TEAM : BASTID

2021

FOREIGN DIRECT INVESTMENT

INTERNATIONAL ARBITRATION MOOT

SOUTH KOREA

MEMORANDUM FOR RESPONDENT

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

On behalf of

VEMMA HOLDINGS INC.

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

(CLAIMANT)

Against

FEDERAL REPUBLIC OF MEKAR

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

(RESPONDENT)

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LIST OF AUTHORITIES

ARBITRAL DECISIONS

Abbreviation	Citation
A11Y	A11Y LTD v Czech Republic, ICSID Case No UNCT/15/1, Decision on Jurisdiction, 9 February 2017
AES	AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary (II), ICSID Case No ARB/07/22, Award, 23 September, 2010
Al Warraq	Al Warraq v Indonesia Ad hoc Arbitration, Final Award, 15 December 2014
Azurix	Azurix Corp v Argentina, Award, ICSID Case No ARB/01/12, 14 July 2006
Banka	Ceskoslovenska Obchodni Banka, a.s. v The Slovak Republic, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999
Bear Creek	Bear Creek Mining Corporation v Republic of Peru, ICSID Case No ARB/14/21, Award, 30 November, 2017
Bernhard	Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No ARB/10/15, Procedural Order, No 2, 26 June, 2012
Biwater Guaff	Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No ARB/05/22, Award, 24 July 2008
Blue Bank	Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/20, Award, 26 April, 2017

Bridgestone	Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v Republic of Panama, ICSID Case No ARB/16/34, Award, 14 August 2020
BUCG	Beijing Urban Construction Group Co Ltd v Republic of Yemen, ICSID Case No ARB/14/30, Decision on Jurisdiction, 31 May 2017
Casinos Austria	Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/14/32, Decision on Jurisdiction, 29 June 2018
CMS	*CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 1 September 2006
Commodities	Commodities & Minerals Enterprise Ltd v CVG Ferrominera Orinoco, CA (I), Order of the United States Court for the Souther District of Florida, 8 July, 2021
Copper Mesa	Copper Mesa Mining Corporation v Republic of Ecuador, PCA Case No 2012-02, Judgment of the Court of Appeal for Ontario, 11 March 2011
Duke Energy	Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador, ICSID Case No ARB/04/19, Award, 18 August 2008
EBO Investment	EBO Invest AS, Rox Holding AS and Staur Eiendom AS v Republic of Latvia, ICSID Case No ARB/16/38, Award, 28 February 2020
Eli Lilly	Eli Lilly and Company v The Government of Canada, UNCITRAL, ICSID Case No UNCT/14/2, Procedural Order No 4, 12 September, 2013

Enron	Enron Corporation Ponderosa v Argentina, Award, ICSID Case No ARB/01/3, 22 May 2007
Glamis Gold	Glamis Gold, Ltd v United States of America, Award, UNCITRAL, 8 June 2009
Iberdola	Iberdrola Energía, S.A. v Republic of Guatemala (I), ICSID Case No ARB/09/5, Award, 17 August 2012
Jan de Nul	Jan de Nul N.V and Dredging International N.V v Arab Republic of Egypt, ICSID Case No ARB/04/13, Award, 6 November 2008
Mera	Mera Investment Fund Limited v Republic of Serbia, ICSID Case No ARB/17/2, 30 November 2018
Methanex	Methanex Corporation v United States of America, UNCITRAL Case, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae', 15 January 2001
Mondev	Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2, Final Award, 11 October 2002
Noble Energy	Noble Energy Inc and Machala Power Cía Ltd v Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 March, 2008
Parkerings	Parkerings-Compagniet AS v Lithuania, ICSID Case No ARB/05/8, Award, 11 September 2007
Philip Morris	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Decision on Jurisdiction, 2 July 2013
Philip Morris PO	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay, ICSID Case

	No ARB/10/7, Procedural Order No 3 (Feb. 17, 2015) and Procedural Order No 4, (March 24, 2015)
Romak	Romak SA v The Republic of Uzbekistan, PCA Case No 2007-07/AA280, Award, 26 November, 2009
Salini	Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction, 29 November, 2004
Suez	Suez, InterAguas Servicios Integrales del Agua SA, Sociedad General de Aguas de Barcelona SA v The Argentine Republic, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006
UAB	*UAB E energija (Lithuania) v Republic of Latvia*, ICSID Case No ARB/12/33, Award of the Tribunal, 22 December 2017
Generation Ukraine	Generation Ukraine Inc v Ukraine, ICSID Case No ARB/00/9, Award, 16 September, 2003
UPS	United Parcel Service of America, Inc v Government of Canada, ICSID Case No UNCT/02/01, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001
Venezuela	Venezuela US, SRL v Bolivarian Republic of Venezuela, PCA Case No 2013-34, Interim Award on Jurisdiction, 26 July, 2016

OTHER CASE LAW

Abbreviation	**Citation**
Hilmarton	Hilmarton v Ominium (1999) 2 All ER (Comm) 146

JOURNAL ARTICLES

Abbreviation	Citation
Blyschak	Blyschak P., 'State-owned Enterprises and Investment Treaties' (2011) 6 J Intl L & Intl Rel 1, 40
Born and Forrest	Gary Born, Stephanie Forrest, Amicus Curiae *Participation in Investment Arbitration*, *ICSID Review - Foreign Investment Law Journal*, Volume 34, Issue 3, Fall 2019, Pages 626–665
Crawford(a)	Crawford J, 'Investment Arbitration and the ILC Articles on State Responsibility', (2010) 25(1) ICSID Review - Foreign Investment Law Journal 127
Feldman	Feldman, M, 'State-Owned Enterprises as Claimants in International Investment Arbitration', (2016), 31(1) ICSID Review 24
Gomez	Gomez K., 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' [2012] 35(2) Fordham International Law Journal
Lamb and others	Lamb S and others, 'Recent Developments in the Law and Practice of Amicus Briefs in Investor State Arbitration' [2017] 5(2) Indian Journal of Arbitration Law
Mann	Mann, FA, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 British Year Book of International Law 241

BOOKS

Abbreviation	Citations
Alexandrov and Carlson	Alexandrov S and Carlson M, 'The Opportunity to Be Heard: Accommodating Amicus Curiae Participation

	in Investment Treaty Arbitration', in Fernandez Ballesteros, MA and Arias Lozano, D (eds), *Liber Amicorum Bernardo Cremades*, La Ley, January 2010
Blackaby and Richard	Blackaby N. and Richard C., 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in Waibel, M, Kaushal, A, Chung, KHL and Balchin, C (eds), *The Backlash against Investment Arbitration*, Kluwer Law, January 2010
Broches	Broches, A, *Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers 1995)
Paulsson	Paulsson, J, *Arbitration and State enterprises: Survey on the National and International State of Law and Practice* by Böckstiegel, K-H, Arbitration International, 1984
Schreuer	Schreuer, CH, Article 25, in Schreuer, CH (ed), *The ICSID Convention: A Commentary 71*, 2nd ed, 2009
Sornarajah	Sornarajah, M, *The International Law on Foreign Investment* (4th ed, CUP 2017)

MISCELLANEOUS

Abbreviation	**Citations**
ASEAN-FTA	Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, 2009
ILC Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)
NAFTA	North American Free Trade Agreement
UNCTAD Series	UNCTAD Series on Issues in International Investment Agreements II, UNITED NATIONS New York and Geneva, 2012

Atkinson	Atkinson Par mary , 'Egypt's currency in freefall: What does it mean and why now?' (Egypt's currency in freefall , 22 November) <https://www.middleeasteye.net/fr/news/egypts-currency-flotation-what-does-it-mean-and-why-now-1444672660> accessed 20 September 2021
Alshaali	Alshaali Abdulnasser, 'Iran and Turkey are learning the hard way that there is no easy way out' (Currencies in free fall and the economies caught up in them, 24 August 2018) <https://gulfnews.com/business/analysis/currencies-in-free-fall-and-the-economies-caught-up-in-them-1.2270088> accessed 20 September 2021

LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
CBFI	The Consortium of Bonoori Foreign Investors
CBFI Submission	Amicus Submission by The Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	The Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement 2014
CETA	The Comprehensive Economic and Trade Agreement between Canada and the European Union 2016
CILS	Centre for Integrity in Legal Services
e.g.	exempli gratia

ed	Edition
External Advisors of the CRPU	Amicus Submission by External Advisors to The Committee on Reform of Public Utilities
Facts	Facts from the Case File
FET	Fair and Equitable Treatment
i.e.	id est
ICSID AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes 1978, amended in 2006
LPM	Labourers' Party of Mekar
Mekar	The Federal Republic of Mekar
MRTP	Monopoly and Restrictive Trade Practice Act, as amended in 2009

NDP	non-disputing party
No	Number
p	Page
para(s)	paragraph(s)
PO3	Procedural Order 3
PO4	Procedural Order 4
SOEs	State-owned Entities
Response	Response to the Notice of Arbitration
UNCITRAL	UNCITRAL ML on International Commercial Arbitration 1985, amended in 2006
USD	The United States of America

VCLT	Vienna Convention on the Law of Treaties 1969
Vol	Volume

STATEMENT OF FACTS

Parties to the Dispute

1. Both the Parties are placed in the Greater Narnian region, in the Eastern Ocean, covering 7.9 million square kilometers, accounting for 31% of the Aslanian continent and encompassing 11 independent nations.

2. The Federal Republic of Mekar ('**Mekar**' or '**The Respondent**') is situated at approximately 1,600 kilometres south of the Commonwealth of Bonooru ('**Bonooru**'). It is a country experiencing a period of lengthy political instability marked by widespread flight out of the nation and resource exploitation by several occupying powers. The Mekari Mon ('**MON**') is its national currency.

3. Bonooru is a developing archipelagic State with 109 islands, totalling 895 square kilometres, located far north in the region. Vemma Holdings Inc ('**Vemma**' or '**The Claimant**'), is an airline holding corporation based in Bonooru, a State which currently holds a 55% share in the corporation since March 2021. In order to ensure the liberalization of trade and investment and foster strong economic relationships with Bonooru, Mekar signed a BIT in 1994 ('**the Bonooru – Mekar BIT**'), which was replaced in 2014 by the Comprehensive Economic Partnership and Trade Agreement ('**the Bonooru – Mekar CEPTA**').

4. In 2011, Vemma has purchased shares of a Mekari airline under the Share and Purchase Agreement with Mekar Airservices and operated in the territory of the Respondent.

Background

5. After suffering losses as a result of the 1973 and 1979 oil crises, the Civil Aviation Authority ('**CAA**'), converted Bonooru Air's parent company, BA Holdings, into an arms-length firm in order to improve profitability. On 19 December 1984, Bonooru Air was separated into three airlines at the same time among them the Royal Narnian

which became Bonooru's flag carrier, which is owned and operated by Vemma, the successor of BA Holdings.

6. Mekar's civil aviation companies until 2003 were Aer Caeli and Caeli Airways ('**Caeli**'). Until 1994, both State-owned corporations had a statutory monopoly, the former on national routes and the latter on international flights. In 2003, the two airlines were merged to Caeli Airways.

Caeli's Privatisation

7. Shortly after the merger, Caeli's financial situation started to become instable. The Ministry of Civil Aviation in Mekar, therefore, issued Decree F-0056 on 14 February 2004, extending government assistance to the airline. In 2005 and 2006, Mekar amended the decree to add debt forgiveness, tax and fee deferrals, and industry-specific types of help, such as fuel subsidies, to the list of allowed infusions.

8. However, Caeli's situation worsened as a result of the 2008 financial crisis. After the midterm elections, which took place in November 2008, the Labourers' Party of Mekar ('**LPM**') parliamentary majority was shattered. Soon after, the Ministry of Finance issued a policy Statement classifying Caeli Airways as acceptable for privatisation after the International Monetary Fund decreased Mekar's growth forecast for 2009 by 2.8 percent.

9. In 2009, the new legislature updated Mekar's Monopoly and Restrictive Trade Practice Act in order to boost investor trust, which called for the establishment of the Competition Commission of Mekar ('**CCM**'), an independent and autonomous enforcement body.

The Claimant's Investment

10. In January 2010, Caeli Airways' privatisation was prioritised due to its perilous financial situation. The successful third attempt was launched in September 2010.

11. The Claimant has offered the most financially advantageous business strategy and on 5 January 2011, Vemma's proposal for 800 million USD was accepted. The Chairperson of Mekar's Committee on Public Utilities Reform was a vocal supporter of Vemma's offer, who found its ties to Bonooru advantageous for Mekar's economy.

CCM Investigations

12. Caeli's quick rise grabbed the CCM's notice, prompting a *suo moto* probe of its operations ('**The First Investigation**'). The CCM announced its intention to investigate whether Caeli used predatory pricing methods to stifle competition on the domestic market in a news release on 9 September 2016. As a result, Caeli Airways' airfare was capped as a stopgap measure by the CCM to prevent it from making supra-competitive profits in the future.

13. By the end of August 2018, the CCM had completed its First Investigation into Caeli Airways' business activity and produced a lengthy report on the findings, which resulted in a 150 million MON fine.

14. In December 2016, a group of Mekari members in Greater Narnia filed a new complaint with the CCM, claiming that Caeli's activities rendered it nearly hard for them to break into the market tied to Phenac International Airport, Mekar's capital city airport. This resulted in a second inquiry into Caeli's business practices by the CCM, which this time focused on price undercutting on specific routes to and from Phenac International Airport ('**The Second Investigation**'). The CCM finished the Second Investigation on 1 January 2019, and further fined Caeli with 200 million MON.

Economic Crisis

15. In March 2017, Mekar experienced a currency crisis, due to the MON's decrease in late 2016, which was blamed on poor investor mood, government involvement with the central bank, and tariff threats from trading partners. Mekar's fiscal and current accounts were both in deficit due to its high foreign-currency debt.

16. The LPM was re-elected to a parliamentary majority in November 2017, and many foreign investors pulled out of Mekar's market. The new government adopted multiple measures permitting bailouts to State-owned or controlled enterprises, mainly in the hydrocarbon sector, in December 2017, as the macroeconomic situation in Mekar was in free fall.

17. Mekar's government issued a decree on 30 January 2018 forcing all enterprises operating in the country to offer goods and services denominated entirely in MON, in order to stabilize the national currency and avoid the economy's collapse. Subsequently, Caeli asked the CCM to lift the interim airfare limitations it has been subjected to, emphasising the necessity to boost its fares in light of rising inflation, now that ticket costs are designated in MON. Caeli's plea was denied by the CCM, which reasoned that the interim restrictions could not be lifted until the investigation was completed, and that interfering with inflation rates was beyond its jurisdiction.

18. The President signed Executive Order 9-2018 on 25 September 2018, allowing airlines to receive subsidies for each Mekari citizen travelling on board. The Secretary of Civil Aviation was given discretion in granting subsidies under the Order, and awarded subsidies to several airlines, including Star Wings and JetGreen, which were owned by holdings from Arrakis.

Arbitral Proceedings

19. In November 2019, Vemma Stated its desire to sell its shares in Caeli. Vemma received a bid for the entirety of Vemma's shares in Caeli Airways from Hawthorne Group LLP, which has subsequently been rejected by Mekar Airservices.

20. Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce ('**SCC**') Arbitration Institute on 11 February 2020, after failed negotiations between the two parties with regards to the Hawthorne Group LLP offer. This request was submitted under the SCC Arbitration Rules and Article 48 of the Shareholders' Agreement. After the Parties were not able to decide on a single arbitrator, the SCC Secretariat nominated Mr. Rett Eichel Cavannaugh, and on 9 May 2020 a ruling was made in favour of Mekar Airservices, subsequently to a fast-tract procedure. It held that the Claimant failed to provide a *bona fide* third party offer as per Article 39 of the Shareholders' Agreement, as Hawthorne Group LLP was in direct connection to the Claimant through their common membership in the Moon Alliance.

21. In spite of the Claimant's request for arbitration to the Supreme Arbitrazh Court of Sinnograd on 9 May 2020 which resulted in the award being set aside, the Mekar High

Commercial Court recognised and enforced the award on 23 August 2020. This decision was not affected by Vemma's appeal, which was dismissed on 25 September 2020.

Resale of Caeli back to Mekar and the Initiation of the Current Proceedings

22. On 8 October 2020, the Claimant sold its Caeli interest to Mekar Airservices for 400 million USD. On the same day, the Claimant filed a notice of arbitration against Mekar under the CEPTA, seeking reimbursement for its losses.

SUMMARY OF ARGUMENTS

A. JURISDICTION

23. The Respondent submits that the Claimant does not satisfy the criteria outlined in Chapter 9 CEPTA or the ICSID AF RULES. The Claimant does not fall under the definition of an *'investor'* under Chapter 9 of the CEPTA because it is a State-Owned Enterprise. The Claimant performs activities that are governmental and its nature as an SOE creates arbitration that is State-State, to which the Respondent has not consented. This is further supported by the Broches Test. Hence, the Tribunal does not have jurisdiction and the Claimant holds no legal standing to bring the arbitration claim in front of the Tribunal.

B. AMICI SUBMISSIONS

24. The External Advisors of the CRPU's amicus submission meets all of the requirements under the ICSID AF Rules. They are independent of the disputing parties. They introduce a new perspective and insight through their involvement with the Caeli acquisition, they address a matter within the scope of the dispute and they hold a significant interest. The Tribunal should grant leave to the amicus submission of the External Advisors. The CBFI's amicus submission does not meet the three criteria under the ICSID AF Rules, and their submission should not be granted leave. Additionally, there is evidence of partiality and connection to the Claimant.

C. CEPTA ARTICLE 9.9 VIOLATIONS

25. The Respondent submits that the Tribunal must find that the Respondent's actions cumulatively or individually do not violate CEPTA Article 9.9(1), (2) and (3) Minimum Standard of Treatment. The Tribunal must appreciate that the majority of the actions implemented on behalf of the State of Mekar are, in the eyes of a reasonable person, appropriate and necessary.

D. APPROPRIATE COMPENSATION STANDARD

26. The Respondent argues that it owes no compensation to the Claimant. If the Tribunal disagrees, then the award should be calculated based on the '*market value*' of Claimant's investment. The Respondent has already paid the *'market value'* of 400 million USD when purchasing the Claimant's stake in Caeli.

ARGUMENTS

A. JURISDICTION

I. The Tribunal does not have Jurisdiction under Chapter 9 of the CEPTA nor the ICSID AF Rules to hear the claim.

27. Jurisdiction refers to the power of a Tribunal to entertain a proceeding and concerns its competence to adjudicate a particular case. This is supported by *Blue Bank:*

> *'matters that are decisive for purposes of establishing jurisdiction, such as whether a particular Claimant qualifies as an investor or whether an investment falls under the protection of the relevant treaty, must be proven at the jurisdictional stage.'*[1]

28. Respondent seeks to argue that the Claimant does not qualify as an *'investor'* and that the *'investment'* does not fall under the protection of CEPTA Article 9 and the ICSID AF Rules.

1. The Tribunal does not have jurisdiction due to lack of consent by the Respondent

29. The Tribunal does not have jurisdiction because of a lack of consent. The Respondent has consented only to arbitration of investor-State disputes and not State-to-State disputes. The jurisdiction of the current Tribunal cannot be based on an arbitration clause built within an investor-State contract. The current arbitration is a State-to-State dispute.

30. This is confirmed by *A11Y*[2] *'where there is no consent to arbitrate certain disputes under the basic Treaty, an MFN clause cannot be relied upon to create that consent unless the Contracting Parties clearly and explicitly agreed thereto.'*

[1] Blue Bank, para 73.
[2] A11Y, para 104.

31. Similarly, the Tribunal in *Philip Morris*[3] held: *'any limitations on consent contained in a BIT constitute limitations on the scope of the Tribunal's jurisdiction. Procedural preconditions [...] limit State's consent to jurisdiction.'*

32. Although the CEPTA agreement acts as a guideline when understanding the nature of an *'investor'* who can be protected by investment treaty provisions, this is applicable for investor-State disputes and not State-State disputes.

2. The Tribunal does not have personal jurisdiction (*ratione personae*) and subject-matter jurisdiction (*rationae materiae*)

33. The Tribunal does not have personal jurisdiction. This type of jurisdiction is available for disputes

> *'between a contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another contracting State.*[4]*'*

34. The Tribunal also does not have subject-matter jurisdiction, which is *'any legal dispute arising directly out of an investment.'*[5]

35. The *ratione personae* and *ratione materiae* requirements need to be met according to CEPTA Chapter 9. CEPTA Article 9.16(1) States that an arbitral claim can be submitted by *'an investor of a Party on its own behalf'*[6]. The *ratione personae* and *ratione materiae* requirements are not met by the Claimant since it does not qualify as an *'investor'*.

36. Under CEPTA Article 9.1(a), an *'investor'* means:

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[3] Philip Morris, para 35.
[4] Venezuela US, para 75.
[5] Mera para 135, Casinos para 195.
[6] CEPTA, p 79, line 2855.

'a natural person with the nationality of a Party or an enterprise with the nationality of a party seated in the territory of a party that seeks to make, is making or has made an investment in the territory of the other Party'[7].

37. The two elements of a dispute under this definition for the current Tribunal are 1) *'natural persons/enterprise'* and 2) *'investment'*. An *'investment'* is further defined as

'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.' [8]

38. The Claimant does not fall under either the definition of an *'investor'* or performed an '*investment'* through the CEPTA. This is because of its nature as an SOE.

3. The Claimant is an SOE that fails to meet the criteria outlined in the Broches Test, and its claim should be deemed as that a *'State'* and not of an *'investor'*.

39. While there is no unanimous definition of an SOE, it can be described as 'any commercial enterprise predominantly owned or controlled by the State or by State institutions, with or without separate legal personality.'[9] The *raison d'être* of an SOE is that it carries out an economic activity for the public interest.

40. The Claimant, due to its nature as an airline holding company incorporated[10], qualifies as a commercial enterprise since its identity as an enterprise allows for it to benefit from profit, while also performing lawful conducts of business. The type of conduct that the Claimant engages in is governmental, even with its nature as a commercial enterprise because it performs governmental activities.

[7] CEPTA, Chapter 9, Section A, p 73.
[8] CEPTA, page 73, para 2575.
[9] Paulsson.
[10] Facts, p 29, para 10.

41. Through this, the elements of *'commercial enterprise'*, *'predominantly owned or controlled by the State or State institutions'*, *'carrying out an economic activity'* and *'for the public interest'* are fulfilled by the Claimant that characterise it as an SOE.

42. *Aaron Broches* confirmed that an SOE State, which in the present arbitration is the Claimant, is only entitled to standing before the centre given that it meets two main criteria. The first is that the SOE was not *'acting as an agent for the government'* and the second is that the SOE was not *'discharging an essential governmental function'*[11]

43. These two factors are reflected by the ILC Draft Articles on State Responsibility[12] where the attribution of the 'conduct of a person' is to a State where the person. The ILC Articles are applicable since they are considered to be "*the most authoritative statement of law, a codification of customary international law*[13]*"*

ILC Article 5[14]: *'is empowered by the law of that State to exercise elements of governmental authority... provided the person... is acting in that capacity in the particular instance'*

Also, ILC Article 5: States that *'the purposes for which' powers are to be exercised are '[o]f particular importance' when deciding whether a governmental authority has been exercised.*

44. The Claimant's conduct can be attributed to that of an entity *'acting as an agent for the government'*. It also continues to perform the functions that its previously State-owned predecessor did. This refers to Bonooru Air[15], which was a national carrier and a monopoly civil airline. The Royal Narnian[16], owned by Vemma and the Claimant's other subsidiaries received substantial State aid under the Horizon 2020[17] scheme

[11] Broches.
[12] ILC Articles p 43.
[13] Crawford(a), p 134; RWE, para 399.
[14] ILC Artices p 43, para 2.
[15] Facts, p 29, para 9, line 930.
[16] Facts, p 29, para 11.
[17] Facts, p 32, para 28.

which makes it profitable. Vemma's subsidiaries create routes that are profitable for Bonooru in creating better flight connections, even if this priority may result in losses for its subsidiaries and their routes in other States[18], such as Mekar. Hence, the Claimant's actions are largely based on behalf of Bonooru's aims as a State.

45. The claimant is *'discharging an essential governmental function'*. Following the restructuring, Vemma's Board of Directors is now replaced by government functionaries, with its functions also including paramilitary activities[19]. This clearly highlights that the Claimant performs essential government functions for Bonooru. Additionally, it further facilitates a special purpose of the government in accordance to mobility rights even prior to the arbitration:

> *'air travel serves a unique purpose in Bonooru compared to other nations around the globe. Without modern air travel, most of our citizens could not move between our islands or even leave the islands for another nation.'*[20]

46. The Claimant fails to meet the criteria under the Broches Test, hence why its claim should be considered that of a *'State'* and not the claim of an *'investor'*.

47. A State in itself cannot qualify as a *'national of another Contracting State*'. While investment treaties are available to Claimants that are SOE's, an SOE *'cannot qualify as an 'investor' when its claim arises from activities that the SOE has undertaken in a governmental capacity, where the conduct would be attributable to the State and/or immune from the jurisdiction in foreign courts.'*

48. In *BUCG*[21], the Respondent argued a similar stance that the Claimant did not have standing. However, while the Tribunal was satisfied that the company was State-owned, it was building a new international airport terminal, which was defined as a

[18] Phenac Business Today Podcast Transcript, p 55.
[19] Facts p 40 para 65.
[20] Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts) pg 43 para 56.
[21] BUCG, Tribunal's Analysis (2).

purely commercial activity. Additionally, in *Banka,* Tribunal found the dispute to be investor-State so long as the activities of the SOE are *'commercial in nature'.*

49. The Ministry of Transport also nominated one of its officials for the position of a non-executive director on the board[22]. Additionally, as mentioned in PO4, Bonooru is the only governmental shareholder in Vemma, with no other shareholder having more than a 7% stake[23]. Vemma Holdings clearly maintain governmental conduct, and not commercial for Bonooru, as established on public interest grounds for facilitating social mobility rights. It does not maintain activities that are commercial in nature since it seeks to advance governmental aims that are protected by statute within the State's Constitution.

50. Although the Claimant may submit that the level of ownership is not a reliable indicator of the level of control due to the decision-making power that is unevenly shared among the shareholders, this does not hold true in Vemma's case. The head of Vemma's Board of Directors at the time of its submissions of the purchase bid was also the Secretary of Transport[24] and Tourism of Bonooru, indicating a clear influence of a representative member of the Bonoori government. Additionally, Vemma's Board of Directors passes decisions through a majority vote[25] of over 50% at regular meetings, including those for electing directors. Bonooru's representatives are not only present for every meeting, but also form a majority of voting members when not all of the other shareholders are in attendance[26]. By understanding this approach, it is evident that the Claimant is not only a State-owned company but also a State-controlled company.

51. The Claimant has 100% ownership in Royal Narnian[27] and is a leading airline that created the Moon Alliance, which means that it has influence in deciding which airline

[22]Memorandum of Association of Vemma Holdings Inc. p 46 para 152.4.
[23] PO4, p 89, para 2, line 3275.
[24] Facts, p 31, para 23, line 1020.
[25] PO3, P 86, para 3.
[26] PO3, p 86, para 3, line 3160.
[27] Facts, p 29, para 11, line 935.

can also join the organisation, such as Caeli Airways. Additionally, Royal Narnian's predecessor Bonooru Air, was the national carrier and monopoly civil airline of Bonooru, alongside being State-owned[28]. Bonooru's constant shareholding of both airlines throughout their existence highlights the State's involvement within the enterprise, and evidently reforming the nature-based on governmental decisions and needs, as discussed with the second criteria of the Broches Test.

52. The Claimant's main activities in Bonooru prior to the arbitration also involved supplying connections across regional routes to the remote islands[29] of the State due to public importance. This is heavily protected within Article 70 of the Constitution of Bonooru[30], where it assigns special importance to the mobility rights of its population and enforces a positive obligation on the State to make sure that essential transportation is provided to the population living in remote areas.

53. A70(2): *'Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands.'*[31]

54. *National Ferry Workers Union v Bonooru*[32]:

> *'By including the words 'shall ensure' in the Constitution, the drafters signaled their intention not only to protect citizens of Bonooru from government interference but also to have the government provide them a right that is easily denied by our country's unique geography. This does not mean though that all travel within, and outside, Bonooru must be provided free of charge as would be the logical end of the Applicant's argument.'*

[28] Facts, p 28, para 6.
[29] Facts, p 28, para 5.
[30] Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts), p 43, para 56.
[31] Constitution Act of Bonooru, 1947, p 41.
[32] Constitutional Court of Bonooru on Mobility Rights (excerpts), p 42, para 25.

55. *People's Council of the Island of Kyoshi v Bonooru*[33]-:

> *'Article 70 imposes positive obligations on the State to enable citizens' mobility through the archipelago'*
>
> *'That applies not only to boat travel […] but also air travel'*

> *"The Court is satisfied that the government has ensured that there are protections for our citizens' access to mobility. The provisional Memorandum of Association of Vemma Holdings Inc., the primary successor to BA Holdings, ensures that Royal Narnian will continue to operate routes to remote communities. The airline, as the flag carrier, will also continue to enjoy subsidies under Bonoori law for flights offered on routes of significance to the mobility of disparate communities. Combined with Bonooru's continued, although a minority, participation through Vemma Holdings Inc., we are sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit."*

56. In a Statement given by the Prime Minister prior to the privatization of the airlines, the government indicated their aim to maintain involvement with the Royal Narnian, owned wholly by the Claimant.

> *'Our government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability'*[34]

57. It is submitted that the Claimant has met all of the criteria of an SOE. Within the definition of an *'investor'* given by CEPTA, there is only reference to a natural person or an enterprise, but does not refer to or include contracting parties that are *'government-owned'* or *'State-enterprises'*.[35] These are both terms that classify the Claimant. However, specific treaty provisions in similar cases refer to *'State'* or

[33] Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts), p 43.
[34] Facts, p 29, para 8.
[35] Feldman, pp 24–35.

'government owned' for greater certainty and clarity, in order to achieve an *'avoidance of doubt'*.[36] This is evidenced in the ASEAN FTA, which has a provision for greater certainty[37]. Such steps are not taken in the CEPTA provisions, ensuring that Vemma does not fall under the definition of an '*investor'*, and cannot bring forward its claim through this treaty because of a lack of reference to State/government companies and their disputes.

58. Given that the Claimant's conduct is attributable to the State, it should be prevented from qualifying as an 'investor', as supported by the previous differentiation between governmental and commercial conduct. This is further supported by Article 9.2 of the CEPTA, regarding the scope, where *'claims may be submitted by an investor under this Chapter only in accordance with Article 9.16, and in compliance with the procedures set out in the Articles herein.'*[38] Since Vemma does not qualify as an investor under the chapter, it does not fall within the scope of the CEPTA.

59. This is evident through the definition of *'investment'* under which only refers to assets owned and controlled by a private investor, and not a State-:

> *'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.'*

60. The Tribunal needs to seek precedence from UNCITRAL arbitrations where the sole determining factor in those disputes is the agreement of the parties. The agreement between the parties within CEPTA was for investor-State disputes. In this case, Mekar has not provided its consent to a State-to-State arbitration under the CEPTA.

[36] ASEAN-FTA ch 11, art 2 fn 3
[37] ibid.
[38] CEPTA p73, line 2605.

61. *Romak*[39] *'[...] an investment will consist of whatever the contracting States have decided to label as such in the treaty they have concluded. Operating under the UNCITRAL Rules, this Arbitral Tribunal does not need to engage in a discussion of the interplay of the ICSID Convention and the instrument providing consent to arbitration.'*

62. Considering the ICSID AF Rules, The Claimant's governmental capacity is to be established under the definition of *'investment'* and make it evident whether Vemma has invested in Mekar in such a manner. While some of Caeli's functions included the development of international air travel, it also referred to domestic connections between Bonooru and Mekar. As previously discussed, these connections were mainly profitable[40] to Bonooru and less so for Mekar, which is explained with the supporting arguments of the nature of the purpose of Bonooru's involvement in Mekar.

63. This reiterates the submission that the Claimant's activities were performed for governmental purposes to achieve Bonooru's aim, further aligning it with its identity as a State-owned and State-controlled enterprise.

64. In conclusion, the Claimant does not constitute an investor but is a State. Its activities are governmental functions and not of a commercial nature. This creates a situation of a State-to-State arbitration, to which the Respondent has not consented. Hence, the Tribunal does not have jurisdiction and the Claimant holds no legal standing to bring the claim under the Tribunal.

B. AMICI SUBMISSIONS

I. The Tribunal should grant leave for the amici submission of the External Advisors

65. The Tribunal should not grant the leave sought for filing the CBFI's amicus submission but should instead grant leave sought for filing the External Advisors's amicus brief.

[39] Romak, para 205
[40] Phenac Business Today Podcast Transcript, p 55.

66. An amicus or a *'friend of the court'* [41] is a way for external third parties[42], to formally participate in the arbitral proceedings. A Tribunal may obtain some usefulness by an amicus brief. For instance, the Tribunal in *Biwater Gauff*[43] found *'the Amici's observations useful'* and that *'their submissions have informed the analysis of claims [...] and where relevant, specific points arising from the Amici's submission are returned to in that context.'*

67. The Tribunal in *Methanex*[44], for the first time acknowledged that it had the authority to admit an amicus submission, and relied on Article 15(1) of the applicable UNCITRAL Arbitration Rules 1976: *'conduct the arbitration in such manner as it considers appropriate'* In *Glamis Gold*[45], the Tribunal emphasised the need for an amicus brief to actually *'bring some sort of perspective, knowledge or insight that is different from that of the disputing parties'.*

1. The External Advisors bring in a perspective, particular knowledge, or insight that is different from that of the disputing parties.

68. Article 41(3) ICSID AF Rules specifies the three criteria that the Tribunal would have to consider when deciding whether to grant leave for amicus submissions

> *a. "the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;*
> *b. the non-disputing party submission would address a matter within the scope of the dispute;*
> *c. the non-disputing party has a significant interest in the proceeding."*

[41] Blackaby and Richard, p. 258.
[42] Alexandrov and Carlson, p. 50.
[43] Biwater Gauff, para 392.
[44] Methanex, para 3.
[45] Glamis Gold, para 286.

69. The above-mentioned requirements are similar to the FTC's, besides the mention of the public interest factor. However, the question regarding Tribunals, and hence will also be examined in this case.

70. Article 4(1) UNCITRAL Transparency Rules, 2013, with the applicability consented to by the parties[46], also provide some guidance to Tribunals in considering granting leave for an amicus submission.

> a. the extent to which the amicus brief would assist the Tribunal in determining a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and
> b. whether the potential amicus has a significant interest in the proceedings

71. Based on the ICSID AF Rules, the criteria listed in Article 41(3) will be proven to have been met by the External Advisors:

> **'***the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;'*

72. These criteria additional valuable information that can assist the Tribunal when making its decision. The External Advisors bring a unique vantage point in not only highlighting the economic climate of Mekar but are also able to do so from a personalised standpoint regarding one of the main entities in question, Caeli Airways[47]. They were directly involved as advisors with regards to the privatisation,

[46] Article 9.20(6) CEPTA, p 82, line 3010.
[47] Submission of External Advisors of CRPU, p 19, line 625.

liquidation, and restructuring of Caeli Airways. This position allows the External Advisors to bring in different factual knowledge of the acquisition, compared to any other party, because of not only their close links but also impartial participation. They bring in salient data regarding the nature of the transaction between Vemma Holdings and Mekar.

73. The amici are able to build on the public interest in the subject matter, especially regarding the allegations involving Mr. Dorian Umbridge, the Chairperson of the Committee who is said to have received bribes in order for Vemma to obtain rights in Caeli Airways[48]. This is an insight that cannot be provided by either of the disputing parties in a neutral manner, hence bringing in a piece of different knowledge and insight. The Claimant may argue that both parties to the dispute agreed against the allegations, however, PO3 only States that the Constitutional Court of Bonooru has taken the case of allegations against Mr. Dorian Umbridge as their own.

74. The CBFI on the other hand brings in no new perspective or insight that is different than that of the disputing parties. They only bring in information on the business climate of Bonooru and the Greater Narnian region.[49] However, this is all information that can be inferred from the agreed Statement of facts between the disputing parties. he CBFI claims to have intended to provide context on *'the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia[50]* '. It is also claimed that the CBFI *'represents firms of vastly different sizes that play different roles in the Mekari economy '[51]*. However, there is no supporting evidence that uncertainty in the business framework will have negative consequences, or at least no further explanation is given by the CBFI regarding that assertion.

[48] PO3 p 87 para 14.
[49] Amicus submission by the consortium of bonoori foreign investors P 16, para 8.
[50] Amicus submission by the consortium of bonoori foreign investors, p 17.
[51] ibid.

75. Hence, the External Advisors fulfil the first criteria by providing information directly relating to the acquisition, where the CBFI fails to do so and therefore, does not meet this criterion.

2. The External Advisors address a matter within the scope of dispute

76. Since the Respondent has objected to jurisdiction, an NDP will be able to file submissions on jurisdictional issues since it would still be considered within the scope of the dispute.

77. Some of the matters addressed within the amicus brief of the External Advisors include the method through which the amici were elected, highlighting the transparent procedure that took place in Mekar throughout the Caeli acquisition, the tasks that the amici had performed through their role as advisors, which provides clarity on the auditing of the acquisition, and also addresses the importance of the Tribunal in considering public interest grounds for investor-State arbitration, and the impact that its decision could have.[52]

78. Given that the Respondent seeks to argue that the Tribunal does not have the jurisdiction to hear on State-State arbitration claims, the matter covered in the amicus brief on Tribunal's maintenance of authority in investor-State disputes is still within the scope of the case. This is further strengthened by the fact that the External Advisors are directly able to provide input on the Caeli acquisition by Vemma, which is one of the main sources of conflict within the case in deciding its legality.

79. The CBFI on the other hand introduces no new matters of importance regarding the dispute. There is no reference to the Caeli acquisition within their amicus brief. They further seek to argue the *'standing in ISDS is intrinsically tied to the Claimant's commercial activities alone'*.[53] However, it has already been established that the

[52] amicus submission by external advisors to the committee on reform of public utilities, p 19.
[53] Amicus submission by the consortium of bonoori foreign investors pp 16, 17.

Claimant's activities are performed within a governmental capacity, and not commercially conducted. They also assert that *'deviation from international norms facilitating the participation of State-linked enterprises in commercial activities will have negative consequences.'*[54] But the Respondent has already evidenced within the submissions regarding jurisdiction that the Claimant is more than a company linked to the State, it is also owned and controlled by Bonooru, with its activities acting as an extension of the State.

80. In *Bear Creek*, the Tribunal rejected an amicus brief from an NDP which simply described international law and public policy considerations relevant to investments of the respective industry. The Tribunal also held that *'the most important criteria is [...] whether the applicant's submission would assist the Tribunal.*[55]*'*

81. The CBFI has also included that within Bonooru's business climate, its entities are supported through free-market principles *'without direction or instruction of the Bonoori government, irrespective of their ownership structure.'*[56] This is proved to be false considering that Vemma Holding is not only directed by governmental aims of social mobility and access to transportation, but its structural makeup is State parties, even prior to the arbitration, as previously established, where a substantial number of shareholders are connected to the State.

82. Hence, while the External Advisors address matters within the scope of the dispute, such as its relevance to Caeli acquisition and the power of the Tribunal only within investor-State disputes, the CBFI bring in no subjects that are important to the dispute, and those that are even remotely connected have been proved to be false by the Respondent.

3. The External Advisors have a significant interest in the proceeding

[54]Amicus submission by the consortium of bonoori foreign investors p 17.
[55] bear creek.
[56] Amicus submission by the consortium of bonoori foreign investors p 17.

83. In terms of the last criterion, the NDP must show that it has more than just a 'general' interest in the proceedings, and must highlight that the outcome of the arbitration could have a direct or indirect impact on the aims or principles that it acts on behalf of or hopes to defend.

84. As the External Advisors have Stated they do possess a general interest in *'promoting fair business practices'* in Mekar[57]. But their interest goes beyond this, given that they had also acted as interveners in the past in disputes concerning approval for privatisation projects. Determination of the legality of the acquisition by Vemma of Caeli Airways also affects the anti-corruption changes made in Mekar. As Stated in their brief, the Amici are *'impacted by financial operations'* since they *'regularly advise potential investors in prospecting opportunities in Mekar.'*[58]

85. In *Phillip Morris*[59], the Tribunal held that *'in view of the public interest in the case, granting the [applications] would support the transparency of the proceedings and its acceptability by users at large'*, and that the amicus submissions are useful when making decisions because of the *'particular knowledge and expertise of [...] qualified entities'.*

86. The External Advisors have a significant 'public interest' in the proceedings[60] This relates to the allegations[61] against Mr. Dorian Umbridge, as mentioned previously, and also the transparency that the amicus brings to the dispute. This contrasts the partiality to the Claimant within the CBFI's amicus brief submission.

4. The CBFI is not sufficiently independent from the Claimant, resulting in a conflict of interest

87. The CBFI is not sufficiently independent from the Claimant, and therefore their amicus brief cannot be considered due to an existing conflict of interest.

[57] Amicus Submission of the External Advisors of the CRPU p 19, line 635.
[58] ibid.
[59] Philip Morris, para 39.
[60] Suez.
[61] PO3, p 87, para 13.

88. The CBFI is evidenced[62] to be biased towards Vemma through their involvement with Lapras Legal Capital, SRB Infrastructure, and Wiig Wealth Management Group, with the last two entities being CBFI members pursuing claims against Mekar under CEPTA Chapter 9.

89. Lapras Legal Capital is already connected to the Claimant since it is Advising Vemma on funding strategies in regard to its claim against Mekar. Both Vemma and LLC are members of the CBFI. Additionally, as Stated under the CBFI's 'Amicus Brief Submission Guidelines,', *'members of the CBFI's Executive Committee cannot participate in discussions or votes in relation to a dispute in which they have a conflict of interest. Such a conflict is presumed to exist when an Executive Committee member '*is a party to the case or has a direct financial interest in the outcome of the case', under PO3.

90. A conflict of interest is evidenced by Executive member having a direct financial interest in the decision of the case. The CBFI has however allowed that Executive Committee member Horatio Velveteen, CFO of Lapras Legal Capital is capable of voting in regard to the amicus submission against Mekar in support of Vemma's claim because *'Lapras' activities in relation to this dispute were restricted to advising Vemma in respect of potential litigation funding and funders.'*[63]

91. This raises serious doubts on the impartiality of the amici and its members in regard to disputing parties since there is a direct association with the Claimant, who benefits from Mr. Velveteen's supporting vote. It is a clear indication that the CBFI's amicus brief indirectly indicates its support for Vemma in the dispute. The Tribunal in *Von Pezold/Border*[64] found that the '*independence of an applicant was an implicit criterion of admissibility under Article 37(2)*'. Additionally, in *Eli Lilly* an amicus brief application was to *'disclose whether or not the applicant has any affiliation, direct or indirect with*

[62] PO3, para 12
[63] PO3, p 87, para 12.
[64] Von Pezold/Border, para 88.

any disputing party to infer that an amicus needs to be independent of the disputing parties.' [65].

92. The Claimant's membership alongside Lapras' supporting vote in the amicus brief and their involvement by acting as Vemma's advisors against Mekar is a clear impediment to the independence of the amicus brief.

93. The CBFI's amicus submission should not be granted leave as it does not meet the three criteria under the ICSID AF Rules. They bring in no new perspective that is not already available, they do not address a matter within the scope of the dispute, and they do not have a significant interest. Additionally, there is evidence of partiality and connection to the Claimant. The External Advisors on the other hand not only meet all the ICSID AF Rules criteria but are also independent of the disputing parties. Hence, the Tribunal should grant leave to the External Advisors.

C. CEPTA ARTICLE 9.9 VIOLATIONS

I. The Respondent did not violate the FET standard outlined in CEPTA Article 9.9

94. The Claimant contends that the actions of Mekar, individually or collectively, breached CEPTA Article 9.9. The Respondent strongly disagrees and submits that all the actions of the Respondent have been complied with CEPTA Article 9.9 and have been fair and equitable.

95. CEPTA Article 9.9 creates an obligation to provide a Minimum Standard of Treatment to investors investing in both parties. It further clarifies, under paragraph 2, the following may lead to a breach of FET:

> '*A Party breaches the obligation of fair and equitable treatment (…)*
> *if a measure or measures constitute:*
> *i. denial of justice in criminal, civil or administrative proceedings;*

[65] Eli Lilly, section D.

ii. *fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*

iii. *arbitrary or discriminatory conduct;*

iv. *abusive treatment of investors, such as coercion, duress, and harassment;*

v. *a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22.'*[66]

96. The article does not refer to customary international law standards; hence, our evaluation should conform closely to the treaty text read in accordance with the VCLT,[67] to which the Claimant and the Respondent are parties. The Tribunal should not be concerned with applying the minimum standard of customary international law.[68]

97. Furthermore, the Tribunal's finding in FET '*cannot be reached in the abstract; it must depend on the facts of the particular case'*[69]. In the present case, the factual record clearly indicates that Vemma's rights under the treaty have been preserved and in no instance breached. As a result, the Claimant here fails to establish that Mekar violated any part of the FET standard, and fails to show that FET was violated as a whole. Rather, 1) The First and the Second CCM investigation comply with CEPTA provisions, 2) Mekar requiring all companies to trade in MON did not breach CEPTA Article 9.9(3), 3) Mekar did not create legitimate expectations to bail out Caeli, nor were their actions discriminatory and 4) Vemma was not denied justice by Mekar.

1. The First and Second CCM Investigations comply with CEPTA provisions

98. The Claimant argues that CCM's investigations and interim measures breach the provisions of CEPTA Article 9.9(2)(b) and (c) and CEPTA Article 9.9(3).

[66] CEPTA, Section D, Article 9.9, p 76, line 2734.
[67] Azurix, para 364; CMS, para 284; Enron, paras 258-259.
[68] Glamis Gold, para 615; Mann, p 244 ; Sornarajah, p 411.
[69] Mondev, para 118.

99. To begin with, the Respondent submits that, contrary to the Claimant's allegation, the CCM is an independent and autonomous body armed with an independent enforcement directorate.[70] The MRTP created the CCM to inspire investor confidence and to prohibit anti-competitive behaviour. The President of the CCM, Moira Rose's vision was '*to see the CCM function as an autonomous body independent of government influence.*'[71] Which the CCM has in fact met. The CCM has acted independent of all government influence and autonomously takes the decision to investigate the companies they find to have behaved anti-competitively. As a result, any act of the CCM cannot be constituted as reflections of the Respondent and cannot breach CEPTA provisions.

100. However, in case this Tribunal finds CCM's actions attributable to the Respondent, the Respondent submits that the CCM followed the due process of law and has legitimately managed Caeli's expectations while initiating investigations against Caeli Airways and their conduct was not discriminatory.

> CEPTA Article 9.9(3) reads:
> '*When applying the above fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation (…) that created a legitimate expectation, and upon which the investor relied (…) but that the Party subsequently frustrated.*'[72]

101. CCM, while approving Vemma's acquisition of 85% stake of Caeli and Caeli's partnership with Moon Alliance, requested for an undertaking from the Claimant which was duly submitted.[73] However, later, as discussed below, Caeli Airways immensely benefited from the co-operation with its Moon Alliance partner, Royal Narnian and explicitly breached their undertaking submitted to the CCM.

[70] Facts, p 30, line 995.
[71] Facts, p 31, line 997.
[72] CEPTA, Section D, Article 9.9, p 76, line 2747.
[73] Facts, p 32, lines 1046 – 1049.

102. The Respondent therefore submits that a**)** the Respondent does not fail to comply with CEPTA Article 9.9(2)(b) and (c)through the CCM's conduct and b**)** CCM clearly managed legitimate expectations of the Claimant thus, complying with CEPTA Article 9.9(3).

a. The Respondent does not fail to comply with the provisions of CEPTA Article 9.9(2)(b) and (c) through the CCM's conduct

103. As stated above, CEPTA Article 9.9(2)(b) and (c) protect the investors of both the States by creating an obligation on the State to be transparent and non-discriminatory in State proceedings.[74]

104. The Claimant inherited existing discounts enjoyed by Caeli at Phenac Airport, this included airport services and landing navigation fees.[75] Also, in 2011, Bonooru launched the '*Horizon 2020*' scheme under which the Claimant received subsidies. A key part of this scheme was to provide recurring subsidies to companies investing in tourist-related infrastructure in Bonooru.[76] And the fall in the fuel prices added to these benefits.

105. As a result of the discounts enjoyed at Phenac Airport and the subsidies, Caeli was operating at a low production cost and managed to price tickets at a cheaper rate compared to its competitors.

106. Furthermore, While the Claimant was acquiring 85% of the stake in Caeli Airways, it wished to introduce their newly acquired company to the Moon Alliance. A request for the same was submitted to the CCM for approval. The CCM realised, participation in the Moon Alliance shall prove beneficial as it will allow the airline to provide

[74] *supra*, para 2.
[75] ibid, line 1054.
[76] Ibid, lines 1076-1081.

improved services and customer welfare and so approved the request on 5 March 2011.[77]

107. However, aware of the fact that an approval of alliance may lead to coercive and anti-competitive behaviours, the CCM requested an undertaking from Caeli Airways which was duly submitted. The undertaking explicitly Stated that Caeli would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities and other sensitive information with the Moon Alliance members.[78] The Claimant has, however, breached this undertaking through their own conduct.

108. It benefited from a co-operation with the Moon Alliance member Royal Narnian, which included lounge access, terminals, IT platforms, check-in operations and code-sharing. Also, there is evidence of Caeli being involved in preferential slot-trading with Royal Narnian.[79]

109. The benefits provided by Caeli to its customers and the cheap pricing attracted a good base of customers to the Claimant. The profits of Caeli increased significantly after such co-operation. Additionally, it captured the market share lost by its Mekari Counterparts.[80] As opposed to its pre-decessor, which carried about 15-20% of Mekari passengers, now approximately 35% flew with Caeli.

110. After being extremely profitable, the board representatives of Mekar Airservices preferred injecting the profits in outstanding debts and improving the financial health. However, Vemma opposed this and slashed the airfares even further[81] in order to dominate the market. It also placed orders for new aircrafts and increased flying hours. As a result of these actions, by June 2016, Caeli became the only consistently

[77] Facts, p 32, line 1042.
[78] Ibid, line 1046.
[79] Facts, p 34, line 1155.
[80] Ibid, line 1131.
[81] ibid, lines 1136-1138.

profitable carrier[82] and was an imminent threat to its competitors as it had the power to drive them out of competition. This came to CCM's attention, and they decided to open investigations.

111. To initiate *suo moto* investigations, the following conditions set by MRTP should be met

> '*(2) The CCM may open an investigation into behaviour it deems anti-competitive, suo moto if the following circumstances are met:*
>
> *(a) a corporation obtains a market share greater than 50%. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share. The use of discretion should be exceptionally rare;*
>
> *(b) the corporation poses a unique threat to the competition in a particular market; and*
>
> *(c) there is evidence the corporation's actions have, or are likely to in the near future, push competitors out of the market.'*[83]

112. In the present case, Caeli in conjunction with its Moon Alliance partner, Royal Narnian enjoyed a 54% market share and therefore by opening investigations, CCM was following the due process of law.

113. The Claimant argues that the market share should be calculated based on an individual company's market share and not that of an alliance. However, the price crash that the Claimant was able to offer was due to the cooperation it was involved in with Royal Narnian as discussed above. Had the other subsidies or the benefits Caeli enjoyed at the Phenac Airport been the only reason behind Caeli's success, Mekar Airservices

[82] Ibid, lines 1144,1145.
[83] MRTP, Annex V, Chapter III, p 47, line 1598.

would not have been in dire need to privatise Caeli in 2011. This clearly indicates that the co-operation with the Royal Narnian played a huge role in the risky hedging strategies of Caeli and its speedy expansion. Thus, showing that the co-operation was a high-level one. As a result, CCM was correct in considering the composite market share while initiating the first investigations.

114. Furthermore, the interim measures of airfare caps introduced by CCM were accepted by the Claimant as reasonable. Hence, one can assume that the Claimant knew they were charging lower than expected prices and behaving anti-competitively. Later, when the market share of Caeli, in conjunction with Royal Narnian, fell below 40%, the airfare caps were removed.

115. In regard to the Second Investigation initiated by the CCM, the MRTP provides that

> '*(3) The CCM shall open an investigation [...] where:*
>
> *(a) a complaint is brought to the CCM by a direct competitor in the market, and*
>
> *(b) the corporation has at least a 10% market share.*
>
> *(c) The CCM must consider whether sufficient evidence is brought by the direct competitor before exposing a corporation to a potentially costly investigation.'*[84]

116. In 2016, the CCM received a complaint from a consortium of small regional airlines in Greater Narnia, alleging that Caeli launched flights on specific regional routes to push its competitors away. They also suggest that Caeli's activities at Phenac made it nearly impossible for them to penetrate the market linked to the Phenac Airport, which effectively became a '*fortress hub*'.[85] Thus, satisfying the first condition.

[84] MRTP, Annex V, Chapter III, p 47, line 1067.
[85] Facts, p 35, lines 1170-1176.

117. The Claimant, to which the term '*corporation*' used in the MRTP refers to, enjoyed a market share of 43%, significantly higher than the required 10% when the complaint was received.

118. Finally, even though the Claimant argues that it did not enjoy any dominance on short-distance routes from Phenac Airport, there is clear evidence that in 2011, the Claimant purchased eight and leased fifteen Boeing 737, optimal for the mid-haul journey, through a contract with its fellow Moon Alliance member.[86] This was to capture the market of the 90 major regional airports around Phenac which were high-traffic destinations.

119. This was evidential enough for CCM to initiate the Second Investigation against the Claimant. On finishing the Second Investigation, CCM's report indicated

> *'Caeli has squeezed out concessions from Phenac International Airport by threatening to shift its traffic out of Phenac International Airport to other airports in the region.'*[87]

120. Squeezing is an anti-competitive act and MRTP describes it as

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

[86] Facts, p 32, lines 1066 – 1068.
[87] PO3, p 86, line 3175.

121. As a result, the Claimant's act was in fact anti-competitive and CCM was correct in initiating investigations against the Claimant.

122. Furthermore, after placing their bid for Caeli Airways in 2011, a member of Vemma's board of directors said in an interview with Gloomberg:

> '*Caeli's contracts with Phenac International Airport would be lucrative to any investor. (...) This opportunity offers unparalleled access to Mekar's airline market to Vemma, one we are keen to take advantage of.*'[88]

123. Thus, clearing out their intentions to dominate the Phenac Airport and squeezing the market it brings since the very beginning.

124. In conclusion, the Respondent submits that CCM was correct in opening the First and the Second Investigation against the Claimant and has merely followed the due process of the law. CCM has acted transparently and non-discriminately and as a result has complied with CEPTA Article 9.9(2)(b) and (c). Instead, the Claimant has breached its contractual undertaking submitted to CCM by involving in co-operation with Royal Narnian.

b. The CCM's conduct clearly managed legitimate expectations of the Claimant, thus, complying with CEPTA Article 9.9(3)

125. Arbitral decisions suggest that an investor may derive legitimate expectations either from specific commitments addressed to it personally, for example, in the form of a stabilization clause,[89] or rules that are not specifically addressed to a particular

[88] Facts p 31, lines 1027-1031.
[89] UNCTAD, p 69.

investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making the investment.[90]

126. The Claimant contends that by approving the privatisation plan of Caeli Airways in 2011, the CCM made a specific commitment addressed personally, creating legitimate expectations on which the Claimant relied and further associated with their Moon Alliance partners.

127. It is the Respondent's position that even though the CCM did approve the privatisation plan, it was conditional to the aforementioned undertaking provided by the Claimant.[91]

[92]

128. The act of CCM asking for such an undertaking indicated that if in future, based on the actions, strategies or pricing of Caeli, it appears to the CCM that Caeli has in fact been involved in high-level cooperation with its Moon Alliance members on competition parameters, then the CCM shall open investigations.

129. In July 2016, the CCM released a White Paper wherein it noted that

> '*The disciplines of the amended MRTP Act concerning 'Agreements or Arrangements that Prevent or Lessen Competition Substantially' are wide enough to envisage market-disruptive agreements between two enterprises operating in Mekar, one of whom is a State-owned enterprise providing a financial contribution to the other*'[93]

130. These actions are clear indications of the intentions of CCM to investigate every matter in which a company is involved or appears to be involved in anti-competitive

[90] Glamis Gold, para 627.
[91] *supra*, 110.

[93] Facts, p 34, footnote 3.

behaviour. It was the responsibility of the Claimant to act within the rules of the State and not take reckless decisions.

131. However, the Claimant continued to make reckless decisions and accepted an '*extravagant approach*'[94] to expansion. At the first annual shareholders' meetings, representatives of Mekar Airservices cautioned the new Vemma-appointed management against taking an '*extravagant approach*', given the volatility of demand in the region, especially in Mekar, during fall and winter months. However, representatives of Vemma argued that to limit expansion would mean forfeiting unclaimed market share.[95] Thus, showing their only aim to capture the control of the Mekari market.

132. The Respondent submits that the losses and fines the Claimant has faced are a consequence of its own actions. The CCM has acted transparently and is not responsible for the fact that Vemma was forced to sell Caeli, it was a fruit of their own doing. As a result, CCM has legitimately managed the Claimant's expectations and has complied with CEPTA Article 9.9(3).

2. Mekar requiring all companies to trade in MON did not breach CEPTA Article 9.9(3)

133. The Claimant contends that the January 2018 decree of the LPM government requiring all companies operating in the country to offer goods and services denominated exclusively in MON[96] breached the Claimant's legitimate expectations based on the approval order in October 2017 of the government which allowed the denomination of airfares in USD.

134. It is important for the Tribunal to consider that the value of MON began to fall since late 2016 due to shaky investor sentiment[97] and Mekar was running into deficit. By

[94] Facts, p 33, line 1097.
[95] Facts, p 33 lines1095-1099.
[96] Facts, p 35, lines 1208 – 1210.
[97] Ibid, lines 1184.

2017, Mekar was hit by a currency crisis. Further, the IMF emphasised *'the need to establish credibility in the [local] currency to avoid a debilitating economic situation.'*[98]

135. Moreover, the LPM was elected back in this freefall of an economy, who vowed to return country to Mekari people. The Respondent also retains the right to regulate its internal affairs and CEPTA provides for this right.[99] Hence, to stabilize the condition of the State, passed the aforementioned decree.

136. The Claimant was aware of the delicate situation of Mekar's economy and the currency crisis and should have kept its expectations in check. As the Tribunal in *Duke Energy*[100] stressed the need to consider all the circumstances:

> '*The stability of the legal and business environment is directly linked to the investor's justified expectations. (...) To be protected, the investor's expectations must be* ***legitimate and reasonable*** *(...). The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the* ***political, socioeconomic, cultural and historical conditions prevailing in the host State****.'*

137. Further, in *Parkerings-Compagniet*, the Tribunal noted that Lithuania was a country in political transition and therefore,

> '*(...) In such a situation, no expectation that the laws would remain unchanged could be legitimate. An investor faced with this situation accepts the business risk of instability …*'[101]

[98] Ibid, lines 1189 – 1190.
[99] Response, p.7 line 216-217
[100] Duke Energy p 340
[101] Parkerings paras. 335–336.

138. The Respondent thus contends that the Claimant must have anticipated that some laws and approvals will change with the change in government and economic situations. It is the government's duty to change the laws according to the changing situations in the country in order to best protect it. The LPM was correct in releasing a decree of trading in MON, as this was the only and the best way to bring back the lost trust in the currency and stabilize the economy. History has been witness to many currencies hit by crisis whose value ultimately goes into freefall[102] and unleashed catastrophe for the nation.[103] The Claimant must have foreseen this step keeping the economic situation of Mekar in mind.

139. It is thus submitted that the acts of LPM comply with CEPTA Article 9.9(3) as they do not breach any expectation that the Claimant could have legitimately made.

3. Mekar did not create legitimate expectations to bail out Caeli nor were their actions discriminatory

140. The Claimant contends that the Respondent was involved in discriminatory behaviour by rejecting to bail out the Claimant under Executive Order 9-2018.

141. In 2018, Mekar attempted to alleviate some of the airline industry concerns. The President passed Executive Order 9-2018 which granted subsidies to airlines for each Mekari citizen travelling on board.[104] Caeli Airways' application for subsidies under this order were rejected by the Secretary of Civil Aviation. Later, Mekar's Deputy Minister of Transportation clarified that:

> '*In any case, authorities worldwide have recognized that State-owned companies have unique advantages over other*

[102] Atkinson; Alshaali.

[103] Response p 7 line 249-250.

[104] Facts, p 36, lines 1251-1253.

companies that enable them to outcompete privately owned firms'[105]

142. The Claimant contends that this is a discriminatory step as other foreign airlines such as Star Wings and JetGreen were provided subsidies.

143. The Respondent is of the position that the decision of the Secretary of Civil Aviation was not discriminatory but rather was a reasonable one. Bonooru owns a significant share in Vemma and as a result it is a State-owned airline. It also received recurring payments from October 2011 to June 2016 under the Horizon 2020 scheme.[106]

144. Furthermore, Vemma has near assurances that Bonooru would step in if anything bad were to happen to its prized national carrier owner[107] and as a result, was taking bold and risky steps. The routes opted for Caeli by Vemma seem to benefit Bonooru more than Vemma or Caeli.[108]

145. The airlines had immense support from their State and the re-assurance of support in case of a crisis is unique to State-owned airlines only. A similar approach was taken towards Lary Air, the only other State-owned airline.

146. The Claimant argues that other foreign airlines which received greater subsidies from their host State than Vemma did under the Horizon 2020 scheme, received subsidies from Mekar. To which the Respondent submits that the reasoning behind the rejection of subsidy application is not solely the subsidies received from the host State, instead it is also the ownership of the airlines and the perks that come attached to it. Star Wings and JetGreen are both airlines owned by holding groups in Arrakis i.e. privately owned and so were given subsidies. Whereas both, the Claimant and Larry

[105] Ibid, lines 1262 – 1264.
[106] PO4, p.89, line 3291-3293.
[107] Annex IX, p. 57, line 1949.
[108] Annex VII, p. 55 line 1870.

Air, are State-owned[109] and enjoy several other perks and as a result, were denied subsidies.

147. In conclusion, it is the Respondent's position that the Secretary of Civil Aviation did not engage in discriminatory treatment of the Claimant and Mekar had no obligation under the CEPTA or international law to disburse its taxpayer's money to the Claimant. The Claimant cannot expect the Respondent to bail them out of their own risky strategies.

4. Vemma was not denied justice by Mekar

148. The Claimant asserts that Mekar denied justice and breached CEPTA Article 9.9(a) by causing delays in judicial hearings, declining to remove airfare caps and enforcing the arbitral award set aside by the Supreme Arbitrazh Court of Sinnograd.

149. In this regard, the Respondent submits that the a) Mekari courts managed to dispense justice speedily as compared to usual times and gave the Claimant every opportunity to voice its grievances, b) Mekar court's decision on the airfare cap issue did not deny justice and c) Mekari courts were right in enforcing the set-aside award under public policy reasons.

a. Mekari courts managed to dispense justice speedily as compared to usual times and gave the Claimant every opportunity to voice its grievances

150. The Claimant argues that the delay caused in reaching a final decision in the validity of CCM air-caps led to Caeli facing losses.

151. To which the Respondent would like to bring the Tribunal's attention to the increasing population of Mekar and its underfunded judiciary conditions. The population of

[109] Facts, p. 37, line 1267.

Mekar grew from 6 million to 10.8 million by 2015.[110] Thereby, the courts' caseload increased and the average time from commencing an action to receiving a final decision rose up to 27 months in commercial matters.[111]

152. Nevertheless, the Mekari courts appreciated the gravity of the Claimant's situation and the decision of the Claimant's request on 27 March 2018 was reached within 15 months.[112] This is faster than the average time taken by the courts and the Claimant was treated beneficial by the judicial system.

153. As per *Jan de Nul*, the period of 10 years to obtain a first instance judgement was '*certainly unsatisfactory*' but did not give rise to a denial of justice.[113] In the present case, 15 months is significantly less than 10 years and therefore should not account as denial of justice.

b. Mekar Court's decision on the airfare cap issue did not deny justice

154. While assessing the denial of justice, it is generally accepted that the Tribunals will not act as courts of appeal when deciding on claims for denial of justice and that the standard of review is limited.[114] Furthermore, the test for establishing a denial of justice sets a high threshold[115] and mere disagreement with the reasoning of the judicial decision or contradictory rulings would not suffice to find a violation.[116]

> '*For the Tribunal, mere discrepancy with the reasoning of the court decision, with the quality of the judgment, with the*

[110] Facts, p 29, line 950.
[111] Ibid.
[112] Facts, p. 38, line 1321.
[113] Jan de Nul, para 204.
[114] Bridgestone, para 410; EBO investment, para 472.
[115] EBO Investment, para 472; Al Warraq, para 620.
[116] Bridgestone, para 222; Iberdola, para 492.

persuasiveness of its content or the surprise that the result may cause the Claimant , do not constitute a denial of justice.'[117]

155. It requires the judicial decision to demonstrate a systemic failure and an erroneous decision is not enough.[118] It should demonstrate '*a wilful disregard of due process at law (...) which shocks, ot atleast surprises, a sense of judicial propriety*'[119]

156. In the present case, the judgement by Justice VanDuzer rendered on 15 June 2019 clearly justifies its decision by stating that

> '*(...) 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.*'[120]

157. The Statement of Justice VanDuzer clearly indicates that the courts weighed the previous conduct and the large market share of the Claimant against the injury such interim removal of caps would cause to the public on a balance of convenience and only then reached a decision. The court has thus given satisfactory reasoning for its decision.

158. Furthermore, keeping Mekar's dire economic condition and limited resources in mind, the court was right to deny appeal under Mekari law when they believed no different decision can be reached. This is clearly justified by stating

[117] Iberdola, para 491.
[118] Paulsson.
[119] Bridgestone, para.222 (v).
[120] Facts, p 38, line 1323-1329.

> '*(...) the Court has considered the Applicant's prima facie case on the merits (…). It does not foresee the possibility of arriving at a different final decision. Therefore, to save the precious resources of our courts, (…), the Court also dismisses the merits of the Applicant's appeal at this point.'*

159. What is seen from the Claimant's arguments is a mere dissatisfaction with Justice VanDuzer's decision which cannot be constituted as denial of justice under CEPTA Article 9.9. The Respondent thus submits that Mekari courts have provided satisfactory reasoning to support their judgement and have acted within the limits of the law and their powers as a result not denied justice to the Claimant.

c. Mekari courts were right in enforcing the set-aside award under public policy reasons

160. Mekar Airservices rejected the artificially inflated offer of the Hawthorne Group for the sale of Caeli Airways. After failed negotiations between Mekar Airservices and Vemma Holdings regarding the offer, Mekar Airservices was forced to initiate arbitration proceedings.[121] The SCC Secretariat appointed Mr. Rett Eichel Cavannaugh as the sole arbitrator[122]. The award rendered on 9 May 2020 was in favour of Mekar Airservices and they sought, before the High Commercial Court of Mekar, recognition and enforcement of this award.[123]

161. The Claimant argues that Mr. Cavannaugh's decision is tainted with corruption and that it should not have been enforced by the Mekar's High Commercial Court after being set aside by the Supreme Arbitrazh Court.

[121] Facts, p 39, line 1348-1350.
[122] Ibid, line1355
[123] Ibid, lines 1358 , 1364.

162. The Respondent strongly disagrees and submits otherwise. Mr. Cavannaugh was appointed, in line with the provisions of the SCC arbitration rules, by the SCC Secretariat and was not selected by Mekar Airservices. The argument of the Claimant is based on the 14 June 2020 CILS report. It is important for the Tribunal to consider that this is merely a report published by a non-profit organisation, not an officially recognised authority, and therefore carries minimum to no weight.

163. Furthermore, as clarified by the High Commercial Court of Mekar in their judgment, Mekar's Ministry of Home Affairs has recognised CILS as '*an entity funded by foreign donations to interfere in Mekar's domestic affairs*' and has therefore frozen their bank accounts till investigations come to an end.[124] An allegation as big as calling an award tainted with corruption cannot be based on hearsay. Since there is no sure indication of corruption, the enforcement of the award is not against the public policy of Mekar.

164. Furthermore, the High Commercial Court of Mekar had the right to enforce the award. Both Bonooru and Mekar are members of the New York Convention on recognition and enforcement of foreign arbitral awards.[125] Article V of the Convention States that an award '*may'* be denied recognition if it has been annulled by the courts of the arbitral seat, however, does not prohibit it. Also, Article VII of the Convention provides that the Convention shall not deprive any party of any right to benefit from the arbitral award permitted by the law of the enforcing State and thus leaves room for national courts to enforce annulled awards. Moreover, Section 36(2) of the Commercial Arbitration Act[126] provides that the recognition of an award can be but must not be denied.

165. This was also confirmed in *Hilmarton*[127] where the court held that the permissive language of Article V(1)(e) of the New York Convention in conjunction with Article VII constituted sufficient bases to enforce annulled awards.

[124] Vemma Holdings Inc v Mekar Airservices Ltd FAO(OS) No285/2020, p 66, para 13.
[125] Facts, p 40, line 1415.
[126] Law No 9.307/1988, p. 65, line 2251.
[127] Hilmartin para j

166. In conclusion, the Respondent submits that the Mekari courts acted speedily and provided the Claimant with every opportunity to voice their opinions. Further, the decision of the Mekari courts denying the removal of the airfare caps was appropriate. It also submits that the award by Mr. Cavannaugh was not tainted with corruption and the CILS report should be disregarded. The Respondent therefore requests the Tribunal to find that the Mekari courts were correct in enforcing the award and have not denied justice to the Claimant.

D. APPROPRIATE COMPENSATION STANDARD

I. In the event this Tribunal finds the Respondent violated CEPTA Article 9.9, then the compensation standard becomes '*market value*'

167. It is submitted that the Respondent has not violated any provisions of CEPTA Article 9.9 and as a result, owes no compensation to the Claimant. The Respondent, therefore, respectfully requests the Tribunal to find the same.

168. In a situation where the Tribunal does find a violation, the Respondent submits 1**)** the compensation amount should be based on '*market value*' and 2**)** the Respondent's dire economic condition should be taken into account.

1. The compensation amount should be based on the 'market value'

169. The Claimant is of the position that the compensation in the present case should be calculated in accordance with the '*fair market value*' standards.

170. However, CEPTA Article 9.21 stipulates

> '*1. Where a Tribunal makes a final award against a Respondent, the Tribunal may award, separately or in combination:*

a. *Monetary damages at **market value**, except as otherwise provided for in Article 9.12;(...)*'

171. CEPTA Article 9.12 deals with expropriation and compensation. The Respondent is of the position that there is no expropriation in the current situation. Therefore, CEPTA Article 9.12 does not apply.

172. As the Parties have explicitly agreed in CEPTA Article 9.21, the compensation standard to be applied shall be that of a '*market value*' and not '*fair market value*', the Respondent submits that the compensation should be calculated on the basis of the '*market value*' standard.

173. The Claimant further argues that the most favoured nation principle contained in CEPTA Article 9.7, and international law principles support the valuation of the compensation to be under the '*fair market value*'.

174. However, the Respondent submits that neither of these principles allows the Claimant to derogate from the standard expressly prescribed in the CEPTA and so the Tribunal should calculate compensation based only on the '*market value*'.

175. Furthermore, it is the Respondent's position that it has already paid the '*market value*' of the Claimant's investment when purchasing the stake in Caeli for USD 400 million. In the situation of the inability of the Claimant to find a *bona fide* arm's length offer, USD 400 million is the correct '*market value*' of the investment and therefore, the Respondent has no liability to pay any further.

2. The Claimant's contribution and The Respondent's dire economic condition should be taken into account

176. The Respondent has submitted that it has paid the 'market value' of the Claimant's investment and owes no further compensation. If the Tribunal does not agree, any

compensation awarded to the Claimant should be reduced primarily because the Claimant bears the responsibility for the losses it has suffered.

177. The board members of Mekar Airservices were never in favour of the rapid expansions and risky strategies of Vemma, instead continuously warned the Claimant about the risks.[128] On the other hand, Bonooru's representatives were present in every meeting. Consequently, for some meetings, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend.[129] As a result, all the risky actions and decisions taken by Vemma are the decisions approved by Vemma and Bonooru, not Mekar. Furthermore, the Aviation Analytics report on 7 June 2019 states that: '*Perhaps if Caeli Airways had focused on its debts, this situation would not have occurred*'.[130]

178. Tribunals have reduced the amount of damages awarded to investors as a result of their contributory fault to reflect investor's role in events leading to loss.[131] In *Copper Mesa*, the Tribunal took into account the Claimant's negligent conduct and reduced the amount of damages awarded by 30%.[132] The Respondent should not be liable to pay for the mistakes committed by Bonooru and Vemma, especially when Mekar Airservices' representatives continuously warned the Claimant about the same.

179. Moreover, the dire economic condition of the Respondent should be taken into account while calculating compensation. The MON is in a freefall and the government is facing a crisis. In PO3, Mekari Officials state '*to pay USD 700 million that Vemma demands, Mekar would have to transfer about twice as consolidated public spending to Vemma.*'[133] Further, there is constant pressure by Bonoori Officials on Mekar as they threaten to stop the Caspian Project-related expansion.[134] They have also threatened to hold back funds promised to rebuild Phenac's port as a part of the

[128] Facts, p 33, line 1095.
[129] PO3, pg. 86, line 3159.
[130] Facts, Aviation Analytics report Pg. 57, line 1958.
[131]UAB, para 1144.
[132] Copper Mesa paras 6.100 - 6.102.
[133] PO3, pg. 86, line 3164.
[134] Aviation Analytics report, Annex IX, p 57 line 1953.

Caspian Project. As a result of this, the expected development of Mekar has come to a pause and so Mekar will not be in a situation to rise back to normal in the near future.

180. The Respondent thus submits that the compensation awarded by the Tribunal should be significantly reduced due to contributory fault of the Claimant and the dire economic condition of the Respondent.

PRAYER FOR RELIEF

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

a. Find that it does not have jurisdiction over the dispute as the requirements of CEPTA Chapter 9 and Article 2 lit(a) of the ICSID AF Rules are not met by the Claimant, whose actions are directly attributable to the State;

b. Exercise its powers under Article 41(3) ICSID AF Rules to grant leave to file an *amici* submission to the External Advisors, should it find that it has jurisdiction;

c. Reject CBFI's request to grant leave to file an *amici* submission on the grounds that it fails to satisfy the criteria outlined in the legal frameworks governing the dispute;

d. Find that the Respondent did not breach any of its obligations under CEPTA Article 9.9;

e. Find that the Respondent is not obliged to pay any compensation to the Claimant, and even if the Tribunal finds the Respondent in breach of CEPTA Article 9.9, the awarded compensation for the Claimant to be limited to the '*market value*' standard, in order to account for the Respondent's dire economic situation;

f. Order the Claimant to pay the costs of arbitration.

Respectfully submitted on 22 September 2021.

By:

Team Bastid

On behalf of the Respondent

The Federal Republic of Mekar