lack of a sophisticated medical R&D industry in Vesper, and the prohibitive costs and limited access of imported medication in many parts of Vesper.

2.7. Media coverage of the report induced widespread panic in parts of Vesper and led to a huge wave of protests in December 2015, with millions of protesters taking to the streets of Vesper demanding better healthcare access and facilities to the masses. The protests, dubbed the ‘Snow Revolution’, continued to generate public outcry in Vesper through 2016 and demands were made for the resignation of the incumbent government due to its inefficient public health management.

2.8. In response to the protests, the Prime Minister of Vesper in June 2016 announced a series of measures aimed at improving public health in Vesper, including construction of 15000 new clinics across the city, subsidization scheme for certain medicines and incentive grants to Medical Universities for undertaking research. Among these reform announcements, the most widely welcomed move was the opening up of the pharmaceutical industry (a sector previously monopolized by public sector enterprises) to foreign investment. The announcement, to allow foreign investment in the pharmaceutical industry as a part of the Policy for Foreign Investment of 2016, was touted to be a big step towards ensuring access to locally produced low-cost medication in Vesper and developing the local medical R&D sector.

3. THE VESPERAN FOREIGN INVESTMENT POLICY

3.1. Investment in Vesper is regulated through the Foreign Investment (Regulation and Management) Act, 2007 (FIRM Act). Section 3 of the FIRM Act states:
“Save as otherwise provided in the Act, or rules or regulations made thereunder, no person resident outside Vesper shall make any investment in Vesper”.

3.2. The Act details the various rules relevant to the making of foreign investment in Vesper, including but not limited to rules on the kind of capital instruments that may be held by the foreign investor (Section 4), the manner of issue of such capital instruments by companies / firms set up in Vesper (Section 5), the transfer of such capital instruments once issued to either other foreign investors or to Vesperan legal entity (Section 6 and Section 7), and the sectors in which foreign investment is permitted (Section 8) etc.

3.3. Section 8 of the FIRM Act states:

1. The Vesperan Government shall from time to time notify the ‘route of investment’ and ‘sectoral cap’ for each sector in which foreign investment may be permitted.

2. ‘Route of Investment’ means the two routes under which a foreign investor can invest in Vesper: ‘automatic route’ i.e. where investment up to the relevant sectoral cap shall be permitted without requiring the approval of the Foreign Investments Approval and Facilitation Board (FIAFB) as set up under Section 9 below, and ‘approval route’ where investment up to the relevant sectoral cap shall be permitted only with the approval of the FIAFB and subject to such terms and conditions as may be set by the FIAFB.

3. ‘Sectoral cap’ as referred to in Section 8(1) means the maximum percentage of permitted foreign investment in a Vesperan company or firm, (through any such instrument as may be permitted under this Act), operating in the sector for which such ‘sectoral cap’ is prescribed.

3.4. Section 9 of the FIRM Act sets up the Foreign Investment Approval and Facilitation Board (the FIAFB) which is authorised to oversee the implementation of the FIRM Act and is also empowered to act as the authority which grants approval to foreign investors for “Approval Sector” investments.
3.5. In September 2007, the Vesperan Government notified in the official gazette the first *Policy for Foreign Investment* (PFI) under Section 8 of the FIRM Act, and an updated PFI has been notified in the gazette every 2 years.

3.6. The following additional entry *inter alia* was included in the PFI 2016:

<table>
<thead>
<tr>
<th>Pharmaceuticals (including manufacture of medical devices)</th>
<th>Upto 49%</th>
<th>Approval Route</th>
<th>Additional Conditions as prescribed below</th>
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<tbody>
<tr>
<td>#7.1 The investment agreement (along with a technology transfer agreement as per #7.2, if any), setting out the terms and conditions for investment by the foreign investor, to be shared with the FIAFB at the time of seeking approval.</td>
<td></td>
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| #7.2 The FIAFB may prescribe the following conditions for granting approval:  
  A. The foreign investor to contribute relevant technology, equipment or know-how as a part of the investment and not just a financial contribution;  
  B. Where #7.1A Requirement is imposed on an investor, such investor to share details of the technology, equipment or know–how contributed, with the FIAFB and the investee company in the format prescribed;  
  C. The investment agreement between the foreign investor and the Vesperan partner / investee company to include the terms of the technology, equipment and information sharing between the two, or a separate technology / know-how transfer agreement to be concluded between the foreign investor and the investee company / partner along with the investment agreement;  
  D. The investment agreement to set out the terms on which technology may be licensed to third parties in Vesperan;  
  E. Any other such conditions as may be deemed appropriate. |
| #7.3 The FIAFB may prescribe the term of the technology sharing agreement, provided that the party with whom such technology is shared will continue to have the right to use, improve, exploit such technology and know-how, notwithstanding the termination of the technology sharing agreement; It is recognised that the term of such technology transfer agreements is typically between 15 to 20 years. |
#7.4 The FIAFB may recommend amendments to the technology transfer agreement prior to granting approval of such investments. Such amendments could include:

- (a) Limiting or restricting any prohibition in such agreements on improvements being made to the contributed pharmaceutical technology by the transferee of such technology;
- (b) Requiring that improvements to any imported pharmaceutical technology belong to the party making the improvement;
- (c) Requiring, in the case of joint venture partners, that all agreements with respect to licensing of such technology and all terms accompanying such licensing be with the consent of the transferee party.

3.7. By December 2016, a number of major pharmaceutical companies around the world announced the decision to invest in Vesper to ‘tap into the vast potential for research & development oriented pharmaceutical industry in light of the recent epidemics’ and to ‘facilitate the development of the nascent healthcare and medical research industry in Vesper.

3.8. By March 2018, 15 pharmaceutical companies had applied for investment approval to the FIAFB. Of these, 8 of the largest were companies from Alderaan. Among the Alderaan companies were Ramin Inc, the pharmaceutical company credited with inventing the most effective medication and delivery-technology for anti-retroviral therapy, Zimmer Pharma Ltd, the leading developer of drugs for combating various strains of the EVD epidemic globally and LVE Biotec Inc, the largest developer and manufacturer of cancer diagnosis technology.

4. The IPR Controversy

4.1. On 25th September 2018, the Vesperan Minister of Health Ms Rowena Pevensie made the following announcement:

“It pleases me to announce that the Foreign Investments Approval and Facilitation Board of the Republic of Vesper has already granted investment approvals to 8 pharmaceutical companies and more investment applications are currently being reviewed. We believe that this will provide a much-needed boost to the local medical and pharmaceutical industry. We also hope that the decades of experience, technical knowledge and advanced technology and processes that these pharmaceutical companies bring to Vesper will be instrumental in combating the healthcare crises and epidemics that
have debilitated Vesper, its people and its economy in the past few years. The Government of Vesper looks forward to a healthy and flourishing cooperation between the Vesperan industry and its foreign partners.”

4.2. On 18th October 2018, a spokesperson for Ramin Inc released the following statement:

“It is with regret that we announce that Ramin Inc will not be pursuing its decision to invest in Vesper in the near future. The restrictions imposed by the FIAFB on the terms of Ramin’s investment with its Vesperan partner Liszt & Co Ltd, were not only onerous but impinged upon Ramin’s ability to effectively exercise its intellectual property rights. The effective protection of IPRs is the foundation stone of a pharmaceutical company’s ability to innovate, research and develop medical technology and drugs in a timely and efficient manner to meet the growing demands of a healthcare sector. The Vesperan government’s inability or unwillingness to protect IPRs of investors such as Ramin will continue to be a roadblock for effective investment in the pharmaceutical sector of Vesper. We hope that the Vesperan government will ease such restrictions in the near future in order to foster greater investment in the Pharma sector.”

4.3. In the following month, Zimmer and LVE also came out with statements saying that while they were not yet contemplating withdrawal from the investment approval process, they were facing hurdles due to the conditions on investment which the FIAFB was imposing and which heavily restricted the effective protection of their intellectual property rights.

4.4. These consecutive statements received widespread media attention and reporting, leading to many news platforms and commentators discussing the 2016 PFI and the implications of the conditions outlined in the PFI to Vesper’s IPR obligations. On 19th of November 2018, ‘Westers’ – an internationally reputed media house, published a report setting out the conditions that were typically imposed by the FIAFB and stated that these were based on the PFI 2016. Subsequent media reports in the weeks following, also confirmed the same from sources inside various pharmaceutical companies which had applied for investment approval in Vesper. The conditions / restrictions reported were:

(a) All foreign investors were required to share certain patented technology and technical know-how with their investee company / joint venture holders;
(b) Such agreement, setting out the terms of the technology sharing was required to be submitted to the FIAFB for approval;
(c) The term of such agreement was not permitted to be longer than 18 years thus far in any of the approved agreements;
(d) The agreement for technology transfer was required to, in all the cases thus far, allow the investee company the rights make improvements to the technology even after the expiry of the agreement, and that such improvements would be the commercial and intellectual property of the investee company.
(e) The FIAFB does not permit any foreign investor to impose restrictions on the Vesperan transferee from commercially exploiting, making improvements upon, or sharing the technology and technical know-how which has been shared by the foreign investor with the Vesperan national.

4.5. In December 2018, the Office of the President of the Federation of Alderaan announced that it would be holding stakeholder discussions with its pharmaceutical industry to examine the nature of investment conditions imposed by the Vesperan FIAFB, and whether the same were preventing protection and enforcement of IPRs. From January to March 2019, the government of Alderaan held a series of roundtable discussions with its domestic pharmaceutical industry, where representatives of Ramin, Zimmer and LVE were also present.

4.6. In April 2019, the President of Alderaan announced that representatives from Alderaan and Vesper would meet from the 2nd to the 4th of May 2019 to discuss the Vesperan investment policy for the pharmaceutical sector. On 1st of May 2019, the Prime Minister of Vesper Ms. Ariadne Danvers released the following statement:

“In light of the meetings scheduled between states of Vesper and Alderaan in the coming days, it is important to make it clear that Vesper is in full compliance with all its international obligations vis-à-vis IPRs under the TRIPS agreement of the WTO. The meetings scheduled in following days is a gesture of cooperation and good faith on the part of Vesper. We firmly maintain that it is our right, in fact our duty to the Vesperan people, to undertake measures that foster the growth of the healthcare sector and that not only combat the growing number of fatal diseases in Vesper but also contribute towards prevention of similar devastating epidemics in the future. The FIAFB has given adequate platform to each of the pharmaceutical companies who have voluntarily sough to invest in the Vesperan market
and ensured that all conditions are imposed transparently and only to the extent set out in the PFI 2016.”

4.7. Subsequent to the 3-day discussions and negotiations between Alderaan and Vesper, both states issued press releases stating that no mutually satisfactory conclusion had been arrived at in these discussions.

5. The WTO Dispute Settlement Proceedings

5.1. On 23rd of May, the Alderaan government requested consultations with the Vesperan government under Articles 4 and 6 of the DSU and Article 64 of the TRIPs Agreement. After 60 days of unsuccessful consultations, Alderaan submitted a request for the establishment of a panel to the WTO Dispute Settlement Body, containing the following claims:

(A) The PFI 2016 violates Article 3 of the TRIPs Agreement, by requiring by mandatorily requiring foreign investors to share patented technology (i.e. medical devices, pharmaceutical medication administration processes, and research on medicines) treated such foreign investors less favourably than Vesperan nationals on whose intellectual property such restrictions were not placed.

(B) The PFI 2016 violates Article 28 of the TRIPs Agreement because it authorizes the FIAFB to set out terms in the commercial agreement between the foreign investor and the JV partner / investee company which restricted the foreign investor from freely exercised their patent rights such as the right to freely assign and license the patent, and the right to exclusively use and improve such patents.

(C) The PFI 2016 and the conditions imposed by the FIAFB under it, violate Article 39 of the TRIPS Agreement by not granting effective protection to the foreign investor’s trade secrets and allowing the unfair commercial exploitation of such trade secrets post the termination of the technology transfer agreement.

5.2. In response to the request submitted by Alderaan for consultation, Vesper stated before the Dispute Settlement Body: Vesper is disappointed that Alderaan would prioritize the profit maximization policies of the pharmaceutical industry despite the devastating healthcare crises plaguing Vesper. It
has re-iterated that Vesper is fully cognizant of its obligations under the TRIPS and has not violated any of them. In fact, the TRIPS Agreement provides full flexibility to WTO Members to balance the protection of IPRs with public policy objectives such as developmental and technological objectives, and the protection of public health, ‘ordre public’ and morality. Vesper is in full compliance with its obligations under Articles 3, 27, 28, 33 and 39 of the TRIPS Agreement. In particular, the Vesper makes the following submissions:

(A) The imposition of requirement of a foreign investor to share technology on the commercial terms and with the joint venture partner of their choice, is in line with the objectives of the TRIPs as set out in Article 7;

(B) Foreign investors investing in Vesper are not treated less favourably than Vesperan nationals and the protections guaranteed to the intellectual property of such investors under TRIPs has been provided by Vesper to all Alderaan investors;

(C) Vesper is allowed to impose reasonable limitations on the rights of patent holders, in light of the healthcare crises and the legitimate interests of the Vesperan public under Article 30 of the TRIPs;

(D) Vesper has not violated Article 39 of the TRIPs as there has been no unfair commercial exploitation of undisclosed information and the Vesperan state has provided adequate mechanism to foreign investors for preventing such exploitation.”

CLARIFICATION: ISSUES OF MARKET ACCESS UNDER THE GATT AND SECTORAL COMMITMENTS ARE NOT WITHIN THE SCOPE OF THIS CASE.

REFERENCES:
The following material may be referred to for preparation of the case:


