TEAM BROMS

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

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

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

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

16 September 2021

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Treaties and Conventions

1994 Mekar-Bonooru BIT	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments, 24 August 1994
2006 Mekar-Arrakis BIT	Treaty between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments, 16 January 2006
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar, 15 October 2014
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union, 21 September 2017
ICJ Statute	Statute of the International Court of Justice, *opened for signature* July 1899 (entered into force 4 September 1900)
ICSID Additional Facility Rules	ICSID Additional Facility Rules, Schedule C – Arbitration (Additional Facility) Rules, 11 April 2016
VCLT	Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969 (entered into force 27 January 1980)

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RWG III	Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-seventh Session (New York, 1–5 April 2019), A/CN.9/970
UN Review	Application for Review of Judgement No. 158 of The United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166 (12 July 1973)

LIST OF ABBREVIATIONS

¶	Paragraph
¶¶	Paragraphs
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
BPB	PJSC Bonoorian People's Bank
BUCG	Beijing Urban Construction Group
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union, 21 September 2017
CILS	Centre for Integrity in Legal Services
Co.	Company
Corp.	Corporation
CRPU	Committee on Reform of Public Utilities
CSOB	Ceskoslovenska Obchodni Banka
eds.	Editors
FET	Fair and Equitable Treatment
FMV	Fair Market Value
i.e.	*Id est* (that is)
Ibid	Ibidem (in the same place)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID AFR	ICSID Additional Facility Rules
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement

Ltd.	Limited
MFN	Most Favored Nation
MON	Mekari Mon
MV	Market Value
NAFTA	North American Free Trade Agreement
No.	Number
p.	Page
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
pp.	Pages
SOE	State-owned Enterprise
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
USD	US Dollar
v.	Versus

STATEMENT OF FACTS

1. The Claimant is Vemma Holdings Inc. (Vemma), which is the successor of BA Holdings. BA Holdings was a state-owned company, and was restructured in 1980s. Bonooru retained minority shareholding in Vemma which ranged between 31% to 38% from 1984 until May 2020. The Claimant is incorporated under the laws of the Commonwealth of Bonooru, which is a contracting party of the CEPTA.

2. The Respondent is the Federal Republic of Mekar (Mekar), which is a small developing state that has undergone a period of prolonged political instability.

3. In 2010, Mekar decided to privatize Caeli Airways, a state-owned company that had faced difficulties in previous years. Vemma was the highest bidder. On 29 March 2011, Vemma successfully acquired an 85% stake in Caeli Airways. The remaining 15% shares were still beneficially owned by Mekar.

4. From 2011 to 2014, Vemma took a risky approach and got Caeli Airways into rapid expansion. Representatives from Mekar advised against the extravagant approach, but representatives of Vemma decided to stick to their plans.

5. In 2016, The expansion of Caeli drew the attention of the Competition Commission of Mekar (CCM), which launched an investigation into Caeli's activities. The CCM placed caps on Caeli Airways' airfare as an interim measure. Caeli did not protest the airfare caps at that time.

6. In 2017, a currency crisis ensued in Mekar and the Mon (Mekar's currency) began to rapidly decline in value. In October 2017, Mekar approved the denomination of airfare in US dollars for airlines. In January, after re-election of parliament members, Mekar shifted its economic policy and required all companies in Mekar to offer goods and services denominated in Mon.

7. Caeli requested the CCM to remove the interim airfare caps, claiming that the caps had become unreasonable considering the rising inflation. Caeli also requested the Central Bank of Mekar to revise the inflation rates more frequently. Both requests were denied.

8. Caeli then decided to seek judicial review of the airfare caps. The hearing was scheduled one year after the registration of Caeli's claim. Caeli urged for immediate hearing with no success. By the end of August 2018, the CCM announced that Caeli did violate Mekar's legislation and imposed a penalty on Caeli.

9. On 25 September 2018, Mekar's president passed Executive Order 9-2018, granting subsidies for airlines. Caeli's application for subsidies was rejected because it was considered as a state-owned company with unique advantages.

10. On 1 January 2019, the CCM completed its second investigation into Caeli, announcing that Caeli had abused its dominant position. A fine of MON 200 million was imposed. Caeli appealed both orders of the CCM in Mekari courts.

11. In April 2019, Mekar's High Court heard submissions on the imposition of airfare caps. The decision released on 15 June 2019 was against Caeli Airways.

12. In November 2019, Vemma decided to sell its stake in Caeli Airways. Vemma got an offer from Hawthorne Group LLP, but the offer was challenged by Mekar. Mekar considered the price to be artificially inflated due to the connection between Caeli and Hawthorne Group.

13. In February 2020, Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce's (SCC) Arbitration Institute. The award rendered by the sole arbitrator, Mr. Cavannaugh, declared that Hawthorne Group's offer could not be

considered as one received from a "*bona fide* third party".

14. In June 2020, an organization called CILS alleged that Mr. Cavannaugh had received bribes from representatives of Mekar Airservices. Mekar strongly denied such allegations. The award was set aside by Supreme Arbitrazh Court of Sinnogra, but recognized and enforced by the High Commercial Court of Mekar.

15. In October 2020, Vemma sold its stake in Caeli to Mekar Airservices. It simultaneously filed a notice of arbitration against Mekar on 15 November 2020 to seek compensation under the CEPTA.

ARGUMENTS

I. The Tribunal does not have jurisdiction over this dispute

1. Claimant initiated the arbitral proceedings against Respondent pursuant to Article 9.16 of the CEPTA[1], arguing that it has sustained unfair and inequitable treatment. However, Respondent submits that the Tribunal does not have jurisdiction over this dispute. To meet the jurisdictional requirements, Claimant bears the burden that the jurisdiction *ratione temporis*, *ratione materiae* and *ratione personae* within the restrictions of arbitration and the scope of consent of each party stated in the respective investment treaties are all satisfied. [2]

2. Specifically, in this case, Respondent raises jurisdictional objection *ratione personae*. Respondent respectfully requests the Tribunal to decline confirming the jurisdiction, because first, **[A]** Claimant does not qualify as an "investor" under the CEPTA, and second, **[B]** Claimant does not qualify as a "national" under ICSID AFR.

A. Claimant does not qualify as an "investor" under the CEPTA

3. The central element in determining jurisdiction *ratione personae* under respective investment treaties lies in the definition of "investor".[3] Respondent argues that **[1]** Claimant is an SOE under the control of Bonooru government, **[2]** disqualifying it as a protected investor to launch arbitration against Mekar under the CEPTA.

1. Claimant is an SOE under the control of Bonooru with a significant state ownership

[1] CEPTA, Article 9.16.
[2] OECD on Understanding Concepts (2008), p. 9.
[3] *Ibid.*

4. The definition of SOE adopted by OECD is "any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership".[4] Under this version of SOE's definition, it doesn't matter whether the ownership of the government amounts to a specific proportion.

5. Claimant might argue that the factor of "control" should be satisfied when determining the SOE status. Even assuming that not every tiny proportion, such as 1%, can make the company an SOE, an absolute majority proportion of shareholdings is not necessary, as long as the governmental control is exercised over the entity. In this connection, control can be established by ownership of a majority of shares.[5] It can be equally established through a significant minority ownership considering relevant circumstances on a case-by-case basis.[6] Different voting rights, decision-making procedures and the exercise of management are attached to different types of shares, which altogether contribute to a complex picture of "control".[7] According to the case of *Adt v. Bolivia*, the Tribunal noted that the ordinary meaning of the term "control" can "encompass both the rights arising from the shares ownership and the actual exercise of powers".[8]

6. In the present dispute, Bonooru's stake ranged from 31%-38% during Vemma's investment in Caeli,[9] and was increased to 55% on 2 March 2021.[10] The State control of the Bonooru government is guaranteed through its ownership and the operation of board of directors. Bonooru's right to hold a significant stake is recognized by Vemma's memorandum of association.[11] According to articles of association of Vemma Holdings Inc., one official of the Ministry of Transport and tourism shall be nominated by the government for the non-executive director

[4] IEG, p. 3.
[5] McLaughlin (2020), p. 605.
[6] *Ibid*, p. 603.
[7] Schreuer/Sinclair (2009), p. 323.
[8] Tunari, ¶ 227.
[9] Case 2021, Statement of Uncontested Facts, ¶ 10.
[10] *Ibid*, ¶ 65.
[11] *Ibid*, Annex IV, Memorandum of Association of Vemma Holdings Inc.

position.[12] And Bonooru's representatives on Vemma's board are present for every meeting, forming a majority of members.[13] Governmental control factor has been satisfied.

7. Therefore, Vemma constituted an SOE under the control of Bonooru government.

2. Claimant should not be defined as an "investor" under the CEPTA as an SOE

8. Article 1.6 of the CEPTA terminated the 1994 BIT, prescribing that "as well as all the rights and obligations derived from the said Treaty, will cease to have effect on the date of entry into force of this Agreement".[14] As a result, the only applicable law in the determination of the Tribunal's jurisdiction is the CEPTA. However, the 1994 BIT is of significance to the interpretation of "investor" under the CEPTA.

9. Both Bonooru and Mekar are parties to the VCLT.[15] In addition, the rules for treaty interpretation stipulated in VCLT has been recognized as customary international law.[16] Therefore, treaties between both parties shall be interpreted under Article 31(1) of the VCLT "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[17]

10. The plain language of Article 1 of 1995 Bonooru-Mekar BIT explicitly defines the term "investor" as "a natural person possessing the citizenship of or permanently residing in one State in accordance with its laws, or any enterprise incorporated or duly constituted in accordance with applicable laws in that State, who makes the

[12] *Ibid*, Articles of Association of Vemma Holdings Inc.
[13] Case 2021, Procedural Order 3, ¶ 3.
[14] CEPTA, Article 1.6.
[15] Case 2021, Statement of Uncontested Facts, ¶ 66.
[16] The Genocide Convention, ¶ 160.
[17] VCLT, Article 31(1).

investment in the territory of the other State".[18] It further clarifies that enterprise "means any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or **government-owned** [emphasis added], including any corporation, trust, partnership, sole proprietorship, joint venture, or other association; and a branch of any such entity".[19] With express inclusion in the definition of an investor, a government-owned enterprise is recognized as a qualified investor under the CEPTA.

11. Contrarily, it is specifically defined in Article 9.1 of the CEPTA that the enterprise of a Party, under the definition of investor, "is constituted or organized under the laws of that Party and has substantial business activities in the territory of that Party or is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned above".[20] The government-owned enterprise is no longer included in the definition of "investor".

12. If the Tribunal consider the meaning of investor is "ambiguous or obscure", the Tribunal should refer to supplementary approach of interpretation stipulated in Article 32 of VCLT, considering the circumstances of the treaty's conclusion.[21] In this connection, given the previous treaty practice between Bonooru and Mekar, if the contracting parties intended to provide protection for SOEs, they would have explicitly stipulate SOEs as investors under the CEPTA, as they did in 1994 BIT. Moreover, the CEPTA was negotiated under the background that there was a public sentiment in Mekar against 1994 BIT because it provided unbalanced protection to investors from Bonooru.[22] Combined with fact that there are more Bonoori investors in Mekar than Mekari investors in Bonooru,[23] a broad meaning of investor with inclusion of SOE will be inconsistent with the parties' intention to

[18] 1994 Mekar-Bonooru BIT, Article 1(d).
[19] *Ibid*, Article 1(a).
[20] CEPTA, Article 9.1.
[21] Blyschak (2011), p. 25.
[22] Case 2021, Procedural Order 3, ¶ 14.
[23] *Ibid*.

strike a balance between rights of investors and host states.

13. In conclusion, compared with the provision of 1994 BIT, the CEPTA does not define SOE as protected investor. Therefore, based on the CEPTA, the Tribunal has no jurisdiction *ratione personae* over this dispute.

B. Claimant does not qualify as a "national" under the ICSID AFR

14. Even if the Tribunal determines that the CEPTA extends its protection to SOEs, the jurisdictional requirements under Article 2 of the ICSID AFR should also be satisfied. In accordance with Article 2 of the ICSID AFR, the Tribunal only has jurisdiction over mixed disputes between a State and a national of another State.[24] To determine whether an SOE constitutes a "national", the Broches test is applicable, which is originated from customary international rule[25] of the attribution in Articles 5 and 8 of the ILC's ARSIWA,[26] and has been applied in previous cases like *BUCG*[27] and *CSOB*[28].

15. Particularly, the first limb focuses on the degree to which an SOE's investment is directed by the State, while the second limb focuses on the degree to which an SOE make investment with elements of governmental authority.[29] An "agent" is often indistinguishable from and legally part of the government, while "discharging government function" refers to legally separate entities.[30] Both of the two standards should be considered adequately and distinctly when confronted by an SOE Claimant.[31]

[24] Schreuer/Sinclair (2009), p. 85.
[25] ICJ Statute, Article 38.
[26] Blyschak (2011), p. 27.
[27] BUCG.
[28] CSOB.
[29] Blyschak (2011), p. 40.
[30] Bungenberg/Kim (2015), p. 1214.
[31] Blyschak (2011), p. 41.

16. The relationship between the two limbs is disjunctive, which is separated by the word "or", indicating that the test clearly imposes two distinct but equally significant inquiries.[32] An enterprise meeting either of the requirement will disqualify it as a "national" under ICSID AFR.

17. In this case, the relationship between Claimant and its home state is suspicious, as in the ongoing arbitration against Respondent, its legal team was equipped with governmental lawyers of Bonooru.[33] Respondent submits that Claimant does not qualify as a "national" under ICSID AFR because both the two limbs of the Broches test have been satisfied, namely **[1]** Claimant acted as an agent for the government and **[2]** it was discharging an essentially governmental function.

1. Claimant acted as an agent for Bonooru government

18. In the case of *Bayindir v. Pakistan* case, the Tribunal applied Article 8 and regard Claimant as an agent of the government because of the significant guidance and approval by senior members of the state.[34] Therefore, reference to Article 8 of the ARSIWA and related commentary international law can provide a basic framework for application of the test.[35] According to Article 8 of the ILC's ARSIWA, "acting as a government agent" focuses on the degree to which the state has directed a SOE's investment actions or investment activities.[36] The ILC Commentary further depicts that the terms "instructions of the state" and "under the state's direction or control" are disjunctive referring to Article 8.[37]

19. According to *BUCG* case, whether an SOE is acting as an agent for its government is decided in the fact-specific context.[38] Conducts which can be attributed to the

[32] *Ibid*, pp. 34-35.
[33] Case 2021, Statement of Uncontested Facts, ¶ 65.
[34] Bayindir, ¶ 125.
[35] Blyschak (2011), p. 40.
[36] ARSIWA, Article 8.
[37] *Ibid*.
[38] BUCG, ¶ 39.

State control are those exercised with respect to both the controlled entity generally and the particular act in question.[39] The entity must possess and exercise the delegated governmental authority in the particular instance at issue.[40]

20. In this case, Bonooru is an archipelagic State comprising 109 islands with a disparate nature of geography.[41] Article 70 of the Constitution of Bonooru assigns special importance to mobility rights of its population to tackle the disproportionate distribution of major public facilities,[42] which bestows positive obligations upon the State to assist and ensure provision of essential transportation to the population.[43]

21. Claimant's predecessor, Bonooru Air, was Bonooru's national carrier and monopoly civil airline, under the management of the CAA until 1979.[44] During the privatization, the Prime Minister clearly emphasized that the intended successor will be directed by the government.[45] Subsequently, Claimant is beholden to Bonooru and exercises its functions under the entrustment and direction of the government for economic development and essential transportation needs, which has been recognized by Bonooru's constitutional court[46] and Article 3 of the founding documents of Claimant.[47] As aforementioned, the Bonooru government controlled the company through shares ownership and the actual exercise of powers.

22. Based on the foregoing, it is clear that Claimant acted as an agent for Bonooru government. Therefore, Claimant is not a qualified "national" under ICSID AFR.

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[39] Feldman (2016), p. 32.
[40] *Ibid*, p. 33.
[41] Case 2021, Statement of Uncontested Facts, ¶ 5.
[42] Case 2021, Annex I, Constitution Act of Bonooru,1947, Article 70.
[43] Case 2021, Annex II, Constitutional Court of Bonooru on Mobility Rights (excerpts), p. 25.
[44] Case 2021, Statement of Uncontested Facts, ¶ 6.
[45] *Ibid*, ¶ 8.
[46] Case 2021, Annex III, Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts), ¶ 59.
[47] Case 2021, Annex IV, Memorandum of Association of Vemma Holdings Inc., Article 3(h).

2. Claimant was discharging an essentially governmental function

23. The "essentially governmental function", which is the second limb of the Broches test, focuses on the degree to which an SOE may be performing investment activities with elements of governmental or regulatory authority. [48]

24. Claimant might argue that the Tribunal should only pay attention to nature of the investment activities rather than the purpose behind the investment, citing *CSOB* case[49] and *BUCG* case[50]. However, *stare decisis* is not a principle of international law nor a rule that an investment tribunal should adhere to in arbitration. Rather, as noted in the case of *Burlington Resources*, a tribunal should duly examine the decisions of earlier tribunals, and the rationale behind previous cases can only be adopted without "compelling contrary grounds".[51] This is the case of the *CSOB* decision, where its outright dismissal of the "purpose" is not articulated with persuasive reasoning.[52]

25. Since the Broches test is originated from customary international law of attribution theory, well-developed customary international law pertaining to attribution rules can serve as a guidance for tribunals to distinguish commercial conducts from governmental ones. Bearing this in mind, customary international rules require consideration of both the nature and the purpose of an SOE's activities.[53] The significant importance of purpose factor when determining whether an enterprise has exercised governmental function is specifically emphasized in the ARSIWA's commentary to Article 5.[54]

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48 ARSIWA, Article 8.
49 CSOB, ¶ 20.
50 BUCG, ¶ 42.
51 Burlington Resources, ¶ 100.
52 Blyschak (2011), p. 32.
53 Feldman (2016), p. 35.
54 ARSIWA, Article 5, commentary (6).

26. While the term "nature" refers to whether the investment activities themselves "were essentially commercial rather than governmental in nature", "purpose" refers to the motivation behind the superficially commercial investment, focused on whether the activities functioned to "promote the government policies".[55]

27. In the present case, firstly, the investment of Vemma in Caeli is not commercial. The pillar of Caeli Airways business model under state ownership was flights between Mekar and Bonooru, which benefited Bonooru more than Caeli. Significant resources were put into the high-traffic routes between Mekar and Bonooru,[56] though the losses were particularly concentrated in those routes.[57] Such aa flight pattern benefited the transportation of Bonooru, but actually are not profitable for the Caeli Airways.[58]

28. Secondly, in the context of Bonooru's Caspian Project and the Horizon 2020 scheme,[59] the Claimant's investment is driven for governmental purpose. Claimant received recurring subsidies from Bonooru Government from 28 October 2011.[60] Ms. Sabrina Blue, the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru, who is the former head of Vemma's directors,[61] put emphasis on the underlying reason to grant Vemma subsidies was the potential of investment in the Caeli Airways to bring substantial benefits to Bonooru by enhancing the aviation network available to prospective tourists through its expansion.[62] Therefore, the investment was assimilated as a part of Bonooru's governmental initiative, with the purpose of boosting tourism infrastructure in Bonooru.

29. Taking both the nature and the purpose of Claimant's activities into consideration,

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55 CSOB, ¶ 20.
56 Case 2021, Annex VII, Phenac Business Today Podcast Transcript, 17 November 2014.
57 Case 2021, Statement of Uncontested Facts, ¶ 33.
58 Case 2021, Annex VII, Phenac Business Today Podcast Transcript, 17 November 2014.
59 *Ibid*.
60 Case 2021, Statement of Uncontested Facts, ¶ 28.
61 *Ibid*, ¶ 22.
62 *Ibid*, ¶ 28.

Claimant was discharging an essentially governmental function.

II. The Tribunal should permit *amicus* submission by the external advisors to CRPU, and reject *amicus* submission by the CBFI

30. Both Article 41(1) of the ICSID AFR and Article 9.19 of the CEPTA, expressly authorize *amicus* participation, giving the Tribunal discretion to determine whether the *amicus* submission filed by a third party should be permitted.[63]

31. In accordance with Article 41 of ICSID AFR[64] and Article 9.19 of the CEPTA[65], the following factors should be considered by the Tribunal in determining the permission of *amicus submission*: **[A]** whether the applicant will provide a new perspective different from disputing parties, **[B]** whether the applicant's submission addresses matters within the scope of the dispute, **[C]** the applicant's significant interest in the arbitration and **[D]** public interest in the subject-matter of the arbitration.

32. Both the CBFI and the external advisors to CRPU submitted *amicus* submission, however, not both should be accepted by the Tribunal. Respondent submits that the *amicus* submission made by the external advisors to CRPU should be accepted, considering the factors mentioned above, while this is not the case of the *amicus* submission by the CBFI.

A. The external advisors to CRPU provides a new perspective different from disputing parties, but the CBFI fails to do so

33. In exercising discretion, this factor should be considered from two dimensions:[66] **[1]** "applicant's independence and impartiality of the parties" and **[2]** "applicant's

[63] ICSID Additional Facility Rules, Article 41; CEPTA, Article 9.19.
[64] ICSID Additional Facility Rules, Article 41.
[65] CEPTA, 15 October 2014, Article 9.19.
[66] Gary Born & Stephanie Forrest, pp. 652-654.

ability to provide assistance to the tribunal". In this case, application submitted by the external advisors to CRPU meets the two requirements, while the petition filed by the CBFI is a frustration.

1. The external advisors to the CRPU has independence or impartiality of the parties, while the CBFI lacks

34. Independence requirement is implicit in the provision of Article 41(3)(a) of the ICSID AFR,[67] for the purpose of helping the Tribunal reach a correct decision with arguments and perspectives different from the disputing parties.[68] *Amicus* participation by those who are not independent from the disputing parties would be contrary to the purpose of such participation.[69] The Tribunal should only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the independence to be of assistance in the settlement of the dispute,[70] rendering apparent lack of independence or neutrality a sufficient ground to deny the amicus status.[71]

35. As for the judgement of impartiality, in previous cases, insufficient information to assess independence led to the tribunal's declination to make *amicus* submission.[72] In this connection, evaluation of the information on applicant's membership with the parties is necessary.[73] When a founder of a non-governmental organization was engaged in on-going dispute with the Claimant, the applicant was not independent.[74]

36. In the case of *von Pezold*, the tribunal decided that as the Group CEO of an SOE

[67] ICSID Additional Facility Rules, Article 41(3)(a); von Pezold, ¶ 135.
[68] Suez, ¶ 23.
[69] Gary Born & Stephanie Forrest, p. 654.
[70] Suez, ¶ 90.
[71] von Pezold , ¶ 56.
[72] Suez, ¶ 32.
[73] *Ibid.*
[74] Gary Born & Stephanie Forrest, p. 654.

owned by Zimbabwe through its department, Mr. Kanyekanye lacked the independence to submit the *amicus* application.[75] Therefore, even a detour, indirect and complicated relationship between the applicant and the disputing party constitutes a barrier of the admissibility of the *amicus* submission, being an actual lack of independence during the hearing.[76] If the party is directly a member of *amicus*, its non-independence is even more apparent which will also become an actual lack of independence.

37. In the present case, it has been stated that in the *amicus* submission of the "**external**" [emphasis added] advisors to CRPU, participated in the privatization process of independently.[77] Such a status equipped the external advisors to the CRPU with ability to present unique and unbiased facts.

38. The CBFI, however, is not independent. Firstly, Claimant itself is a member of the CBFI.[78] Secondly, the participation of Lapras Legal Capital in this arbitration through the CBFI raises a conflict of interest, because it is advising Vemma on funding strategies related to its claims against Mekar.[79] Thirdly, other two members of the CBFI are engaging in disputes with Respondent.[80] Therefore, these direct relationships between Claimant and CBFI, including its members, resulted in the frustration of CBFI's independence.

2. The external advisors to CRPU provide different information, while the CBFI does not advance any novel argument

39. This requirement is focused on applicant's contribution of particular knowledge,

[75] von Pezold, Award, ¶ 805.
[76] *Ibid.*
[77] Case 2021, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, ¶ 19.
[78] Case 2021, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶ 16.
[79] Case 2021, Mekar's Application to Bar the Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶ 24.
[80] Case 2021, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶ 16.

expertise and likely utility to the tribunal.[81] In *Bear Creek Mining* case, the Tribunal considers that it has not sufficiently been shown that the *amicus* would be able to contribute any further information or arguments that would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[82]

40. It is critical that *amicus* should present evidence relevant for the decision of the dispute[83] or introduce legal arguments or perspectives not addressed by the parties in their own submissions.[84] This approach is adopted by tribunals in Resolute Forest case [85] and Apotex case. [86] In this connection, the applicant must demonstrate that its submissions will be sufficiently "different" in content and perspective from those of parties, while the "duplicative" statement submitted by the *amicus* curiae should be rejected.[87]

41. In the present case, the external advisors to CRPU have the ability to provide information before the Tribunal that may not be obtained from either disputing party, because of its independent participation in the entirety of the privatization process. Actually, it is apparent that there is no duplicative statement in the submission compared with the two disputing parties' arguments.

42. However, the CBFI fails to advance novel arguments. The CBFI's views and interpretation of ISDS provisions is nothing different from Claimant. The legal team of Claimant, with governmental lawyers, are able to raise all of the information and arguments provided by the CBFI. Thus, the submission made by

[81] Suez, ¶ 87.
[82] Bear Creek, ¶ 38.
[83] Rahim Moloo, pp. 287, 310.
[84] Daniel Barstow, p. 347; Tomoko Ishikawa, p. 402.
[85] Resolute Forest, ¶ 4.3.
[86] Apotex, ¶ 34.
[87] von Pezold, Award, ¶ 49; Philip Morris, ¶ 46.

the CBFI does not meet the requirements of this dimension.

B. The external advisors to CRPU's submission addresses matters within the scope of the dispute

43. Admittedly, non-disputing parties are not allowed to unnaturally broad the scope of the dispute,[88] turning the dispute different.[89] Claimant might argue that *amicus* submission related to questions of jurisdiction should be rejected, citing NAFTA cases such as *UPS v. Canada* under UNCITRAL Rules.[90] However, under ICSID tribunals, jurisdictional questions themselves are not misappropriate content for *amicus* submission.[91] The Tribunal should not adhere to "such hard and fast rule", considering potential public interest, such as anti-corruption, containing in jurisdictional issues and the unique position of non-disputing parties to assist the Tribunal beyond disputing parties.[92]

44. Claimant may also allege that "it is for Respondent to take jurisdictional points".[93] However, in *Electrabel v. Hungary*, the tribunal assessed materials regarding the tribunal's jurisdiction provided by the non-disputing party, nevertheless the parties did not dispute on those matters.[94] Importantly, not all jurisdictional requirements are subject to the parties' disposition.[95] For instance, objective requirements should be independently established regardless of a party's conduct.[96] In this connection, issues in relation with the definition of investment were characterized by ICSID tribunals as a matter "within the scope of the dispute".[97]

88 Apotex, ¶ 27.
89 UPSA, ¶ 60.
90 UPSA, ¶ 71.
91 Pacific Rim, ¶ (ii).
92 Apotex, Procedural Order No.2, ¶ 33.
93 UPSA, ¶ 71.
94 Electrabel, ¶ 2.3.
95 Oded Besserglik, ¶ 316.
96 *Ibid.*
97 Gary Born & Stephanie Forrest, p. 649.

45. In this regard, the legality premise inherent in the notion of investment, based on "in accordance with the law" clause and international public policy,[98] is such an objective requirement that a tribunal may on its own initiative consider whether it is within its competence.[99] Within the subject-matter scope of legality requirement, corruption is of magnitude significance. Accordingly, in light of the weight of the corruption issue, the tribunal in *Metal-Tech* focused its analysis on corruption with full awareness that Uzbekistan alleges instances of illegal conduct other than bribery.[100] As with to *amicus* submission, in *Infinito Gold* case, while neither party had made allegation of corruption, the tribunal still decided that it related to the definition of investment under BIT and it fell "within the scope of the dispute".[101]

46. In this case, although there is no compliance clause, i.e. "in accordance with the law" clause attached to the definition of investment, the preamble of the CEPTA explicitly indicates parties' intention to "eliminate bribery and corruption in trade and investment law".[102] Therefore, legality is a requirement implicit in a covered investment, with an effect on jurisdiction *ratione materiae*.

47. What the external advisors to CRPU raised in its *amicus* submission is bribery, with "fundamental nature"[103] and significant importance for the determination of jurisdiction. Once it has been brought to the attention of the Tribunal, no matter by disputing parties or a third party, the Tribunal cannot decline to consider it *sua sponte*.[104]

48. Therefore, the submission by external advisors to CRPU adduces corruption falls within the scope of the dispute and the Tribunal should address the bribery issue

98 World Duty Free, ¶¶ 138-157; Inceysa Valliosoletana, ¶¶ 245–252.
99 ICSID Additional Facility Rules, Article 45(3).
100 Metal-Tech, ¶ 166.
101 Infinito, ¶ 33.
102 CEPTA, Preamble.
103 Oded Besserglik, ¶ 318.
104 *Ibid.*

based on *Kompetenz-Kompetenz* principle.

C. The external advisors to CRPU have a significant interest in this dispute

49. Admittedly, significant interest cannot be satisfied by a merely general interest.[105] According to the *Apotex* case, the applicant must explain that rights or principles it represents or defends might be directly or indirectly affected by the outcome of the over-all proceedings.[106]

50. In the present case, the external advisors to CRPU possess interest in promoting fair business practices in Mekar,[107] under the background that public perception of corruption in Mekar is neutral since this is considered a friendly custom that is a part and parcel of doing business.[108] This might be objected by Claimant as general interest. Respondent further argues that *amicus* submission by CRPU has demonstrated something more, as they regularly advise potential investors prospecting opportunities in Mekar.[109] As alluded to earlier, Mekar's corruption is quite serious. Stagnation in anti-corruption efforts, resulted from the recognition of the Tribunal's jurisdiction over a tainted investment, will impact the financial operations of the external advisors to CRPU. Thus, the external advisors to CRPU have a significant interest in this case.

D. The external advisors to CRPU file its application in pursuit of public interest, whereas the CBFI doesn't

51. Although it is not expressly listed in Article 41 of the ICSID AFR, many tribunals considered "public interest" an important factor through the interpretation of the

105 Eco Oro, ¶¶ 34, 35.
106 Apotex, ¶ 40.
107 Case 2021, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p. 19.
108 Case 2021, Procedural Order No. 3, ¶ 13.
109 Case 2021, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p. 19.

wording "among other things", and conducted in-depth discussions around it.[110]

52. According to Resolute Forest case, to satisfy the public interest requirement, an impact upon individuals and entities beyond the disputing parties is not enough.[111] Instead, the link between their application and "furtherance of the public interest" must be demonstrated.[112] According to *Apotex* case, the applicant's failure to identify the public interest that its submissions would advance is sufficient to reject the application.[113] The Tribunal rejects the point that what lies behind the asserted public interest is a particular and professional interest.[114]

53. In the present case, the external advisors to the CRPU file its application in pursuit of public interest to combat corruption. However, the CBFI fails to identify the public interest beyond the impact upon the CBFI itself in its submission, which only concentrate the interest of its own members. The submission by CBFI refers nothing pertaining to public interest issues at all, not to mention the "link" between the public interest and its submissions.

III. Respondent did not violate Article 9.9 of the CEPTA

A. Article 9.9.2 has listed out all the elements of the FET standard in the CEPTA

54. Respondent would like to first clarify that Article 9.9.2 of the CEPTA has listed out all the conditions in which the FET standard may be violated, which means the Tribunal should not take other elements into consideration. The way Article 9.9.2 is drafted supports this view.

[110] Gabriel Resources, ¶ 65.
[111] Resolute Forest, ¶ 4.7.
[112] Resolute Forest, ¶ 4.7.
[113] Apotex, ¶ 42.
[114] Apotex, ¶ 43.

55. The wording of Article 9.9.2 suggests that the contracting parties intended to make the list exhaustive. Under the *expressio unius est exclusio alterius* rule,[115] other elements that are traditionally viewed as part of the FET standard, such as stability of regulatory framework, should be considered to have been excluded from the list. If the parties intended to make the list unexhaustive, they could have included words such as "include" or "unexclusive".

56. It is also noteworthy that the wording of this article is very similar with the FET standard in the CETA.[116] In April 2019, the Court of Justice of the European Union emphasized that the list in Article 8.10.2 of CETA is exhaustive.[117] Therefore, it is clear that the list in Article 9.9.2 of the CEPTA should be considered exhaustive, and no further elements should be taken into account. Respondent will prove in the following that none of the elements listed in this article can be satisfied.

B. Mekar courts' actions did not constitute denial of justice

57. Denial of justice may be found where certain actions deprive someone of the fundamental right to present his case.[118] Claimant's allegations in this case have focused on undue delay in proceedings and clear and malicious misapplication of the law.[119] While these are indeed two typical types of denial of justice,[120] Respondent contends that both standards cannot be met in the present case.

1. Mekar courts did not subject proceedings to undue delay

58. As indicated in previous cases,[121] while there is no fixed time limit, the period of the delay is a crucial factor to be considered. In multiple previous cases, tribunals

115 Black's Law Dictionary, p. 661.
116 CETA, Article 8.10.2
117 EUCJ Opinion, ¶ 158
118 UN Review, p. 92
119 Case 2021, Notice of arbitration ¶ 20, 27.
120 Azinian, ¶¶ 102-103.
121 White Industries, ¶ 10.4.22.

have found delays ranging between five and ten years to be not undue.[122] In the present case, Mekar court scheduled the hearing concerning the airfare caps one year after registration,[123] which is a rather short period. Such a period was also significantly shorter than the average time taken to solve a commercial case in Mekar.[124] Therefore, the slight delay in the present case certainly had not reached a stage where it could be counted as undue.

59. Moreover, lack of judicial resources has been considered by tribunals to be a justification for delays in proceedings. In White Industries case, the tribunal took into consideration that India's judicial system underdeveloped in terms of size and capacity, and came to the conclusion that there was no undue delay.[125]

60. The delay in the present case was indeed caused by lack of resources, rather than by intentional procrastination or lack of action. Mekar had went through political instability and economic reforms in past years, and its population has greatly increased.[126] Therefore, it is understandable that Mekar's courts have not expanded at the same rate. Due to Mekar courts' limited resources and the ongoing economic crisis, it was practically impossible for Mekar courts to solve every problem immediately.

61. Claimant might submit that the changing inflation rate had impaired Caeli's profitability, so the case required greater swiftness. However, purely commercial matters should be considered less urgent than criminal or human right matters. In White Industries the tribunal stated:

[122] Frontier, ¶ 334; White Industries, ¶¶ 11.4.9, 11..4.14; Jan De Nul, ¶ 204.
[123] Case 2021, Statement of Uncontested Facts, ¶ 44.
[124] Case 2021, Statement of Uncontested Facts, ¶ 13.
[125] White Industries, ¶ 10.4.18.
[126] Case 2021, Statement of Uncontested Facts, ¶¶ 12-13.

> *"The Tribunal considers it relevant to distinguish between criminal proceedings (and applications before human rights courts), where there is a particular need for the urgent resolution of cases, and purely commercial matters such as are involved here."*[127]

62. Therefore, it was reasonable for Mekar courts to prioritize criminal cases.[128] Also, it must be noted that an economic crisis would affect almost everyone in the country. Claimant has failed to explain why its appeals should be prioritized over other cases in that sense.

2. The decision to enforce the 9 May award was reasonable and lawful

63. Claimant also put emphasis on Mekar courts' decision to enforce an arbitral award that had been set aside. However, the decisions were actually made in good faith and in accordance with relevant rules, therefore cannot constitute denial of justice.

64. Firstly, it should be borne in mind that wrong judgment by a court would not result in denial of justice by itself, unless there is clear and malicious misapplication of law.[129] As stated by the tribunal in Eli Lilly, the international court "is not the appellate tier in respect of the national judiciary".[130] It was also stressed that only "in very exceptional circumstances" can a tribunal assess the conduct of a national court.[131] Therefore, the threshold for "clear and malicious misapplication of law" should be strictly high.

65. Neither Article 5 of the New York Convention nor Section 36 of Mekar's Commercial Arbitration Act mandates national courts not to enforce awards that have been set aside. It is generally accepted that domestic courts enjoy sufficient

[127] White Industries, ¶ 10.4.14.
[128] Case 2021, Statement of Uncontested Facts, ¶ 44.
[129] Azinian, ¶ 103.
[130] Eli Lily, ¶ 224.
[131] Eli Lily, ¶ 224.

discretion on this issue, as shown by the word "may" in both provisions.[132]

66. Countries have indeed adopted very different approaches. For instance, courts of United States generally decide whether to enforce an annulled award by evaluating whether the decision to set aside the award is against the public policy of United States.[133] German courts almost never enforce annulled award.[134] French courts, on the contrary, do not even consider whether an award has been set aside.[135] Therefore, there is no universal standard about in what circumstances can national courts enforce awards that have been set aside., and Claimant cannot expect Mekar courts to adopt an approach that benefits Vemma.

67. In fact, from Mekar court's ruling in Alta Lumina Trading case,[136] it can be inferred that Mekar had adopted an approach similar with that of France; that is, an international arbitral award is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Such an award is not anchored in any national legal order, so its recognition in one country would not be contrary to transnational public policy.[137]

68. Claimant might argue that Mekar court also stated that "in the event of allegations of serious breaches of transnational conceptions of public policy", preceding judicial dicisions rendered at the seat of arbitration should usually be deferred to.[138] However, even if that judicial decision can be considered as binding, the words "shall usually" in the ruling shows that Mekar courts still have discretion whether to enforce annulled awards in such scenarios. Referring to previous cases, it can be

[132] Hilmarton, ¶¶ 4-5.
[133] Chromalloy, p. 913, Baker Marine, p. 9.
[134] Erica Smith, pp. 358-361.
[135] French Code of Civil Procedure, Article 1502; Hilmarton, ¶¶ 4-5.
[136] Case 2021, Annex XV, Superior Court of Mekar ruling- 25 September 2020, ¶ 11.
[137] *Ibid.*
[138] *Ibid.*

said that annulled awards can definitely be enforced if setting aside the award would be against Mekar's public policy.[139]

69. In the present case, setting aside the award would indeed be against Mekar's public policy. The decision made by Supreme Arbitrazh Court of Sinnograd to set aside the award was based solely on the CILS report.[140] The Sinnoh court stated in the ruling that it considered "internationally recognized persons such as CILS and the experts cited in its Report as neutral and impartial".[141] However, CILS had been recognized by the Mekari Ministry of Home Affairs as "an entity funded by foreign donations to interfere with Mekar's domestic affairs".[142] The Ministry had frozen CILS' bank accounts and designated its activities illicit.[143] Therefore, from Mekar's perspective, the neutrality and objectivity of the organization was extremely questionable. Giving credence to CILS' report would actually be against Mekar's public policy.

C. Respondent's actions were not arbitrary

70. A measure may be characterized as arbitrary if it is "founded on prejudice or preference rather than on reason or fact"[144] or constitutes a "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[145] Therefore, even if the measures taken by the host state are poorly executed or unsuccessful, they would not necessarily be arbitrary.[146] In the present case, the actions taken by Respondent were indeed all based on reason or fact.

139 Chromalloy, p. 913.
140 Case 2021, Annex XIII, Supreme Arbitrazh Court of Sinnograd Ruling, ¶ 11.
141 *Ibid.*
142 Case 2021, Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶ 13.
143 *Ibid.*
144 Lauder, ¶ 841.
145 El Paso, ¶ 319.
146 LG & E, ¶162.

1. The CCM investigation was not arbitrary

71. Claimant contends that the first CCM investigations was arbitrary and illegal.[147] However, when CCM launched the investigation into Caeli Airways' activities, it had legitimate regulatory concerns about Caeli's exorbitant expansion.[148] The suspected predatory pricing strategy of Caeli could significantly harm its competitors.[149] The investigation also fully complied with Mekar's domestic laws. Chapter III of Mekar's Monopoly and Restrictive Trade Practice Act states:

> "…The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share."[150]

72. The airline industry is surely an industry that requires special attention, since it is part of a nation's infrastructure. In any event, according to the law, the CCM enjoys discretion to decide whether to open an investigation. The exercise of such discretion surely cannot be considered as arbitrary.

2. The maintenance of the airfare caps was reasonable and lawful

73. Claimant contends that the maintenance of airfare caps in the context of a deteriorating economic situation in Mekar was unreasonable and arbitrary. However, Mekar had established practices concerning the changing inflation rate. The airfare caps set by CCM would be adjusted according to the inflation rate released by Mekar's Central Bank each year.[151] Claimant cannot expect Respondent to alter its long-standing policies in order to protect Caeli Airways. Even if the decision to follow established practices might be inflexible, it surely

[147] Case 2021, Notice of Arbitration, ¶¶14, 15.
[148] Case 2021, Statement of Uncontested Facts, ¶ 36.
[149] *Ibid.*
[150] Case 2021, Annex V, Monopoly and Restrictive Trade Practice Act, as Amended 2009, Chapter III (2).
[151] Case 2021, Statement of Uncontested Facts, ¶ 43.

could not amount to arbitrariness.

3. The policy requiring airlines to price their service in MON was not made arbitrarily

74. During the economic crisis, Respondent shifted its economic policy and required airlines in Mekar to price their services in MON.[152] While it is true that such a policy would harm airlines operating in Mekar, it aimed to stabilize the currency, mitigate against capital outflows and secure Mekar's macroeconomic situation. Such a regulatory measure definitely did not constitute arbitrary conduct.

D. Respondent did not discriminate against Claimant

75. Respondent's decision to grant subsidies for airlines operating in Mekar while denying subsidies to Caeli Airways was not discriminatory. A measure can be discriminatory only if the claimant and its investment are in like circumstances with the comparator.[153] In Total v Argentine the tribunal stressed:

> "Mere differences of treatment do not necessarily constitute discrimination…discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way."[154]

76. Caeli Airways was not in like circumstances with other airlines that received subsidies. Regardless of whether Vemma is a state-owned company, it was clear that Caeli Airways was owned in a significant part by Bonooru government.[155] Although some privately-owned companies, such as Star Wings and Jet-Greens also received subsidies from home states,[156] Caeli Airways' relationship with

[152] Case 2021, Statement of Uncontested Facts, ¶ 42.
[153] Parkerings-Compagniet, ¶ 288.
[154] Total, ¶ 210.
[155] Case 2021, Statement of Uncontested Facts, ¶¶ 10, 47.
[156] Case 2021, Statement of Uncontested Facts, ¶ 46.

Bonooru government had given Caeli Airways other unique advantages over its competitors.

77. For instance, Caeli Airways refinanced its inherited debt liability from BPB, a nationalized bank in Bonooru, at more favourable rates than available on the market.[157] Such a favourable treatment was obviously due to Caeli Airways' relationship with Bonooru government. There were also reports showing that "Vemma has near assurances that Bonooru would step in if anything bad were to happen to its prized national-carrier's owner".[158] Considering these factors, it was reasonable to infer that Caeli Airways would be more capable of getting through the difficult situation with help from Bonooru. It is also noteworthy that the other state-owned company, Larry Air, did not receive subsidies from Mekar as well.[159]

78. Therefore, it is clear that Caeli Airways and its competitors were not "in all material respects the same".[160] Therefore, denying Caeli Airways subsidies would not be discriminatory.

E. The rule of "creeping violation" is inapplicable due to the nature of the challenged measures

79. Claimant has mentioned that Respondent's actions, "either individually or taken together", violates the FET standard.[161] Such a statement seems to indicate application of rules of "composite act" or "creeping violation". However, while it is true that sometimes a series of measures can be accumulated and considered as a whole,[162] such an approach is not always available.

[157] Case 2021, Statement of Uncontested Facts, ¶ 30.
[158] Case 2021, Annex IX, Aviation Analytics.
[159] Case 2021, Statement of Uncontested Facts, ¶ 47.
[160] Total, ¶ 210.
[161] Case 2021, Notice of Arbitration, ¶29.
[162] El Paso, ¶ 518; ARSIWA, Article 15.

80. Article 15 of ARSIWA defines the concept of a "composite act" as "a series of actions or omissions defined in the aggregate as wrongful".[163] The commentary explains that such "composite acts" are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such.[164] In other words, "composite act" actually refer to obligations that can only be breached through a series of measures rather than through an individual act.[165] Examples include genocide, apartheid, systematic acts of racial discrimination, etc.

81. The obligation concerned in El Paso was stability of regulatory framework, which could be violated through a series of minor policy changes.[166] The obligations concerned in the present case, on the contrary, are not of such nature. For example, it is difficult to conceive of an instance in which a series of unarbitrary actions could in the aggregate amount to arbitrary conduct. Therefore, it would be unreasonable to refer to the concept of composite act in this case.

F. Claimant cannot invoke the rule of legitimate expectation

1. Legitimate expectation is not an element of the FET standard in the CEPTA

82. As aforementioned, Article 9.9.2 lists out all the elements of the FET standard in the CEPTA. Legitimate expectation, however, is only mentioned in Article 9.9.3 as follows:

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

163 ARSIWA, Article 15.
164 ARSIWA, Article 15, commentary (2).
165 Scott Vesel, p. 560.
166 El Paso, ¶ 515.

investment, but that the Party subsequently frustrated."[167]

83. The wording of this paragraph is almost identical to that of Article 8.10.4 of CETA.[168] It is clear that such a way of drafting the provision shows that legitimate expectation is not a stand-alone element of FET standard, but merely a factor that may be taken into account, since it is not listed in Article 9.9.2 of the CEPTA.[169]

2. In any event, Respondent did not make any representation to create a legitimate expectation.

84. Article 9.9.3 of the CEPTA expressly refers to "specific representation" made to an investor to "induce" an investment. Article 1105 (e) of NAFTA also uses the words "representation" and "inducing", so rulings of NAFTA tribunals could provide some guidance here. The Mobil tribunal, for example, stated that such representation should be "definitive, unambiguous and repeated".[170] Even if the host state drastically changes its regulation upon which the investor has relied on when making investment, it would not violate Article 1105.[171]

85. In the present case, Respondent never made any specific representation to Claimant. Although Vemma's connection to the Moon Alliance was a selling feature of Vemma's bid to acquire Caeli,[172] Respondent never made any relevant promise. Therefore, in this case there is not any legitimate expectation to be met.

IV. The compensation standard should be MV standard and any compensation awarded should be reduced

[167] CEPTA, Article 9.9.3.
[168] CETA, Article 8.10.4.
[169] Dumberry, p. 107.
[170] Glamis, ¶ 802.
[171] Mobil, ¶ 143; Mesa, ¶ 619.
[172] Case 2021, Statement of Uncontested Facts, ¶ 25.

86. Claimant requests 700 Million USD in compensation based on the FMV standard, invoking principles of international law and the MFN clause contained in the CEPTA.[173] However, Respondent submits that in the present case, the appropriate compensation standard should be the MV standard. Even if the Tribunal considers the FMV standard as the applicable standard, any compensation awarded should be reduced on account of mitigating factors.

A. The applicable compensation standard is MV rather than FMV

87. In accordance with Article 9.21 of the CEPTA, when it comes to compensation for treaty violation, monetary damages should be awarded against a respondent based on the MV standard.[174] The FMV standard invoked by Claimant is merely an exception in the situation of expropriation.[175]

88. Respondent submits that the MV standard expressly stipulated in the CEPTA shall be applied. Moreover, it cannot be derogated under principles of international law, and the FMV standard should not be imported through the MFN clause in the CEPTA.

1. The MV standard cannot be derogated under principles of international law

89. Respondent submits that the FMV formula has not been recognized as a principle of international law to realize “full reparation” related to violation of the FET and alternatively, **the** MV standard, which is expressly prescribed in the CEPTA, should prevail.

[173] Case 2021, Notice of Arbitration, ¶ 30.
[174] CEPTA, Article 9.21.
[175] CEPTA, Article 9.12.

i) The FMV standard is not a principle of international law

90. Referring to *Chorzów Factory* case [176] and/or Article 31 of ARSIWA, [177] investment tribunals unanimously recognized that under customary international law, principle of compensation for violations of the FET is "full reparation".[178] Under this principle, the reparation must "wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed".[179]

91. In this vein, FMV is not a sub-standard of "full reparation" concerning non-expropriation compensation. Multiple arbitral tribunals rejected the application of the FMV standard, while applied the principle of full reparation,[180] implying that these two formulas should be distinguished. The tribunal of *Myers* case considers that "FMV standard is not a logical, appropriate measure of compensation to be awarded", noting the distinction between compensating for an illegal act as opposed to lawful expropriation.[181]

92. Therefore, FMV is not a compensation principle for violation of the FET under customary international law. Consequently, principle of international law as basis of FMV standard is not tenable.

ii) In any event, the market value standard set out in the CEPTA should prevail

93. On the same topic, the provisions in the investment treaties constitute *lex specialis*, whereas the principle of international law or customary international law functions as *lex generalis*.[182] In the relationship of *lex specialis vis-à-vis lex generalis*, treaty

176 The Factory at Chorzow, ¶ 125.
177 ARSIWA, Article 31.
178 Joseph Award, ¶ 149; Archer, ¶ 280; BG Group, paras. 426, 427.
179 The Factory at Chorzow, ¶ 125.
180 S. D. Myers, ¶ 308; Nykomb, p. 38; Petrobart, pp. 77, 78.
181 S. D. Myers, ¶¶ 308, 309.
182 CCTPC, ¶¶ 242–244; El Paso, ¶ 552.

provisions supersede the principle of international law.[183] Specifically, in previous cases, investment tribunals reverted to principles of international law or the FMV standard attached to expropriation for the reason that the BIT in question did not provide guidance regarding compensation standards for non-expropriation breaches.[184]

94. In the present dispute, even assuming the FMV standard constitute a reparation principle under customary international law, it serves as *lex generalis*. Thus, the MV standard clearly stipulated in the CEPTA on the same matter should prevail.

2. The FMV standard should not be imported through the MFN clause in the CEPTA

95. Respondent submits compensation standard should not apply to invoke a more favorable treatment. Firstly, **i)** compensation standard is excluded from the application scope of the MFN clause under Article 9.7.2. Secondly, **ii)** the FMV standard contained in the target treaty is out of the temporal scope of MFN clause.

i) The compensation standard is not covered by the MFN clause

96. The scope of the MFN clause in the CEPTA is strictly limited. To be specific, two scenarios of exceptions are set forth in Article 9.7.2 of the CEPTA.[185] Firstly, ISDS procedures are excluded from the scope of the MFN clause. Secondly, substantive obligations absent measures adopted or maintained by a Party cannot be considered as "treatment", thus cannot give rise to a breach of the MFN clause. The FMV standard that Claimant intends to import falls within the scope of these exceptions.

[183] Amoco, ¶ 112.
[184] National Grid P.L.C., ¶ 269.
[185] CEPTA, Article 9.7.2.

a. Compensation standard is part of procedures for dispute resolution

97. According to *Plama*, dispute settlement provisions should not be changed in whole or in part by operation of the MFN clause, unless the MFN clause in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[186] Contrary to the clear language to incorporate ISDS provisions, Article 9.7.2 of the CEPTA explicitly stipulates that the definition of treatment does not include procedures of investment.[187]

98. In this case, the compensation standard contained in Final Award clause is a part of dispute settlement provisions, regulating tribunals' behaviors of rendering final awards. Moreover, it is widely accepted that calculation of damages is a procedural matter pertaining to ISDS mechanism.[188] Therefore, applying certain compensation standard to calculate monetary damages is the procedural obligation of the Tribunal. If the FMV standard is incorporated, the dispute settlement provisions will be altered, which contravenes the intention of the Contracting Parties.

b. Alternatively, the acompensation standard is not substantive obligation within the definition of "treatment"

99. Even assuming that a certain compensation standard constitutes a substantive obligation, according to Article 9.7.2 of the CEPTA, "substantive obligations in other treaties and other trade agreements do not in themselves constitute 'treatment'".[189] By contrast, only substantive obligations with measures adopted or maintained by a Party pursuant to which fall within the definition of "treatment".[190] Under international law, "measure" is broadly understood as acts or steps taken by a State.[191] In this way, the MFN treatment under the CEPTA

[186] Plama, ¶ 223.
[187] CEPTA, Article 9.7.2.
[188] RWG III, p. 8.
[189] CEPTA, Article 9.7.2.
[190] CEPTA, Article 9.7.2.
[191] Fisheries Jurisdiction, ¶ 66.

aims to forbid *de facto* discrimination rather than merely *de jure* discrimination.[192]

100. In this case, there is no evidence that acts or steps have been taken by Respondent pursuant to the purported substantive obligation of the FMV standard. Actually, as alluded to earlier, adopting a certain compensation standard to calculate monetary damages is the obligation of the tribunal according to the language of both the CEPTA and the Arrakis – Mekar BIT. Therefore, there is no possibility for Respondent to adopt measures to fulfill the obligation to apply a certain compensation standard.

ii) The intended FMV standard is out of the temporal scope of the MFN clause

101. In *Bayindir v. Pakistan*, while the tribunal permitted the importation of the FET standard in subsequent third-party treaties, it supported Pakistan's objection to the application. of the FET provisions under the already existing treaty.[193] The underlying rationale is that the omission of an express provision that has already existed in another treaty clearly indicated Parties' intention not to include the FET clause.[194]

102. Further, in light of Article 9.9 of the CEPTA, the FET standard shall not be applied to invoke a more favorable treatment accorded by third-party treaties signed prior to the entry into force of the CEPTA.[195] The compensation standard attached to the FET violation stipulated in prior treaties should also be precluded from the application of the MFN clause.

103. In this case, the Arrakis – Mekar BIT was signed on 16 January 2006,[196] which means that the treatment has already been accorded pre-date the conclusion and

[192] Claire, p. 88.
[193] Bayindir, ¶¶ 166, 167.
[194] Bayindir, ¶ 166.
[195] CEPTA, Article 9.9.7.
[196] 2006 Mekar-Arrakis BIT.

entry into force of the CEPTA.[197] Bonooru and Mekar cannot have intended to include the FMV standard such as the one in the Arrakis – Mekar BIT or else they would have inserted an identical provision that pre-date the conclusion of the CEPTA, employing the terminology FMV instead of MV.

104. Bearing this in mind, the MFN clause cannot be invoked to introduce the FMV standard in Arrakis – Mekar BIT, which is signed before the entry into force of the CEPTA.

B. Any compensation awarded should be reduced on account of limiting factors

105. Even assuming that FMV is the applicable compensation standard, the 1.1 billion USD valuation of its investment estimated by Claimant, which equals to the peak valuation,[198] is out of proportionality.[199] The amount of compensation can be limited for certain reasons,[200] such as **[1]** the claimant's contributory fault and **[2]** the situation of economic crisis.

1. Damages arising from Claimant's own contributory fault should be deducted

106. Contributory fault as a limitation of compensation is widely recognized.[201] As enshrined in Article 39 of ILC Articles on State Responsibility,[202] in the determination of the form and extent of reparation, the conduct of the injured party should be taken into consideration.[203] Investor-state tribunals frequently applied this principle to reduce the amount of compensation.[204] For instance, with explicit

197 Case 2021, Statement of Uncontested Facts, ¶ 32.
198 Case 2021, Annex IX, Aviation Analytics.
199 Faccio, pp. 199-222.
200 Sabahi/ Duggal/ Birch, p. 1116.
201 Marboe, p. 72.
202 ARSIWA, Article 39.
203 ARSIWA, Commentary on Article 39.
204 AGIP S.p.A., ¶ 99; IBAAC, ¶ 84; RosInvestCo, ¶¶ 634-635.

reference to "contributory fault", in *Yukos* case[205] and *Occidental Petroleum* case[206], both tribunals reduced the damages by 25%.

107. The investor's bad business judgement has been characterized as a form of contributory default,[207] since "BITs are not insurance policies against bad business judgement".[208] Put it another way, where the business judgement partly induces the losses suffered by investors, rather than wrongful conducts of the host state,[209] the investor itself should bear the consequence of their own behaviors as experienced businessmen.[210] As held in *Waste Management*, the host state should not be imposed the compensation for the defective business plan based on an extremely narrow client base and "unsustainable assumption about customer uptake and contractual performance".[211] In *MTD*, even though the tribunal confirmed the host state's violation of FET standard, it awarded only 50% of the damages.[212] The tribunal decided that the investor's choice of partner, acceptance of valuation based on future assumption without contractual protection and failure to conduct due diligence were the risks the investor should bear.[213]

108. *In casu*, there was a consensus that Claimant's extravagant approach to rapid expansion is an ill-strategized business plan,[214] which worsened the financial situation of the company and caused Claimant's failure in Caeli.[215] It is noteworthy that Respondent repetitively warned Claimant against the exorbitant approach and unsustainable business strategy.[216] *A fortiori*, the business choice of overexpansion was the risk that Claimant took irrespective of Respondent's actions. Accordingly,

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[205] Yukos, ¶ 1827.
[206] OPCOEP, ¶ 687.
[207] Azurix, paras 426–429; Waste Management, ¶ 177.
[208] Maffezini, ¶ 64; Total, ¶ 309.
[209] Sabahi/ Duggal/ Birch, p. 1121.
[210] MTD, ¶ 178.
[211] Waste Management, ¶ 177.
[212] MTD, ¶ 243.
[213] MTD, ¶ 178, 243.
[214] Case 2021, Annex VII, Phenac Business Today Podcast Transcript; Case 2021, Annex IX, Aviation Analytics.
[215] Case 2021, Statement of Uncontested Facts, ¶ 53; Case 2021, Annex IX, Aviation Analytics.
[216] Case 2021, Statement of Uncontested Facts, ¶ 29; Case 2021, Statement of Uncontested Facts, ¶ 31; Case 2021, Statement of Uncontested Facts, ¶ 35.

damages caused by Claimant's own contributory fault should be deducted from the compensation.

2. The economic crisis in Mekar should be taken into consideration

109. In *Lemire*, considering the economic crisis and the developing status of Ukraine, the tribunal adjusted the evaluation method for the assessment of compensation, in order to reflect the "country risk".[217] Similarly, in *National Grid*, the tribunal recognized the necessity to assess the effect of economic crisis irrespective of the measures in question in calculating the quantum of compensation.[218] In cases concerning the Argentine economic crisis, the method of compensation was also adjusted for purpose of distributing proportionally the losses caused by the emergency.[219]

110. *In casu*, as a developing country, Mekar suffered an economic crisis ensued in 2017,[220] and the microeconomic situation in Mekar is continuously exacerbating.[221] The loss partly caused by economic crisis out of Respondent's control are not attributable to Respondent. Thus, considering the ongoing economic crisis, the compensation requested by Claimant should be reduced.

[217] Joseph Award, ¶ 280; Joseph Jurisdiction and Liability, ¶ 424.
[218] National Grid P.L.C., ¶ 274.
[219] Enron, ¶ 232; CMS, ¶ 248.
[220] Case 2021, Statement of Uncontested Facts, ¶ 39.
[221] Case 2021, Statement of Uncontested Facts, ¶ 41; Case 2021, Procedural Order No. 3, ¶ 4.

PRAYER FOR RELIEF

Claimant respectfully requests the Tribunal to adjudicate and declare that:

1. The Tribunal has no jurisdiction over this dispute, which constitutes State-to-State arbitration;

2. The Tribunal should grant the leave sought for filing amici submissions to external advisors of CRPU, but not to CBFI;

3. Respondent did not violate the FET standard under Article 9.9 of the CEPTA;

4. The appropriate compensation standard is market value standard. Alternatively, the compensation should be reduced, considering Claimant’s contributory negligence and the economic crisis.

On behalf of Respondent

Team Broms