TEAM CASTILLA

FOREIGN DIRECT INVESTMENT MOOT COMPETITION
Seoul, South Korea, 28 October – 3 November 2021

IN THE MATTER OF AN ARBITRATION UNDER ICSID ADDITIONAL FACILITY RULES

- between -

VEMMA HOLDINGS INC.
Claimant

- and -

THE FEDERAL REPUBLIC OF MEKAR
Respondent

MEMORIAL FOR RESPONDENT

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23 September 2021

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

Registry
International Centre for Settlement of Investment Dispute

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ELSI	*Elettronica Sicula (ELSI) (United States of America v Italy)* – ICJ Judgement 20/07/1989
Neer	*L.F.H. Neer and Pauline Neer v Mexico* – General Claims US-Mexico Mixed Commission – Award, 15/10/1926, IV RIAA 60, PP.61-62
Oscar Chinn	*Oscar Chinn (United Kingdom v Belgium),* PCIJ Judgement No.61, 12/12/1934

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CEPTA	Comprehensive Economic Partner & Trade Agreement, 2014
CETA	Comprehensive Economic & Trade Agreement, 2016
Decree n°2004-1190	French Decree n°2004-1190 opening the right of requisition of French airlines, 2004
ICSID(AF) Rules	ICSID Additional Facility Rules, 2006

ILC Articles	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001
UNCITRAL (Transparency) Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014
VCLT	Vienna Convention on the Law of Treaties, 1969

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Galindo/Leiderman	Arturo José Galindo and Leonardo Leiderman – *Living with Dollarization and the Route to Dedollarization*, IDB WORKING PAPER NO. 437 (2005)
Lodewyk	Erasmus Lodewyk, Leichter, Jules and Menkulasi, *Dedollarization in Liberia: Lessons from Cross-country Experience*, I.M.F Working paper, WP/09/37 (2009)

Schliemann	Christian Schliemann – *Requirements for Amicus Curiae Participation in International Investment Arbitration: A deconstruction of the Procedural Warr erected in joint ICSID cases ARB/10/25 and ARB/10/15*, 12(3) THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 365 (2013)

MISCELLANEOUS

Crawford	James Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490/Add. 1-7, 1998
IVS:104	International Valuation Standard Council, IVS 104: Bases of Value, 2020

INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
1994 BIT	1994 Bonooru – Mekar Bilateral Investment Treaty
A –	Annex
Art.	Article
BIT	Bilateral Investment Treaty
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CBFI's Application	*Amicus Curiae* Application for Leave to File Submission by the Consortium of Bonoori Foreign Investors
CCAS	Claimant's comments on Application for leave to file *amicu*s submissions
CCM	Competition Commission of Mekar
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
DCF	Discounted Cash Flow
External Advisors	External Advisors to the Committee on Reform of Public Utilities
External Advisors' Application	*Amicus Curiae* Application for Leave to File Submission by External Advisors to the Committee on Reform of Public Utilities
FMV	Fair Market Value as understood under international customary law
FET	Fair and Equitable Treatment

HCC	High Commercial Court
Mekar/Respondent	The Federal Republic of Mekar
Hawthorne	Hawthorne Group LLP
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ILC Articles	International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts
IVSC	International Valuation Standards Council
L	Lign(s)
Lapras	Lapras Legal Capital
IVSC	International Valuation Standards Council
MFN	Most Favoured Nation Clause
MOA	Memorandum of Association
MON	Mekari MON
MV	Market Value
NY Convention	New York Convention on the Recognition and Enforcement of Arbitral Awards
NoA	Notice of Arbitration
P/PP	Page(s)
RNoA	Response to the Notice of Arbitration

RCAS	Respondent's Comments on Application for leave to file *amicus* submission
SC	Superior Court
SCC	Sinnoh Chamber of Commerce
SE	State-enterprise
SoUF	Statement of Uncontested Facts
USD	United States Dollars
Vemma/Claimant	Vemma Holdings Inc.

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STATEMENT OF FACTS

1. *Shallow men believe in luck. Strong men believe in cause and effect.*[1] This case is about a Bonoori state-owned investor who unsuccessfully tried its luck dabbling in the airline business out of the Republic of Mekar ("**Mekar**" or "**Respondent**"), had to be bankrolled by its home country, Bonooru, and now seeks to make easy money in this arbitration alleging that Mekar would somehow be the cause of its own misfortune.

2. Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") is an investment fund established by the Commonwealth of Bonooru for the purpose of holding shares in domestic and international airline companies.[2] In early 2011, Vemma took part in the bidding process for the privatisation of Mekar's airline monopoly, Caeli Airways ("**Caeli**").[3]

3. One of the main reasons behind Mekar's decision to privatise Caeli was that Caeli was heavily indebted and required an urgent debt restructuring.[4] Fully aware of Caeli's financial situation, Vemma set out in its bid its plans to return Caeli to sustainable debt ratios.[5] While Vemma's proposal would provide Caeli with a much-needed capital infusion, members of the privatisation committee voiced serious concerns about Vemma's risky business plan based on an aggressive growth model and overstated forecasts.[6] However, the committee's chairperson rode roughshod over other members' misgivings, emphasising that Bonoori capital would be a real godsend given Caeli's financial situation.[7]

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1 Ralph Waldo Emerson.

2 SoUF, P30:¶9:L927-931.

3 SoUF, P31:¶22:L1018.

4 SoUF, P30:¶15:L964-966, P31:¶21:L1006.

5 SoUF, P31:¶23:L1024-1026.

6 SoUF, P31:¶24:L1034-1037.

7 SoUF, P31:¶24:L1037-1041.

4. As a result of this vocal support, Vemma's bid was selected and Vemma thus acquired an 85% shareholding in Caeli on 29 March 2011.[8] As it later transpired, the Chairperson's pro-Bonooru stance was no coincidence.

5. Between 2011 and 2016, Vemma remained hell-bent on expanding Caeli at all costs despite mounting opposition from Mekari shareholders.[9] All the while, its commitments made in 2011 to restore Caeli's balance sheet had long been forgotten.

6. In September 2016, as part of an investigation into anticompetitive practices, the Competition Commission of Mekar imposed caps on Caeli's airfares to prevent it from abusing its dominant position on the Mekari market.[10] Caeli did not challenge them at the time.[11]

7. As from December 2016, Mekar faced an overwhelmingly high inflation which precipitated Mekar's economic downturn.[12]

8. In October 2017, to alleviate the effects of the devaluation of the MON, Mekar's national currency, Mekar granted all airlines operating on its soil a temporary authorisation to denominate their airfares in USD.[13] This policy was reversed in January 2018 because it meant that customers would bear the brunt of the inflationary crisis with a reduced purchasing power and depressing demand.[14]

9. This crisis brought to light flaws in Vemma's strategy, prompting it to seek administrative and judicial review of the airfare caps,[15] in addition to subsidies[16] in 2018.

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8 SoUF, P32:¶26:L1050-1051.

9 SoUF, P33:¶29:L1095-1098, P33:¶31:L1108-1110, P34:¶35:L1136-1138.

10 SoUF, P34:¶¶36-37:L1136-1161.

11 SoUF, P34:¶37:L1166-1169.

12 SoUF, P35:¶39:L1183; PO3, P86:¶4:L3161-3162.

13 SoUF, P35:¶40:L1197-1199.

14 SoUF, P35:¶42:L1208-1210.

15 SoUF, P36:¶43:L1221-1223.

16 SoUF, P36:¶46:L1255-1256.

10. Vemma's spoiled attitude and its insatiability can only be explained because it knew that in the event of hardship, Bonooru would step in and bankroll it.[17] Unsurprisingly, by early 2021, Bonooru increased its control in Vemma, acquiring 55% of its shares.[18]

11. Then, instead of advocating for the company's rights through diplomatic espousal, Bonooru instructed Vemma officials to initiate arbitration under CEPTA.[19] At the same time, Bonooru also instructed a government-run professional consortium to intervene in the arbitration procedure to support Vemma's claims.[20]

12. The launch of this arbitration is the last trick up Bonooru's sleeve to exert economic leverage as a tool of diplomacy,[21] as illustrated by its threat on Mekar to freeze the funds promised as part of the Caspian Project,[22] a regional infrastructure development project.[23]

13. In the midst of the take-off of these disloyal arbitration proceedings, and after years of suspicion, direct evidence of corruption on part of Vemma emerged in connection with the 2011 bidding process.[24]

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17 A-IX, P57:L1948-1949.

18 SoUF, P40:¶65:L1408-1412.

19 SoUF, P40:¶63:L1392-1393, P40:¶64:L1414.

20 CBFI's Application, P17:L574.

21 SoUF, P28:¶4:L8913-894.

22 RNoA, P8:¶18:L280-281; A-IX, P57:L1953-1954; PO4, P89:¶1:L3269-3271.

23 SoUF, P28:¶4:L889-891.

24 External Advisors' Application, P19:L636-637.

STATEMENT OF ARGUMENTS

***Amicus* Submissions**

14. Impatient to have the benefit of all the underlying evidence sustaining corruption claims, leave to file a submission should be granted to the External Advisors. On the contrary, the Tribunal should deny CBFI the leave to file a submission as it does not satisfy the criteria of Article 9.19.3 CEPTA, Article 41(3) ICSID(AF) Rules and Article 4 UNCITRAL(Transparency) Rules (**Part One**).

Jurisdiction

15. This Tribunal must decline its jurisdiction as SEs are not protected under Article 9.1 CEPTA and Vemma qualifies as such pursuant to the CEPTA and international law. In any case, Article 1.6 CEPTA cannot serve as an alternative gateway for the Tribunal's jurisdiction. (**Part Two**).

Merits

16. Should the Tribunal reach the merits, it will quickly discover that Vemma's frivolous assertions are doomed to fail. Mekar only applied the rule of law to Vemma, who had taken the liberty to deviate from it. Each of Mekar's acts were appropriate and a necessary exercise of its sovereign rights to regulate (**Part Three**).

Damages

17. In any case, Vemma is owed no compensation. Should this Tribunal find that Mekar breached the CEPTA and that Vemma has not been compensated adequately, compensation should be reduced on account of Vemma's contributory fault and the ongoing economic crisis (**Part Four**).

ARGUMENTS

PART ONE: ADMISSIBILITY OF *AMICUS CURIAE* SUBMISSIONS

I. ARTICLE 9.19(3) CEPTA AND ARTICLE 41(3) ICSID(AF) RULES SHOULD BE APPLIED CUMULATIVELY

18. First, the parties agreed on the application of Article 41 ICSID(AF) Rules to decide on the application for leave to file the submission.[25] Both CBFI and External Advisors considered that they had to fulfil the requirements of Article 41(3) ICSID(AF) Rules.[26] The Tribunal accepted a cumulative application of Article 9.19(3) CEPTA and Article 41(3) CEPTA.[27]

19. Second, Article 9.20 CEPTA provides that when a dispute occurs between a Bonoori investor and Mekar, the latter must consider applying the UNCITRAL(Transparency) Rules.[28] Here, Respondent complied with this obligation and requested UNCITRAL(Transparency) Rules' application.[29]

20. Claimant has yet to accept or decline the offer.

21. In any case, while there may be some differences in the wording between Article 4 UNCITRAL(Transparency) Rules and Article 41(3) ICSID(AF) Rules, those are merely semantic distinctions that do not bear any consequences on the admissibility conditions.

22. As such, the Tribunal should apply Article 9.19(3) CEPTA and Article 41(3) ICSID(AF) Rules cumulatively.

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25 CCAS, P22:L711-712.

26 CBFI's Application, P16:¶1:L502-504; External Advisors' Application, P19:L612-615.

27 PO1, P13:¶19:L426-427.

28 Art. 9.20(6), CEPTA.

29 RCCS, P24:L771-772.

II. THE TRIBUNAL SHALL GRANT THE EXTERNAL ADVISORS' APPLICATION FOR LEAVE TO FILE AN *AMICUS* SUBMISSION AS IT ITS SUBMISSIONS FALLS WITHIN THE SCOPE OF THE DISPUTE

23. External Advisor alleges corruption in the making of the investment by Vemma[30] raising the question of the investment's legality.

24. Claimant argues that External Advisors' submission should be disregard as it raises a matter outside the scope of this dispute.[31] This contention has no basis as legality of the investment is within the scope of this dispute (**A**) and in any case, corruption allegations are always within the scope of the dispute (**B**).

A. The existence of a covered investment is a matter within the scope of the dispute

25. By alleging corruption in the making of the investment, External Advisors question the existence of a covered investment based on the illegality of Vemma's investment.

26. Respondent argues that Vemma's investment does not qualify as a covered investment under CEPTA which is a precondition to benefit from CEPTA's protection. [32]

27. The existence of a protected investment is thus a matter within the scope of the dispute.

28. Should Claimant argue that legality of the investment is not a condition to the qualification of a covered investment, Respondent contends that legality of the investment is implied under the CEPTA and international law.

29. First, while the CEPTA does not provide for an explicit "*accordance with law*"[33] clause, there is an implicit requirement in the BIT.

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30 External Advisors' Application, P19:L635-646.

31 CCAS, P22:L710-715.

32 *Infra*. Part Two.

33 Art. 9.1, CEPTA.

30. According to its preamble, the CEPTA aims to "*PROMOTE transparency, good governance, and the rule of law, and eliminate bribery and corruption in trade and investment.*"[34]

31. Considering that a treaty should be interpreted according to its preamble,[35] the CEPTA is to be read as promoting the rule of law, and therefore requiring that an investment be made in accordance with the rule of law.

32. For instance, the *Plama* tribunal interpreted the ECT's preamble to refuse substantive protection to investment made contrary to law even if the ECT did not require the conformity of the investment with a particular law.[36]

33. Second, legality of the investment requirement is implied under international law, applicable according to the CEPTA.[37] Tribunals have indeed considered that:

> "*legality of the investment is implicit in the international investment arbitration system and therefore operates even when a treaty provision is absent.*"[38]

34. Therefore, legality of the investment is a precondition to the existence of a covered investment and is a matter within the scope of the dispute.

35. This approach is confirmed in *Infinito*. An *amicus* made corruption allegations questioning the legality of the investment which was not raised by the disputing parties. The tribunal allowed the submission as it considered that the scope of the dispute comprises of parties' submissions and the definition of a covered investment in the BIT.[39]

36. Even further, in *Gran Colombia Gold,* the tribunal sitting with the same wing arbitrators allowed an *amicus* alleging corruption in the investment's making which was not raised

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34 Preamble, CEPTA, P71:L2495.

35 Art. 31, VCLT.

36 *Plama (Merits),* ¶¶138-140; *Blusun*, ¶¶264-268*; Yukos*, ¶¶1349-1356.

37 Art. 1.3(2), CEPTA.

38 *South American Silver*, ¶456, *Yukos*, ¶¶1349-1356; *SAUR*, ¶307-310; *Fraport II*, ¶467.

39 *Infinito (PO2),* ¶¶33,35.

by the disputing parties. It considered that the submission was within the scope of the dispute even though the BIT did not explicitly provide for legality of the investment, referring to (i) the disputing parties' submissions, (ii) the treaty, (iii) the ICSID Convention and (iv) international law. [40]

37. Consequently, the issue of legality of the investment, precondition to the existence of a covered investment, is a matter within the scope of the dispute.

B. In any event, corruption allegations are necessary within the scope of the dispute

38. Corruption is considered contrary to international public policy.[41] As to implement this prohibition of corruption, tribunals have found "*ex officio*" powers and duty under Article 43 ICSID Convention[42] to investigate corruptions in the making or during the life of the investment.[43]

39. Hence, if arbitral tribunals have the duty to investigate corruption, corruption is intrinsically a part of any investor-state disputes, even when the parties failed to raise such issue. In other words, corruption is, under international law, necessary a matter within the scope of any investor-state dispute.

40. The *Gran Colombia Gold* tribunal has taken a similar approach by considering that *amici's* submission could be of relevance to the tribunal's assessment of its duties under international law, even when the parties failed to raise these corruption allegations.[44]

41. External Advisors therefore raise an issue within the scope of this dispute as this Tribunal has a duty to investigate corruption allegation by Vemma *ex-officio*, even more

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40 Gran Colombia.

41 *WDF*, ¶157; *Niko Resources*, ¶¶431-433.

42 Art. 43, ICSID Convention; Article 41(2), ICSID(AF) Rules.

43 *Infinito*, ¶¶178,181, *Metal-Tech*, ¶241.

44 Gran Colombia.

when Vemma's state constitutional court has considered these allegations sufficiently founded to take actions of its own accord.[45]

42. It should further be noted that refusing to grant leave to External Advisors' to file its submissions can expose this award to annulment proceedings due to the Tribunal's failure to discharge this *ex-officio* duty as regards to corruption allegations.

43. On the contrary, raising this issue will not unfairly prejudice nor unduly burden the proceedings[46] but benefits the Tribunal.

44. Indeed, both disputing parties will nevertheless have the right to a fair trial as they will have the opportunity to discuss the reality of these allegations in lengthy post-hearing submissions.[47] The Tribunal will finally be in a better position to assess these corruption allegations.

45. Therefore, Respondent requests this Tribunal to allow the External Advisors' Application for leave to file this *amicus* submission.

III. THE TRIBUNAL MUST REJECT CBFI'S APPLICATION FOR LEAVE TO FILE AN *AMICUS* SUBMISSION AS IT DOES NOT MEET THE CONDITIONS LISTED IN CEPTA AND ICSID(AF) RULES

46. CBFI's Application does not meet the required conditions as it fails to show a significant interest in the dispute (**A**) and will not assist this Tribunal in any way (**B**).

A. CBFI fails to demonstrate that they have a significant interest in the arbitration

47. Pursuant to Article 9.19(3) CEPTA and Article 41(3) ICSID(AF) Rules, *amici* must demonstrate that they have a significant interest to contribute in the proceeding. To

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45 PO3, P87:¶13:L3212-3213.

46 Art. 9.19(3), CEPTA.

47 PO2, P26:¶4:L832-835.

satisfy this requirement, *amici* must show that they will be affected directly or indirectly by the decision of the tribunal.[48]

48. The *Apotex* tribunal laid down the test by stating that the *amicus* needs to show more than a "*general*" interest in the proceeding by demonstrating that the "*outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.*"[49] For example, the same tribunal rejected Mr Appleton's application on the basis that advocating for a legal interpretation of NAFTA favourable to its clients does not constitute a significant interest since he was not representing its own rights.[50]

49. Similarly, CBFI evidently advocates for a specific interpretation of the CEPTA that would be advantageous for its members since three of them are currently pursuing claims against Mekar. CBFI solely aims at persuading the Tribunal to render a decision favourable to its members. Whilst the outcome of the decision may affect those three members, it does not have any direct or indirect impact on CBFI itself. The outcome of the decision will not cause CBFI to lose members, nor will it affect its functioning.[51] Besides, its interest in the growth of Bonooru and the greater Narnian region is too general to reflect a "*significant*" interest in this particular arbitration.[52]

50. Hence, CBFI does not satisfy the first condition of showing a significant interest.

B. The CBFI's Application will not assist the Tribunal in determining a factual or legal issue related to the arbitration

51. CBFI's submission will not assist the Tribunal because, first, it does not bring any additional inputs (**1**) and second, its submission will only replicate Claimant's arguments (**2**).

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48 Schliemann, P372.

49 *Apotex*, ¶38; *Gabriel*, ¶63.

50 *Apotex*, ¶40.

51 PO3, P87:¶11:L3198-3199.

52 CBFI's Application, P16:¶2:L505-509.

1) CBFI cannot assist the Tribunal as it fails to bring a particular expertise or knowledge

52. An *amicus*' submission should only be allowed if it assists the tribunal by bringing a "*perspective, particular knowledge or insight that is different from that of the disputing parties*."[53] In that respect, the arbitral practice relies on the assumption that the disputing parties benefit from inputs and insights of the experienced counsels they have retained.[54]

53. CBFI offers to bring insights related to the Bonoori legal framework and its economic context to advocate for a specific interpretation of "*investors*" under the CEPTA.[55] Those inputs do not add any value to the proceedings. Indeed, both Claimant and Respondent will fully brief the Tribunal on that particular issue.[56] By contributing as such, CBFI will only burden the Tribunal with redundant information.

54. CBFI will not bring additional inputs and will not assist the Tribunal. The condition is therefore not satisfied.

2) CBFI cannot assist the Tribunal as it lacks independence

55. CBFI's failure to comply with its duty to disclose materialised its lack of independence (a). As a result, it cannot bring any perspective different from Claimant (b).

a) The concealment of crucial information shed light on CBFI's lack of independence

56. The existence of a duty to disclose cannot be disputed.

57. Pursuant to Article 9.19(3) CEPTA, an *amicus*, wishing to submit a report must comply with its duty to disclose.[57] In this regard, the CEPTA imposes on *amicus* the disclosure

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53 Art. 41(3)(a), ICSID(AF) Rules

54 *Bear Creek (PO5)*, ¶37; *Eco Oro*, ¶31; *Apotex*, ¶32.

55 CBFI's Application, P16:¶10:L537-555.

56 PO1, P14:¶27:L455-456.

57 Art. 9.19(3), CEPTA.

of any affiliation, direct or indirect with the disputing party and the disclosure of any governmental assistance.[58]

58. A failure to disclose any crucial information will raise doubt as to the independence of the *amicus*.[59]

59. Admittedly, CBFI complied with its duty to disclose, but only partially.

60. Despite the tight business relationship between Lapras Legal Capital ("**Lapras**") and Claimant, CBFI omitted to inform this Tribunal that the Chief Financial Officer of the former was allowed to participate in the vote related to the making of *amicus* submission in Vemma's claim.[60]

61. Further, CBFI clearly states that "*no government, person or organization associated with Vemma or otherwise has provided financial or other assistance in the preparation of this document.*"[61] However, CBFI is manifestly involved with Bonooru since the email of the author of the application is: *gkalliyat@cbfi.gov.bn.*[62] (emphasis added) The involvement of the Bonooru in CBFI is of paramount importance since the arbitrators are meant to decide on whether Claimant is a Bonoori SE.

62. Hence, the concealing of those crucial information evidences that CBFI lacks independence.

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58 Art. 9.19(3), CEPTA.

59 *Agua Provinciale*s, ¶29; *Vivendi (2005)*, ¶¶24-27, *Vivendi (2007)*,¶13; De Brabandere, ¶48.

60 PO3, P87:¶12:L3207-3211.

61 CBFI's Application, P16:¶3:L513-515.

62 CBFI's Application, P17:L574.

b) CBFI cannot bring a perspective distinct from Claimant as it clearly lacks independence

63. Article 41(3) ICSID(AF) Rules contains a non-exhaustive list of conditions entitling tribunals to use their discretion when assessing *amici*'s applications.[63] In that respect, tribunals have required *amicus* to be independent from the disputing parties. [64]

64. For example, in *Pezold*, the tribunal stated that that independence is an implicit requirement deriving from the condition of bringing "*a perspective, particular knowledge or insight that is different from that of the Parties.*"[65] It further concluded that "*the apparent lack of independence or neutrality of the petitioners is a sufficient ground to deny the Non-Disputing Party Application*."[66]

65. Doubts as to the independence of an *amicus* may arise when it has any financial interest in the outcome of the dispute, or when it is assisted or funded to participate by any of the disputing party.[67]

66. In *Eli Lilly*, the tribunal refused to grant a leave to file a petition to PhrMA, AMIIF, BIO, IMC and BTC, on the ground that their submissions would only replicate Claimant's arguments. In particular, it acknowledged the close ties existing between the petitioners and Claimant, (*i.e*. membership in the petitioner, involvement in the board, joint lobbying activities).[68]

67. *In casu*, Claimant and Lapras are both members of the Consortium. Lapras is advising Claimant on funding strategies with respect to its dispute with Mekar.[69] Therefore, it will be indirectly impacted as its remuneration may vary depending on the length and on the outcome of the proceeding. [70]

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63 Art. 41(3), ICSID(AF) Rules.

64 *Vivendi (2005)*, ¶24; *Agua Provinciales*, ¶23; *Eco Oro*, ¶31.

65 *Pezold*, ¶49; *Border Timbers*, ¶49.

66 *Pezold*, ¶49; *Border Timbers*, ¶49.

67 *Agua Provinciales*, ¶24; Buckley/Blyschak, P24.

68 *Eli Lilly (Respondent)*, PP3-4, P7; *Eli Lilly*, PO4, ¶D.

69 CBFI's Application, P16:¶7:L520-522.

70 CBFI's Application, P16:¶7:L520-522.

68. Moreover, to assess the funding avenues or potential funders, Lapras must have had access to Vemma's documentation related to its claim against Mekar. As such, with its "*insider information*", Lapras's Chief Financial Officer must have influenced CBFI in submitting the brief.[71]

69. Finally, CBFI intends to be the spokesperson of Bonoori "*state-linked enterprises*"[72] like Claimant. Its submission is not destined to assist the Tribunal but to support Claimant's position.[73] CBFI is, therefore, not an *amicus* of this tribunal but an *amicus* of Claimant.

70. On top of this, CBFI failed at its duty to disclose, raising doubts as to its independence.

71. Hence, the lack of independence precludes CBFI from providing inputs distinct from Claimant.

72. For the sake of efficiency and because Respondent is conscious of not burdening the Tribunal with unnecessary work, it requests this Tribunal to reject CBFI's application as it would only parrot Claimant's arguments.

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71 PO3, P87:¶12:L3207-3211.

72 CBFI's Application, P16:¶7:L541.

73 CBFI's Application, P16:¶8:L524-532.

PART TWO: JURISDICTION

73. The Tribunal must decline its jurisdiction as SEs are not protected under Article 9.1 CEPTA (**I**) and Vemma qualifies as such in accordance with the CEPTA and international law (**II**). In any case, Article 1.6 CEPTA cannot serve as an alternative gateway for the Tribunal's jurisdiction (**III**).

I. PARTIES' CONSENT TO ARBITRATION DOES NOT ENTITLE STATE-ENTERPRISES TO BRING A CLAIM UNDER THE CEPTA

74. States' consent to arbitration is the cornerstone of investor-State arbitration tribunals' jurisdiction.[74] In that sense, the Tribunal must determine its jurisdiction *ratione personae* in accordance with the Parties' consent to arbitration enshrined in the CEPTA.

75. Under Article 9.1 CEPTA, an investor is:

> "*an enterprise with the nationality of a Party* [...] *that seeks to make, is making or has made an investment in the territory of the other Party.*"

76. This provision must be interpreted in its context and in light of the CEPTA's object and purpose.[75]

77. Article 9.1 CEPTA does not distinguish between privately or government-owned enterprises and, therefore, does not entitle *per se* SEs to bring claims. A presumption in favour of jurisdiction would be incompatible with the assessment of States' consent to arbitration on an individual basis.[76]

78. Parties' intention to exclude SEs from the CEPTA personal scope is clear for the following reasons.

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74 *Chevron II*, ¶4.61.

75 Art. 31.1, VCLT.

76 *Inceysa*, ¶176.

79. First, a comparative analysis between the CETA's wording, published on 26 September 2014,[77] and the CEPTA, signed on 15 October 2014,[78] highlights the true points of contention extensively negotiated by the signatories.

80. Indeed, out of 7.417 words in the CETA only 137 words were modified in the CEPTA. These modifications are concentrated in two provisions, namely the amount of compensation to be awarded in case of a breach and the treaty's scope of application.

81. The CETA's reference to States as entities that qualify as investors, through the use of the term a "*Party*"[79] has been deliberately deleted in Article 9.1 CEPTA, indicating a clear intention of its signatories to prevent States and, *a fortiori*, SEs from qualifying as investors.

82. This suppression cannot be considered as an omission but as an expression of the treaty signatories as they have introduced a specific provision dealing with issues raised by SEs with no equivalent in the CETA.[80]

83. Also, Mekar and Bonooru reproduced verbatim the CETA's dispute resolution clause leaving references to the ICSID Rules of Procedure for Arbitration Proceedings and ICSID(AF) Rules as applicable arbitration rules. As such, the signatories have confined their arbitration proceedings to the rules laid down by the ICSID apparatus, including tribunals' interpretation of the ICSID Convention and rules which do not apply to state-to-state arbitrations and exclude, *per se*, SEs from their scope of application.[81]

84. Second, Mekar had the express intention to depart from the regime set by the 1994 BIT which explicitly encompassed SEs in its investors' definition.[82] Mekari officials who dubbed the 1994 BIT "*the worst BIT in the history of BITs*",[83] expressly sought to

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77 EU-Canada Summit, 24 September 2014.

78 CEPTA, P83:L3065.

79 Art. 8.1, CETA.

80 Art. 9.13, CEPTA.

81 Schreuer, P4:¶11.

82 Art. I(a), 1994 BIT.

83 PO3, P87:¶14:L3223-3224.

negotiate an agreement "*which adequately balanced investors' and host States' rights.*"[84]

85. This intention is illustrated in numerous CEPTA's articles more restrictive than those of the 1994 BIT. For instance, the CEPTA has further restricted its investors' definition, no longer protecting natural persons permanently residing in the contracting parties' territories.[85] The broad 1994 BIT MFN clause which covered substantive and procedural protections[86] was replaced by a more detailed MFN clause, expressly excluding procedural protections.[87] Finally, the broad FET clause[88] was modified in favour of a modern clause limiting behaviours that may fall within its ambit.[89]

86. Therefore, SEs are excluded from the CEPTA's definition of investors.

II. VEMMA QUALIFIES AS A 'STATE-ENTERPRISE' IN ACCORDANCE WITH THE CEPTA AND INTERNATIONAL LAW

87. While the CEPTA provides for an article on SEs, the term is not defined therein.[90] Nevertheless, this provision contains hints pointing to the criteria mostly applied by tribunals under the Broches test.[91] Indeed, Article 9.13 CEPTA refers to entities maintained and established by States which exercise regulatory, administrative or other governmental authority delegated by them.[92]

88. In that sense, an analysis under the Broches test of Vemma's structure and functions confirms that it is a State-enterprise (**A**). In any case, Vemma equally qualifies as such under the ILC Articles (**B**).

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84 PO3, P87:¶14:L3225-3226.

85 Art. I, 1994 BIT.

86 Art. III, 1994 BIT.

87 Art. 9.7, CEPTA.

88 Art. II, 1994 BIT.

89 Art. 9.9, CEPTA.

90 Art. 9.13(1), CEPTA.

91 Broches, P355.

92 Art 9.13.1, CEPTA.

A. Vemma is a State-enterprise under the Broches test

89. The Broches test has been developed on the basis of Article 25(2)(b) ICSID Convention to assess whether an entity has standing under this agreement.[93] Under this test, tribunals do not have jurisdiction *ratione personae* if the entity "*act*[s] *as an agent for the government*", the structural test[94] **(1)**, or "*is discharging an essentially governmental the function*", the functional test[95] (**2**).

1) Vemma acts as an agent for the State of Bonooru

90. The structural test focuses on the ownership, control and domestic purpose of an entity.[96] Under this test, an entity does not have standing if it is dominated or controlled predominantly by a State or State institutions.[97]

91. In applying this test, tribunals have considered various elements such as shares' majority held by a State in the shareholders' assembly.[98] Tribunals also looked at whether the State's ownership was entrenched in the company's board of directors through the presence of governmental officials.[99] Finally, a company's bylaws providing that an official must be nominated as chairman of the board of directors was considered to materialize the State's close control over the company.[100]

92. Bonooru's ownership over Vemma is undisputed as its shareholding in the airline operator ranged from 31% to 38%[101] from its date of incorporation until March 2020, when Bonooru increased its shareholding to 55%.[102]

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93 Broches, P355.

94 *Tatneft*, ¶128.

95 *Tatneft*, ¶135.

96 *Maffezini*, ¶76.

97 *RFCC*, ¶35.

98 *RFCC*, ¶36.

99 *RFCC*, ¶36, *Helnan*, ¶92.

100 *RFCC*, ¶36.

101 SoUF, P29:¶10:L934.

102 SoUF, P40:¶65:L1410-1411.

93. This strong ownership is reinforced by a heavy governmental presence in Vemma's board of directors, which jointly provide Bonooru with absolute control over it.

94. Indeed, Bonooru set the tone by nominating Vemma's board chairman as Secretary of Transport and Tourism on the day of the tender offer for Caeli.[103] Later, Bonooru tightened its grip over Vemma, removing all board members in favour of Bonoori functionaries.[104] The State's presence is also anchored in plain language in Vemma's MoA under which the Ministry of Transport and Tourism nominates one of its officials for the non-executive director position.[105] Finally, Vemma's legal team is composed of Bonooru's justice department lawyers[106] highlighting the State's control over Vemma's top tier management.

95. This control is all the more firmly rooted as Bonooru's representatives always have been present in every meeting resulting in the State having the majority of members present and voting at all times[107] as no other shareholder holds more than 7% stake,[108] making it impossible to resist Bonooru's decisions.

96. With the help of Bonooru's Secretary of Transport and Tourism and chairman of Vemma's board of directors, Mrs Blue,[109] Vemma secured subsidies from Bonooru as the company would develop tourism-related infrastructure in Bonooru.[110] Also, the remainder of Caeli's debt liability was to be refinanced by PJSC Bonoorian People's Bank, a nationalised bank, so that Vemma could continue to pursue Bonoori interests in Mekar.[111]

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103 SoUF, P31:¶22:L1020-1021.

104 SoUF, P40:¶65:L1412.

105 A-IV, P46:L1575-1576.

106 SoUF, P40:¶65:L1414.

107 PO3, P86:¶3:L3159-3160.

108 PO4, P90:¶2:L3273.

109 SoUF, PP32-33:¶28:L1081-1088.

110 SoUF, P32:¶28:L1079-1080.

111 SoUF, P31:¶23:L1025-1026.

97. The foregoing emphasises the strong interest of Bonooru in Vemma's operations and management and are persuasive evidence that Bonooru owns and controls Vemma.

2) Vemma is discharged with essentially governmental functions

98. Under the functional test, Vemma's acts must be assessed to determine whether they are essentially governmental rather than commercial.[112]

99. Applying this test, tribunals considered a company's purpose.[113] Particularly, the *Helnan* tribunal observed the bylaws requiring the company "*to contribute to the development of the national economy in its field of activity.*"[114]

100. In *RFCC*, the tribunal found that an entity operating highways qualified as a SE as it met the structural needs of the State.[115] In *Toto*, the tribunal found that an entity exercised governmental authority elements by elaborating and implementing projects assigned by the Lebanese government, using the budget it allocated.[116]

101. In the present case, Bonooru's own highest courts recognized that the State's stakes in Vemma were preserved to maintain and perform governmental functions.[117] This is corroborated by Vemma's MoA providing that it was established to:

> "*assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act.*"[118]

102. Indeed, Article 70 of the Bonoori Constitution bestows a positive obligation on the State to assist and guarantee mobility rights to its citizens,[119] a task that was entrusted to

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112 *Maffezini*, ¶80.

113 *Helnan*, ¶92; *RFCC*, ¶37; *Maffezini*, ¶77.

114 *Helnan*, ¶92.

115 *RFCC*, ¶37.

116 *Toto*, ¶¶51,58.

117 SoUF, P6:¶3:L186-188.

118 A-IV, P44:L1519-1521.

119 SoUF, P28:¶5:L900-902; A-I, P41:L1429, A-II, P42:L1454-1459.

Vemma's predecessor, BA holdings,[120] and taken over by it.[121] Additionally, SEs historically have operated to achieve Bonooru's centrally planned output targets[122] in the aviation sector, which is of great interest to Bonooru, accounting for almost 13% of Bonooru's GDP.[123]

103. In an attempt to boost Bonooru's tourism potential and facilitate the movement of goods, people, services, and knowledge amongst its neighbours, Bonooru's government launched the Horizon 2020 scheme as part of the Caspian Project. In application of this scheme, Bonooru granted Vemma subsidies from 28 October 2011 until June 2016.[124]

104. Furthermore, Vemma undertakes paramilitary activities, highly sensitive operations, which cannot normally be considered to be commercial in nature.[125]

105. Although private airlines can be commandeered by governments, such as the US Civil Reserve Air Fleet, such activities must be based on a specific delegation of powers by a State facing a particular situation.[126] This can arise in case of emergency when the need for airlift exceeds the capability of military aircraft.[127]

106. There is no mention in the record of a delegation of power, whether contractual or by decree, providing that the company must assist the State in case of emergency.[128] The lack of legal instruments suggests that Vemma is entrusted with paramilitary activities on a permanent basis, unlike private companies.

107. In light of the above, many of these objectives and functions are by their very nature purely governmental tasks and cannot normally be considered to be commercial in nature.

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120 SoUF, P29¶9:L930-931.

121 PO4, P89:¶6:L3295-3296, SoUF, P29:¶8:L923-924.

122 SoUF, P28:¶3:L881-883.

123 SoUF, P28:¶6:L906-907.

124 SoUF, P32:¶28:L1080-1081; PO4, P89:¶6:L3291-3292.

125 SoUF, P40:¶6:L1413.

126 Decree n°2004-1190.

127 Decree n°2004-1190.

128 Decree n°2004-1190.

108. Vemma is therefore a SE acting on behalf of Bonooru, and as such, is not entitled to bring a claim under the CEPTA.

B. Vemma equally qualifies as a State-enterprise under the ILC Articles

109. The ILC Articles formulate the basic rules of international law concerning States' responsibility for their internationally wrongful acts.[129] Only a few tribunals considered attribution rules as an appropriate test to verify the fulfilment of the jurisdiction requirement.[130]

110. Even assuming the ILC Articles would apply (*quod non*) the conditions for jurisdiction would not be met as they mirror the Broches test applied above, so the outcome reached could not be any different.

111. Articles 5 and 8 ILC call for a focus on the nature of the acts of SEs. Indeed, an act is attributable to a State if it is exercised by an entity empowered to exercise elements of governmental authority[131] or if the entity acts under the State's direction or control.[132] For instance, in *Toto*, the tribunal examined the specific activities of the SE in the investment project and whether these activities involve certain public functions in that particular context.[133]

112. As seen above, Vemma is owned and controlled by Bonooru and pursues governmental functions.

113. Therefore, Vemma equally qualifies as a SE under the ILC Articles and as such does not have standing in the present proceedings.

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129 ILC Articles, General Commentary (1).

130 *Toto*, ¶60.

131 Art. 5, ILC Articles.

132 Art. 8, ILC Articles.

133 *Toto*, ¶51.

III. ARTICLE 1.6 OF THE CEPTA CANNOT SERVE AS AN ALTERNATIVE GATEWAY FOR THIS TRIBUNAL'S JURISDICTION

114. Vemma made its investment in Mekar under the 1994 BIT,[134] which was terminated on 15 October 2014 when the CEPTA entered into force.[135] As a result, Vemma lost all its rights and obligations derived from the 1994 BIT at this date.

115. In concluding the CEPTA, Mekar and Bonooru have agreed to depart from the prevailing non-retroactivity principle[136] to extend the substantive protection of the new treaty to pre-existing investments through Article 1.6.1 CEPTA.

116. However, they also made very clear that existing investors may not rely on jurisdictional rights they enjoyed under the 1994 BIT.[137] Any such investor seeking to bring a claim to benefit from the extended protection afforded by Article 1.6.1 CEPTA must therefore fulfil the jurisdictional requirements set by the CEPTA.

117. As demonstrated above,[138] Vemma does not meet the restrictive jurisdictional requirements set by Article 9.1 CEPTA. Therefore, it cannot avail itself from the doorway opened by the contracting parties to a limited number of pre-existing investors under Article 1.6.1 CEPTA.

118. Therefore, the Tribunal must decline its jurisdiction.

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134 SoUF, P32:¶26:L1050.

135 SoUF, P33:¶32:L1119.

136 Art. 28,70, VCLT.

137 Art 1.6.2, CEPTA.

138 *Supra*. Part Two, II.

PART THREE: LIABILITY

I. ARTICLE 9.9 CEPTA IS A RESTRICTIVE STANDARD AND DOES NOT ALLOW TO CLAIM A COMPOSITE BREACH

A. The standard provided by the contracting parties under Article 9.9 CEPTA has a special meaning pursuant to Article 31(4) VCLT and must be interpreted restrictively

119. Article 31(4) VCLT requires giving a special meaning to a treaty provision if the parties so intended.[139]

120. Article 9.9 CEPTA is labelled "*Minimum Standard of Treatment*" but also refers to the FET standard.[140] MST is construed narrowly and provides a floor protection to foreign investors.[141] The seminal formulation of the customary international law MST was established in *Neer,* where it was held that the MST is violated where governmental measures:

> "*amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*"[142]

121. Article 1.3(2) CEPTA provides that States shall interpret and apply the CEPTA in accordance with "*applicable rules of international law*".[143] Both MST and FET standards shall be applied considering the applicable treaty.[144]

122. The reference to "*principles of international law*" or "*international law*" in a treaty means that FET shall be assessed in light of the minimum protection offered by MST

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139 Art. 31(4), VCLT.

140 Art. 9.9, CEPTA.

141 *Glamis Gold*, ¶615; *Waste Management*, ¶98.

142 *Neer*, ¶4.

143 Art. 1.3(2), CEPTA.

144 *AWG*, ¶188; *Mondev*, ¶118; *Waste Management*, ¶99.

under international law.[145] Certain tribunals rejected this view when the wording "*Minimum Standard of Treatment*" was absent of the disputed treaty and as such, no special meaning was given to FET pursuant to Article 31(4) VCLT.[146]

123. Article 9.9 CETPA is expressly labelled MST. Therefore, the contracting parties gave this article a special meaning according to which the FET standard shall be interpreted restrictively considering the MST.

B. Article 9.9 CEPTA consequently does not provide a legal basis for composite breach claims

124. A composite breach of FET is:

> "*a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.*"[147]

125. Accordingly, an individual measure not breaching FET by itself can violate the standard if assessed together with other measures.[148]

126. Article 9.9(2) CEPTA expressly provides that FET may be breached only if a "*measure*" or "*measures*" amount to "*(a) denial of justice* […], (b) *fundamental breach of due process* […], (c) *arbitrary or discriminatory conduct*, (d) *abusive treatment of investors*."[149] The list enshrined in Article 9.9(2) is restrictive and provides for four alternative conducts capable of breaching FET.

127. In substance, a State may breach FET pursuant to its special and narrow meaning under the CEPTA if a State's measure or measures amounts to at least one of the four types of conduct defined within Article 9.9(2).

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145 *OEIG*, ¶482; *Koch Minerals*, ¶8.44; *Flughafen*, ¶573.

146 *Infinito*, ¶¶330-340; *Global Telecom*, ¶487; *AWG*, ¶184.

147 *El Paso*, ¶518.

148 *Croatia Courier*, ¶840.

149 Art. 9.9.2, CEPTA.

128. It therefore bars tribunals from interpreting the CEPTA's FET standard to assess whether disputed measures constitute a composite breach, as "*measures*", even assessed together, must in themselves fit into one of the four categories to breach the FET.

129. Vemma has no legal basis to argue that Mekar's acts can breach the CEPTA in aggregate.

C. Alternatively, the actions of Mekar and its authorities are not sufficiently interwoven to constitute a composite breach of FET

130. Should the Tribunal find that there is a legal basis to assess a composite breach of FET under the CEPTA, the disputed measures must in any case be closely interwoven and pursue the same objective to breach FET in aggregate.[150]

131. However, where separate acts can amount to different breaches of FET, the aggregate claim must fail if they amount separately to the same breach as the composite acts.[151]

132. Vemma has not demonstrated that Mekar's acts and omissions do not follow a "*common thread.*"[152] They are independent actions that are not entangled. They pursued different objectives, namely enforcing Mekar's competition law, resorbing the financial crisis and recognising an award pursuant to Mekar's domestic law.

133. Moreover, should the Tribunal find that any of Mekar's acts and omissions individually breach FET under Article 9.9, it cannot accept an additional claim of aggregate breach of the same legal standard under the CEPTA.

134. Therefore, Vemma's claim of a composite breach of FET must fail.

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150 *Global Telecom*, ¶¶641-642; *Tatneft* (*merits*), ¶330; *Gold Reserve*, ¶566; *Crystallex*, ¶609; *Valores Mundiales*, ¶540; *STEAG*, ¶327.

151 *Infinito*, ¶230.

152 *Global Telecom*, ¶¶644-647; *Blusun*, ¶364.

II. MEKAR'S DECISIONS PRESERVED VEMMA'S FET

A. Mekar's decisions and its authorities fall within the scope of its right to regulate pursuant to Article 9.8 CEPTA

135. Article 9.8 CEPTA provides the States' right to regulate to achieve legitimate public policy objectives such as safety and consumer protection.[153] Mekar's Competition Act also promotes consumer protection.[154]

136. States are afforded great deference in making regulatory choices, preserving their margin of appreciation when they implement their economic policy.[155] Similarly, in competition law enforcement, an FET violation necessarily entails a determination that the State excessed its right to regulate.[156]

137. Mekar's acts were a legitimate and non-excessive exercise of its right to regulate to preserve its domestic market from unfair competition, enforce a favourable award and tackle the inflation crisis.

B. The CCM's decisions and their judicial review preserved Vemma's FET

1) Both investigations were not arbitrary and based on objective criteria enshrined in the Monopoly Act in line with Mekar's previous commitments

138. Competition authorities' enforcement actions cannot be considered arbitrary, discriminatory or abusive.[157] If competition authorities exercise their prerogatives without exceeding regulatory powers, investors' rights are not affected[158] and in any event, that does not necessarily entail a breach of FET.[159]

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153 Art. 9.8, CEPTA.

154 A-V, P47:L1591.

155 *Hydro Energy*, ¶534; *RREEF*, ¶464; *RWE*, ¶553; *Bear Creek*, ¶471.

156 *Tallin*, ¶767; *Croatia Courier*, ¶1057.

157 *Lidercón*, ¶¶248-251; *Tallin*, ¶¶874-876.

158 *Tallin*, ¶767.

159 *Cementos* (*Excerpts*).

139. Investigations were the mere exercise of the CCM's core attribution. Indeed, the Monopoly Act empowers the CCM as the sole authority capable of investigating anti-competitive conduct, the latter enjoying discretion to conduct investigations *suo moto*.[160]

140. The CCM launched the first investigation due to its reasonable doubts about Vemma's pricing strategy[161] and secondary slot trading practices between them.[162]

141. The CCM launched the first investigation due to Vemma's pricing strategy and the composite market share it enjoyed with its strategic partner.[163] Additionally, Vemma's predatory pricing, enabled by secondary slot trading and subsidies received, justified the investigation.[164]

142. Furthermore, the CCM expressly sought undertakings from Caeli not to engage in high-level cooperation on competition parameters.[165] Having breached these commitments, Vemma cannot expect the CCM not consider these parameters when investigating Caeli's anti-competitive conduct.

143. Hence, the CCM lawfully exercised its investigative powers based on a rational decision aimed at safeguarding the integrity of Mekar's market in the airline industry.[166]

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160 A-V, P47:L1598.

161 SoUF, P34:¶36:L1148-1158.

162 SoUF, P34:¶36:L1148-1158.

163 SoUF, P34:¶36:L1148-1158.

164 SoUF, P34:¶36:L1148-1158.

165 SoUF, P32:¶25:L1046-1049.

166 SoUF, P36:¶45:L1242-1249, P37:¶49:L1278-1288.

2) Airfare caps, grounding of aircrafts and fines were proportionate applications of domestic law and Mekar's right to regulate which ensured a reasonable margin of profits to Vemma

144. To assess whether FET is encroached, tribunals consider whether the State's measures were reasonable and offer a reasonable margin of return to foreign investors.[167] This was the case for Mekar.

145. Firstly, caps and fines imposed on Vemma fall within Mekar's right to regulate in application of the Monopoly Act entrusting the CCM to impose interim and final remedies.[168] Being a matter of domestic law, the Tribunal cannot review the measures' pertinence.[169]

146. Secondly, Vemma did not contest the airfare caps. They were reasoned interim remedies, and they did not "*hurt its profitability in 2016*."[170] The caps balanced Vemma's right to a reasonable marge of return, as they were "*were set reasonably above the rates Caeli Airways charged on set routes.*"[171]

147. Thirdly, the aircraft's grounding was a reasoned measure to preserve flights' security following serious technical failures.[172] The ban of certain aircrafts for security concerns affecting all airline operators are not arbitrary measures.[173]

148. Fourthly, Vemma did not suffer any damage as it never paid the fine. It sold its investment whilst awaiting a definitive decision.[174]

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167 *Teinver*, ¶¶590-598; *AES* (*Summit*), ¶10.3.44; *Guaracachi*, ¶426.

168 A-V, P47:L1615-1617.

169 *Croatia Courier*, ¶¶950, 955; *Lidercón*, ¶273.

170 SoUF, P35:¶37:L1168-1169.

171 SoUF, P35:¶37:L1161-1162.

172 SoUF, P37:¶48:L1272-1275.

173 *El Jaouni*, ¶¶614-615,621.

174 SoUF, P37:¶50:L1296-1298, P40:¶64:L1398-1400.

149. Lastly, airfare caps were lifted once Vemma anti-competitive advantages were resorbed.[175]

150. Vemma's losses were the result of an ill-considered business strategy. Mekar did everything possible to preserve investors' interests but could not work a miracle.

3) Mekar's courts' review of the CCM decisions were afforded scrutiny and due process

151. To breach FET, a violation of due process by a State's judicial system is subject to a high threshold.[176] The failure of the judiciary to deal promptly with requests for interim relief does not amount to a breach of FET,[177] nor the refusal to join proceedings.[178]

152. Investment tribunals are not appellate courts.[179] Competition authorities, who are owned a certain level of deference, [180] have discretion to choose how to enforce their country's legislation,[181] including the decision to revise tariffs which does not disregard procedural unfairness under international law.[182]

153. The CCM's apparent lack of structural independence, whose decision-making tribunal is made up of three investigating officers,[183] is not a threat to due process as the decisions are subject to further review.[184]

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175 SoUF, P38:¶55:L1336-1338.

176 *Waste Management*, ¶98; *Genin*, ¶371.

177 *Vanessa Ventures*, ¶¶226-227.

178 *Agility*, ¶¶227-228.

179 *AES (Corporation)*, ¶¶307,318.

180 *Krederi*, ¶672.

181 *Tallin*, ¶¶840-842,911.

182 *Tallin*, ¶889; *AES* (*Summit*), ¶¶9.3.40-9.3.41; *Lidercón*, ¶¶248-251.

183 PO3, P86:¶5:L3169-3170.

184 *Glencore*, ¶1319; *Tallinn*, ¶¶870, 905-906; *Amto*, ¶76,99; *UAB*, ¶915; *Flughafen*, ¶595; SoUF, P37:¶50:L1291-1292.

154. The CCM's findings were supported by voluminous reports exposing Vemma's infringements.[185] During his review, Justice VanDuzer transparently indicated that the CCM's findings were amongst the ones it reasonably foresaw as possible.[186]

155. Justice VanDuzer also stressed that on the merits, he did not foresee another outcome to the dispute and used his power conferred by Mekari statutes to proceed with a summary judgment to dismiss the case, saving both Vemma's and the Courts' resources and time.[187]

156. Despite obtaining a final and reasoned decision in a contradictory procedure in less time than is normally required,[188] Vemma complained about their inefficiency. Yet, Vemma's attempts to cloak the effectiveness of Mekar's judiciary as a FET violation will fool no one.

C. The denomination of services in MON was a reasonable strategy to target rising inflation

157. The denomination of services in MON was a lawful exercise of monetary sovereignty (**1**), without being arbitrary (**2**) and, in any event, is justified on grounds of necessity (**3**).

1) Mekar lawfully exercised its monetary sovereignty

158. Under Article 9.8 CEPTA, Mekar has the right to regulate "*to achieve legitimate public policy objectives.*"

159. Currency policies, including exchange control mechanisms[189] or denomination in certain currencies,[190] pertain to the State's monetary sovereignty.

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185 SoUF, P36:¶45:L1242-1245.

186 SoUF, P38:¶54:L1323-1325.

187 SoUF, P38:¶54:L1330-1334; PO3, P86:¶8:L3178-3185.

188 SoUF, PP29-30:¶13:L949-959.

189 *Rusoro*, ¶¶577-578.

190 *Continental Casualty*, ¶¶197, 278.

160. This is crucial during an economic crisis, where States enjoy a wide margin of discretion: "*a time of grave crisis is not the time for nice judgments*."[191]

161. Conditioning the denomination of airfares in USD upon an administrative authorisation[192] and requiring airlines to operate exclusively in MON falls within Mekar's monetary sovereignty. It cannot amount to a treaty breach, especially considering the context of Mekar's economic crisis.

2) The denomination in MON was not arbitrary

162. The *AES* test requires two elements for a measure to be arbitrary: existence of a rational policy; and reasonableness of the act related to the policy.[193]

163. Here, Mekar acted reasonably (b) in accordance with a rational policy (a) and without breaching Vemma's legitimate expectations (c).

a) The existence of a rational policy

164. In Mekar, a currency crisis ensued in 2017. Increasing inflation led to a surge in costs of everyday items and reduced purchasing power.[194] Hence, the need to adopt monetary policies was particularly important to target an acceptable inflation rate to maintain price stability and growth. Maintaining low and stable inflation therefore became the primary policy objective.

165. Mekar relied on the IMF emphasising "*the need to establish credibility in the local currency to avoid a debilitating economic situation.*"[195]

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191 *Continental Casualty*, ¶181.

192 *Metalpar*, ¶179; *OIEG*, ¶¶623,624,625; *Continental Casualty*, ¶621.

193 *AES (Summit)*, ¶10.3.7,10.3.9.

194 SoUF, P35:¶39:L1189-1190.

195 SoUF, P35:¶39:L1189-1190.

b) The reasonableness of Mekar's measure in relation to the policy

166. Policymakers use different strategies to combat inflation. One is currency pegging, which links the value of the domestic currency to that of a low-inflation country, such as the USD. However, this approach means that the country's monetary policy would essentially be that of the US, hence constraining its ability to respond to trade changes. Mekar therefore decided to target inflation more directly by denominating services in its national currency.[196]

167. In the context of hyperinflation, States can require companies to price in the local currency, in a bid to encourage greater use of the faltering local currency. The objective is to give the national currency stability on both the internal and external markets, making it attractive *vis-à-vis* foreign currency and thereby incentivising investment in the national currency.[197]

168. Mekar required the denomination of services in MON to reduce reliance on foreign currencies and thus to mitigate against capital outflows and secure its macroeconomic situation. The measure has therefore reasonable correlated to its policy targeting inflation.

c) The absence of specific guarantees with regards to the use of USD

169. Tribunals consistently hold that legitimate expectations cannot arise in the absence of a licence, permit or contract.[198] Specific commitments in regulations cannot be construed as promises since they are not directly addressed to investors.[199]

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196 Galindo, P14; Leiderman, PP10-13.

197 Lodewyk, PP9-14,18.

198 *Metalpar*, ¶186.

199 *Total*, ¶145.

170. It is unreasonable for an investor to expect that circumstances that existed at the time of making the investment would remain completely unchanged,[200] especially when a crisis arises.[201]

171. Here, Mekar did not represent to Vemma that no interferences would ever materialise. No contractual right nor pre-existing legal framework guaranteed the use of USD, fixed exchange rates or their periodic review. Mekar's approval to denominate airfares in USD was only temporary and affected all airlines, not exclusively Caeli.[202]

172. Furthermore, Vemma could not rely on this temporary exemption since it was authorised when the worsening of the crisis was evident.

3) The denomination in MON was justified on grounds of necessity

173. Article 25 of the ILC Articles, assuming it to be reflective of customary international law,[203] envisages that necessity can be considered as a ground for precluding the wrongfulness of an act not in conformity with an international obligation.

174. In evaluating necessity defences, tribunals focus on whether the crisis was a type of situation precluding wrongfulness, and whether the measures adopted were the only way to address the crisis.[204]

175. As to the '*only means'* requirement, the task is to evaluate whether other reasonable choices were available,[205] capturing not only the investor's perspectives but also the wider needs of the country.[206]

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200 *Saluka*, ¶¶305-307; *El Paso*, ¶374.

201 *Continental Casualty*, ¶258.

202 SoUF, P35:¶40:L1197-1199.

203 *Continental Casualty*, ¶165.

204 *LG&E*, ¶246; *Continental Casualty*, ¶¶180-183; *Mobil*, ¶1059.

205 *Continental Casualty*, ¶199.

206 *Urbaser*, ¶716; *LG&E*, ¶¶250, 257.

176. Here, Mekar's economic crisis had "*catastrophic proportions*"[207] and was thus a threat to its economic viability and to the possibility of maintaining essential services.[208] The The MON denomination, together with emergency relief through loan guarantees,[209] aimed at securing Mekar's macroeconomic situation. There were no other more efficient ways to combat the high inflation rate.

177. Hence, the measure is covered by the defence of necessity precluding any wrongfulness.

D. Mekar lawfully exercised its sovereignty when refusing to grant loan guarantees to Caeli

178. In international law, there is no legal entitlement to state aid. A State has the discretion to decide whether or not to grant aid.[210]

179. Vemma's allegation that Mekar's refusal to grant loans to Caeli was discriminatory must fail. The evaluation of discriminatory treatment involves a three-step analysis: like circumstances (**1**); less favourable treatment (**2**); and justification (**3**).[211]

1) Caeli and other foreign airlines are not similarly situated

180. Caeli and other foreign airlines, including Star Wings and JetGreen, were not in like circumstances.

181. Firstly, Caeli was an SE while Star Wings and JetGreen were both privately-owned airlines. Caeli therefore enjoyed a benefit that several of its competitors in Mekar did not – continuous influx of funds from its home State under the Horizon 2020 Scheme,[212] which enabled it to outcompete privately-owned firms.[213]

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207 SoUF, P35:¶41:L1201.

208 RNoA, P6:¶14:L249-250.

209 Executive Order 9-2018.

210 *Invesmart*, ¶269.

211 *Saluka*, ¶313; *Invesmart*, ¶403.

212 SoUF, P36:¶45:L1076-1079.

213 SoUF, P37:¶46:L1261-1265.

182. Secondly, the airlines' market positions differed significantly. While Caeli had a market share of 50%, the other airlines had less than 5% market share.[214]

2) Mekar did not treat Caeli differently than other foreign airlines

183. There can be no finding of discrimination if companies similarly situated to the claimant are found to have been treated similarly.[215]

184. Here, other airlines which were similarly situated to Caeli were also denied state aid. In fact, the SE Larry Air did not receive loans under Executive Order 9-2018.[216] Hence, Caeli was not treated differently than other foreign airlines in like circumstances.

3) Mekar's discrimination was justified

185. Assuming Caeli was treated less favourably than other foreign airlines, such differentiation is justifiable in the public interest.

186. The purpose of the granting of loans was to ensure that businesses have sufficient liquidity to maintain their viability and public services at a time when the crisis seriously disrupted the entire economy. Extending the same support to all companies would have diluted the aid and thus not have prevented the bankruptcy of companies which were important to Mekar.

187. The predominant recipients of loans were airlines operating important domestic routes within Mekar thus having a certain level of significance to Mekar. These airlines depended much more on the loans as their market situation was significantly lower than that of Caeli.[217]

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214 PO3, P89:¶7:L3300.

215 *Invesmart*, ¶413.

216 SoUF, P37:¶47:L1266-1268.

217 PO4, P89:¶7:L3299-3301.

E. Mekar, through Mekar Airservices, lawfully obtained and enforced an award against Vemma

188. Desperate times breed desperate measures. When Vemma realised its poor decisions took its investment through turbulences, Vemma desperately tried to push Mekar Airservices to pay an inflated price for its stake in Caeli pursuant to Mekar Airservices' Right of First Refusal.[218]

189. Failing this, Vemma now alleges that Mekar, through Mekar Airservices treated its investment abusively breaching Article 9.9.(2)(d) CEPTA by unlawfully obtaining an award against Vemma (the "**Award**"), and that the Mekari courts denied Vemma justice by enforcing the Award, breaching Article 9.9.(2)(a) CEPTA.

190. These allegations are speculative. Not only Vemma fails to prove that Mekar treated its investment abusively (**1**), but also, the Mekari courts merely exercised their lawful discretion (**2**).

1) Mekar, through Mekar Airservices, did not treat Vemma's investment abusively

a) Claimant failed to provide direct evidence of corruption

191. The burden of proof lies on the party who makes the claim.[219]

192. However, there is a general consensus that when corruption allegations are made against a State, a heightened standard of proof, *i.e.* "*clear and convincing*" evidence is required.[220]

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218 A-X, P58:L1990-1995.

219 *Metal-Tech*, ¶237; *EDF*, ¶232.

220 *EDF*, ¶221; *Liman*, ¶424.

193. A rigorous testing of the evidence submitted before this Tribunal would ensure procedural fairness.[221] The difficulty in proving corruption cannot be a sufficient reason to discharge a claimant from its burden of proof.[222]

194. Vemma provided no direct and convincing evidence of corruption.

195. Mr Cavannaugh's voice on the leaked recording has been confirmed allegedly by independent experts.[223] However, the voice of Mekar Airservices' representative involved has not been confirmed. It is therefore not clear and convincing that the Award was tainted by corruption.

196. Therefore, Claimant failed to discharge its burden of proof.

b) Should the Tribunal accept circumstantial evidence, the indicia are not sufficient to shift the burden of proof of corruption to Respondent

197. Tribunals only considered circumstantial evidence when allegations of corruption were made against the investor.[224] However, should this Tribunal accept that circumstantial evidence may shift the burden of proof, such proof must be compelling.[225] "*Even the reddest of red flags does not suffice without proof of corruption*."[226]

198. Nothing among the *indicia* raised by Vemma is enough to shift the burden of proof to Mekar.

199. First, as mentioned above, the audio recording is not a convincing piece of evidence.

200. Second, although the Supreme Arbitrazh Court of Sinnograd set aside the Award, it did not "*conclusively rule on whether the act of bribery had in fact taken place.*"[227]

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221 *Sanum*, ¶107.

222 *Liman*, ¶423.

223 A-XII, P61:¶3:L2087-88.

224 *Metal Tech*, ¶243; *Methanex*, Part-III:Chapt.B:¶2; *O and L*, ¶303.

225 *ECE*, ¶4.876.

226 *Unión Fenosa*, ¶7.113.

227 A-XIII, P64:¶11:L2185-2186.

201. Third, the SCC heard Vemma's challenge against Mr Cavannaugh's appointment but found right to dismiss it.[228]

202. Fourth, the published criticisms of Mr Cavannaugh's reasoning are by nature legal opinions which only reflect the views of their authors.[229]

203. Fifth, it is irrelevant that Mr Cavannaugh developed his reasoning in only five paragraphs if it can be followed "*from point A to point B.*"[230]

204. Consequently, there is not enough convincing *indicia* to shift the burden of proof to Mekar. Respondent respectfully asks the Tribunal to find that it did not breach Article 9.9.(2)(d) CEPTA.

2) The Mekari courts rightfully enforced the Award

a) Denial of justice under the CEPTA requires a high threshold

205. The CEPTA protects from "*denial of justice in criminal, civil or administrative proceedings.*"[231] Any "*wilful disregard of due process of law*" that "*surprises a sense of judicial propriety*"[232] breaches the FET.[233]

206. A mere misapplication of domestic law does not meet this threshold,[234] neither does the failure to examine all the evidence.[235] The misapplication of law is one that no "*competent judge could reasonably have made*."[236]

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228 A-XII, P61:¶4:L2097-2099.

229 SoUF, P39:¶59:L1362-1363.

230 *Occidental*, ¶80.

231 Art. 9.9(2)(a), CEPTA.

232 *ELSI*, ¶128.

233 *Mondev*, ¶127; *Chevron*, ¶244.

234 *O and L*, ¶449; *Binder*, ¶449; *Agility*, ¶212.

235 *Liman*, ¶377.

236 *Pantechniki*, ¶94.

207. Tribunals are not international appellate courts,[237] and avoid scrutinising a national court's refusal to enforce an award pursuant to its discretion under the NY Convention.[238]

208. However, when the outcome of enforcement proceedings is scrutinized under a denial of justice claim, tribunals apply a high threshold.[239]

209. Claimant may rely on the *Frontier* tribunal's test: while recognising that States enjoy a certain margin of appreciation, did their courts abuse their discretion in interpreting their public policy under the NY Convention, and were the decisions reasonably tenable and made in good faith.[240] This test has been considered relevant in denial of justice claims regarding enforcement proceedings.[241] However, being "*untenable*"[242] is a different standard from being simply wrong.

210. The *Frontier* tribunal rightly noted that giving a claimant every opportunity to voice its case on the interpretation and application of such public policy exception does not prove bad faith from the enforcement courts.[243]

211. Vemma has failed to demonstrate that the decisions of Mekar's courts meet this standard.

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237 *Mondev*, ¶127.

238 *Kaliningrad*, P4.

239 *GEA*, ¶319.

240 *Frontier*, ¶527.

241 *Gavazzi*, ¶262.

242 *Frontier*, ¶529.

243 *Frontier*, ¶529.

b) The ruling of Mekar's High Commercial Court does not constitute the first step to denial of justice

212. Under both the NY Convention[244] and Mekari's domestic law,[245] the courts enjoy a discretion to refuse or allow the enforcement of an award that has been set aside in the country in which it was made, and which would violate Mekar's public policy.

213. To determine whether corruption has tainted an award, the long-standing jurisprudence of Mekar's Superior Court considers relevant circumstantial evidence that "*could include*"[246], therefore not mandatorily:

> "*limited consideration of evidence on record, an imbalance between the consideration of the two parties' arguments, incomplete reasoning, and the fact that successful allegations of fraud or bribery had previously been made against the same judicial authority.*"[247]

214. Mekar's High Commercial Court applied this jurisprudence in a way that does not shock a sense of judicial propriety.

215. First, it is within domestic courts' discretion to choose the weight to be given to evidence.[248]

216. Second, the HCC rightly found irrelevant the length of Mr Cavannaugh's reasoning, [249] if it can be followed and understood.[250]

217. Third, no tribunal can decide in place of the Mekari courts whether giving credence to the CILS complies with Mekar's public policy.

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244 Art. V.1(e), NY Convention.

245 A-XIV, P65:¶7:L2246-2250.

246 A-XIV, P66:¶9:L2266-2267.

247 A-XIV, P66:¶9:L2267-2270.

248 *Bridgestone*, ¶3283.

249 A-XIV, P66:¶10:L2277.

250 *Occidental*, ¶80.

218. As such, the HCC did not render a decision that shocks a sense of judicial propriety.

c) The ruling of Mekar's Superior Court does not crystallise denial of justice

219. Pursuant to its jurisprudence, Mekar's SC deferred to the decision of the seat of arbitration which could not "*conclusively rule*" on whether there was corruption.[251] This is consistent with Vemma's failure to challenge Mr Cavannaugh's appointment.[252]

220. Finally, Vemma had every opportunity to present its case and voice its objections as to the application of the public policy exception under the NY Convention, thus being guaranteed due process.[253] Absent any proof of corruption, it is reasonably tenable to assume that any reasonable court would not have refused the enforcement the Award.

221. As such, the outcome of the decisions rendered by Mekar's HCC and SC are tenable.

222. Respondent respectfully request this Tribunal to dismiss Claimant's allegations pertaining to the violation of Article 9.9.(2)(a) CEPTA.

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251 A-XIII, P64:¶11:L2185-2186.

252 A-XII, P61:¶4:L2097-2099.

253 A-XV, P67:¶2:L2331-2332.

PART FOUR: DAMAGES

I. CLAIMANT IS NOT ENTITLED TO COMPENSATION

223. As explained above,[254] Mekar has not breached FET. Vemma is therefore not entitled to compensation.

224. Further, should the Tribunal find that Mekar violated Article 9.9 CEPTA, Mekar Airservices has already purchased Vemma's shares in Caeli at a 'market value' of USD 400 million on the 8 October 2020[255] (**A**). Moreover, Vemma cannot use the MFN clause to argue that it was not adequately compensated (**B**).

225. Consequently, Vemma is not entitled to compensation, even if the Tribunal was to find a breach of the FET standard.

A. Vemma was adequately compensated for the sale of its shares in Caeli Airways at a market value

226. Vemma received the market value (**1**) of its stake in Caeli on the 8 October 2020 (**2**) and was thus adequately compensated (**3**).

1) Market value is the appropriate standard pursuant to Article 9.21 CEPTA

227. The CEPTA provides for two distinct standards of compensation. One of them is FMV and applies to expropriation cases.[256] The other standard is determined in Article 9.21, which specifies that monetary damages shall be awarded at a MV.[257] This second standard therefore applies to non-expropriatory breaches of the CEPTA.

228. Although some tribunals have turned to international law and the *Chorzów* principle to establish that customary fair market value should be applied in cases of non-expropriatory breaches, this Tribunal should not follow the same logic. Indeed, such

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254 *Supra*. Part Three.

255 SoUF, P40:¶63:L1391.

256 Art. 9.12, CEPTA.

257 Art. 9.21, CEPTA.

tribunals only resort to international law when the applicable treaty is silent as to the compensation standard for non-expropriatory breaches.[258]

229. These situations differ from the present case. Indeed, the CEPTA *does* establish a compensation standard for non-expropriatory breaches. As already mentioned,[259] contrary to the CETA, the CEPTA drafters intentionally added a compensation standard in Article 21. The Tribunal therefore has no need to turn to international law. Article 9.21 dictates that MV shall be the compensation standard.

230. The MV standard contrasting with the customary fair market value standard is not reason enough to set it aside. Indeed, contracting parties are free to contract out of international law principles in their BITs, if they do not conflict with peremptory norms of general international law.[260]

231. Further, it must be highlighted that FMV was given a special meaning by CEPTA's drafters. Article 9.12 defines FMV as excluding "*losses which are not actually incurred* [and] *probable or unreal profits*."[261] This definition strays away from the customary international law definition which includes probable lost profits.[262] By drafting a definition that departs from the common understanding under international law, the contracting parties undoubtedly intended to attribute a special meaning[263] to FMV as the compensation standard defined in Article 9.12. The drafters of the CEPTA thus established a conservative compensation standard for expropriations.

232. Additionally, the Tribunal must consider that this conservative compensation standard is the upper limit to compensation. Indeed, expropriation occurs where there is a legal transfer of the title to property, an absolute physical seizure[264] or where the property is otherwise destroyed.[265] There is thus no residual value to the investment once it has

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258 *Azurix*, ¶¶419-420; *CMS*, ¶¶409-410.

259 *Supra*. Part Two, I.

260 Art. 53, VCLT.

261 Ar. 9.12, CEPTA.

262 Art. 36(2), ILC Articles.

263 Art. 31(4), VCLT.

264 *Crystallex*, ¶667; *Sempra*, ¶280.

265 *Infinito*, ¶699.

been expropriated.[266] Expropriation having a larger impact on investments, explains why compensation for expropriation must be higher than that for non-expropriatory breaches. The *LG&E* tribunal stated that: "*the only difference in valuation for the expropriation claim and the other claims is in the subtraction of the residual value in the later case.*"[267]

233. In the present case, Vemma suffered only an alleged FET breach and not an expropriation. Consequently, the Tribunal must apply the MV standard provided for in Article 9.21 CEPTA, which must be understood by the Tribunal as referring to a lower compensation standard than the one set out in Article 9.12 CEPTA.

2) Valuation Date is 8 October 2020

234. Should this Tribunal find that Mekar has breached FET, only the 8 October 2020 can be chosen as the valuation date.

235. Indeed, Mekar has no doubt that were the Tribunal to find Mekar liable, it would only result from a composite breach of FET. This breach, involving more than one governmental measure, taking place over a period of time, is similar to cases of creeping expropriation, and the valuation date thus has to be the date of the "*irreversible deprivation of property.*"[268] For example, in *Azurix*, the tribunal relied on past decisions of the Iran-US Claims Tribunal on creeping expropriations to find that the appropriate valuation date was:

> "*The day when the interference has ripened into a more or less irreversible deprivation of property* […]."[269]

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266 *Biloune*, ¶83.

267 *LG&E*, ¶¶34-35.

268 *Santa Elena*, ¶¶77-78.

269 *Azurix*, ¶417; *Malek*, ¶114.

236. This approach was followed by tribunals finding a composite breach of FET. Most recently, the *Watkins* tribunal confirmed *Azurix* and *Enron* tribunals' findings, considering that:

> "*As it has found a series of actions by Respondent that as an aggregate constitutes a breach of FET, it should calculate the* […] *value at the "watershed" moment or when "the most serious damage arose in connection with" the Disputed Measures.*"[270]

237. In this case, there can be no doubt that the watershed moment or when the most serious damage arose was the day that Vemma had to sell its investment to Mekar Airservices. As a result, the valuation date must be the 8 October 2020.[271]

238. Further, this date can be considered by the Tribunal for purposes of compensation as it did not occur during a period of alleged illegality attributable to Mekar. Vemma cannot argue that the 8 October 2020 sale should not be considered by the Tribunal when assessing compensation since the sale allegedly occurred during the period in which Mekar was breaching the CEPTA. Indeed, as already mentioned above,[272] the alleged illegalities resulting from Mekar's measures were temporary and occasional. As a result, they had no long-lasting effect on the investment and most definitely had no impact on its value in October 2020. Undeniably, Vemma only allegedly suffered from Mekar's measures when the imposition of airfare caps, the denomination in MON and inflation occurred simultaneously. More precisely, Vemma suffered harm at the end of each year, when the airfare caps were no longer in line with the annually revised inflation rates and when it had to denominate its services in MON.

239. In practice, this only happened once, in 2018. Indeed, at the end of 2016, inflation had barely even started[273] and at the end of 2017, Vemma was able to denominate its services in USD[274] and thus did not suffer from the combination of the caps and high

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270 *Watkins*, ¶679.

271 SoUF, P40:¶63:L1391.

272 *Supra*. Part Three, II.C.2.

273 SoUF, P35:¶39:L1183.

274 SoUF, P35:¶40:L1198-1199.

inflation rates. At the end of 2018 however, it could be argued that Vemma did suffer from the alleged illegalities of Mekar since it had to denominate its services in MON whilst having caps imposed which prevented it from countering inflation. A year later, in 2019, Vemma again did not suffer any damage since the airfare caps had been lifted.[275]

240. In light of this one-off period of alleged illegality and damages suffered, it would be ludicrous for Vemma to argue that the valuation of its investment in October 2020 cannot be considered by the Tribunal when determining the amount of compensation owed by Mekar.

3) Vemma received Market Value of its investment

241. On the 8 October 2020, Mekar Airservices acquired Vemma's shares in Caeli for USD 400 million.[276] This value represents the market value of Vemma's investment and therefore, Mekar does not owe Vemma any additional compensation.

242. Further, Mekar has been more than generous with Vemma when paying it this sum. As already mentioned, the drafters intended for a limited standard of compensation. Even assuming that the purchase price slightly underestimated Caeli's earning potential, it was still in line with the standard set out in Article 9.12 CEPTA. Indeed, it does not compensate future lost profits and Vemma has not proved that Caeli would have generated future profits with sufficient certainty.

243. Finally, Mekar highlights that the price offered by Hawthorne in December 2019 cannot be used as a benchmark against which to evaluate whether the sum paid by Mekar Airservices represented the corrected market value of Vemma's investment.

244. Undoubtedly, Hawthorne's USD 600 million offer,[277] was artificially inflated and not an arm's length commercial price. Its offer cannot be deemed to be one made at market value. Indeed, as the IVSC indicates, the estimated amount at market value "*specifically excludes an estimated price inflated* […] *by special terms or* […] *special considerations*

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275 SoUF, P38:¶55:L1337.

276 SoUF, P40:¶63:L1391.

277 A-X, P58:L1990-1992.

or concessions."[278] Further, market value is the one obtained where "*parties do not have a particular or special relationship* […] *that may make the price level uncharacteristic of the market or inflated.*"[279] It is reasonable to believe that the purchase price of USD 600 million was only agreed upon in light of the relationship between Hawthorne and Vemma. Hawthorne accepted to pay a higher price because Vemma had promised advantages through its ties to the Moon Alliance. Therefore, this purchase price does not represent a market value and must have no impact on this Tribunal's evaluation of the correct amount that had to be paid for the acquisition of Vemma's shares in Caeli.

245. To conclude, Mekar submits that in the unfortunate event that the Tribunal should find a breach of FET, Vemma is owed no compensation as it received the market value of its shares in Caeli when Mekar Airservices bought them for USD 400 million.

B. The Most Favoured Nation clause cannot be used by Vemma to argue that it was not adequately compensated

246. Vemma argues that the CEPTA's MFN clause could be used to import the compensation standard provided for in Article 13 of the 2006 Arrakis – Mekar BIT to replace the MV standard specified in Article 9.21 CEPTA. This is however an untenable hypothesis which should not convince this Tribunal.

1) The MFN does not allow the importation of procedural protections

247. Article 9.7(1) CEPTA reads:

> "*Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments* […]."[280]

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278 IVS:104, 30.2.(a).

279 IVS:104, 30.2.(f).

280 Art. 9.7(1), CEPTA.

248. Article 31 VLCT requires the treaty to be interpreted in "*good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" In the absence of language to suggest the contrary, the ordinary meaning of "*accord* […] *treatment no less favourable than the treatment it accords in like situations* […]" is that the investor's substantive rights are to be treated no less favourably, and there is no warrant for construing the above phrase as importing procedural rights as well.

249. Accordingly, tribunals have therefore found that MFN clauses cannot apply to dispute settlement provisions absent express wording to such effect.[281]

250. In our specific case, the language of the MFN clause expressly excludes procedural rights:

> "*the treatment* […] *does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties.*"[282]

251. Dispute resolution clauses are unique and often subject to tedious negotiations. Consequently, contracting States cannot be presumed to have agreed that these clauses can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in entirely different contexts.[283]

252. The MFN clause in the CEPTA therefore does not allow the importation of procedural protections.

2) The compensation standard is a procedural protection

253. Article 9.21 CEPTA requires that claimants be accorded monetary damages at 'market value'. Article 9.21 is entitled 'Final Award' and is inserted in Section E of the CEPTA, titled "*Settlement of Disputes*." There is no doubt as to the procedural nature of the

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281 *Plama*, ¶223.

282 Art. 9.7(2), CEPTA.

283 *Plama*, ¶207.

compensation standard. For this reason, a different standard cannot be imported into the CEPTA treaty by way of its MFN clause.

254. As Ian Brownlie noted in the *CME* case:

> "*The application of the most favoured nation clause to the compensation provisions of the Dutch Treaty in order to incorporate the substantially different formulation in the US Treaty is an unattractive hypothesis. In the first place, it involves a strange view of the intention of the parties. The express choice of a compensation clause becomes nugatory if the MFN clause applies in this form. The presumption must be that the clause promises MFN treatment only in matters of treatment of an investment, and not to the process of dispute settlement.*"[284]

255. Therefore, Vemma is not entitled to the FMV of its investment, as is provided in Article 13 of the 2006 Arrakis – Mekar BIT, but only to the MV, as provided by Article 9.21 CEPTA.

II. IN ANY CASE, CLAIMANT IS NOT ENTITLED TO USD 700 MILLION BUT RATHER TO A LESSER AMOUNT

256. Should this Tribunal find that Mekar has breached FET and that Vemma was inadequately compensated, Vemma is nevertheless not entitled to USD 700 million. Indeed, when evaluating the damages, this Tribunal needs to consider Vemma's contributory fault (**A**) and the economic crisis (**B**) for compensation reduction purposes.

257. This is easily done if the Tribunal accepts Mekar's proposed valuation date, since this date would allow the Tribunal to consider this *ex-ante* information.

258. However, should the Tribunal decide to give way to Vemma's demand of an earlier valuation date, the same information should be considered, in line with arbitral practice of accepting *ex-post* information for compensation-reduction purposes.[285]

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284 *CME (Brownlie)*, ¶11.

285 *CMS*, ¶441; *Enron*, ¶405; *Sempra*, ¶209.

A. Compensation should be reduced on account of Vemma's contributory fault

259. Vemma's alleged compensation should be reduced due to Vemma's risky business strategies (**1**) which affected the profitability of its investment (**2**).

1) Vemma lacked due care in its business strategy

260. Pursuant to Article 39 ILC, Claimant's reparation is reduced when it acted wilfully or negligently.[286] Respondent must then establish that the investor's conduct is material and significant.[287] Additionally, Mekar must prove that the injury caused by the contributory fault is severable from the injury it caused.[288]

261. An investor is expected to act in due care; it must not act in a negligent way.[289] The *MTD* Annulment Committee justified the tribunal's reasoning towards Claimant's material and significant contribution to its own injury by asserting that "*claimant's conduct* [is] *a failure to safeguard its own interests.*"[290]

262. Vemma chose to follow an overly optimistic management strategy, a conduct a wise investor would not have adopted.

263. An investor is not protected against its bad business judgment[291] which is characterised by a speculative,[292] unreasonable[293] or imprudent[294] decision. The *Genin* tribunal, held that "*the amount invested was excessive* [...], *the prices of the shares fluctuated widely*."[295] In *RosInvest*, the tribunal held that "*it cannot simply accept Claimant's alleged optimistic expectations regarding the future development of the value of the*

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286 Art. 39, ILC Articles.

287 Art. 39, Commentary (5) ILC Articles; *MTD (Annulment)*, ¶101.

288 Art. 31, Commentary (13), ILC Articles; *Occidental*, ¶669.

289 Art. 39, Commentary (5), ILC Articles.

290 *MTD* (*Annulment*), ¶101.

291 *Maffezini*, ¶64.

292 *RosInvest*, ¶668.

293 *Azurix*, ¶427.

294 *Genin*, ¶356.

295 *Genin*, ¶356.

investment."[296] In this same case also asserted that the investor contributed to its own demise by taking ill-advised steps affecting its own fate.[297]

264. At the time of the bid, Mekar noticed that Vemma's business plan for Caeli relied on "*an overly optimistic forecast which did not account for serious volatility of fuel prices and potential takeover of the long-distance routes by competitors.*" [298]

265. Instead of enjoying the existing discounts on airport services and its twelve young A340 aircrafts,[299] Vemma bought eight and leased fifteen Boeing 737 aircraft to add to Caeli's fleet.[300] Additionally, Vemma expanded its routes, adding twenty new destinations[301] despite Mekar's cautions.[302]

266. Vemma's negligent and reckless behaviour is evidenced by its refusal to acknowledge Mekar's recommendations. Mekar Airservices advised Vemma to focus on domestic flights instead of expanding Caeli [303] to improve Caeli's financial health through profits generated and advantageous inflation.[304] Indeed, in commercial practice loans are indexed to inflation rates stabilising the real value of the debt, while letting the nominal value increase. Considering the decrease of Vemma's profits during this crisis, it exposed itself to a foreseeable and potential loan default. If Vemma had serviced its loans during its initial high-profit periods it would have guaranteed Caeli's financial health, notably by being able to secure new loans at favourable interest rates.[305] Vemma precipitated its precarious financial situation, choosing to expand Caeli rather than saving its profits to protect itself against future liabilities.

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296 *RosInvest*, ¶666.

297 *RosInvest*, ¶634.

298 SoUF, P31:¶24:L1036-1037.

299 SoUF, P32:¶26:L1054-1056.

300 SoUF, P32:¶27:L1066-1067.

301 SoUF, P33:¶29:L1095.

302 SoUF, P33:¶31:L1108.

303 SoUF, P33:¶29:L1092-1093.

304 SoUF, P34:¶35:L1136-1138.

305 SoUF, PP37-38:¶51:L1305-1308.

267. Vemma acted speculatively hoping its strategy would succeed. It acted imprudently, disregarding the realities of the market. Vemma acted unreasonably being overly optimistic about its plan. A wise investor would not have adopted such conduct.

268. The role of the tribunal is to determine what an independent and well informed third party would have been willing to do if it were in Claimant's shoes.[306] Vemma was aware it was skating on thin ice and that Caeli's expansion should be controlled to avoid exorbitant costs and additional financing,[307] notably with the known increase of the fuel prices.[308] Any expert would have agreed that Vemma's risky business model was not good in the long run.[309]

269. Mekar requests this Tribunal to find that Vemma acted unreasonably, which constitutes a fault, and caused its own injury.

2) Vemma's conduct is a cause of the damage suffered

270. Mekar also will demonstrate the causal link between the conduct in question and the injury suffered.[310] Indeed, the burden of proof lies with respondent to prove that claimant's allegedly wrongful conduct contributed to the damage suffered,[311] by showing that the damage was caused by factors attributable to the victim.[312]

271. Vemma allegedly stopped making profits through Caeli because of Mekar's measures, taken in response to the economic crisis.[313] A 'but for' scenario whereby Mekar would not have committed any illegality easily demonstrates that Vemma's business decisions caused the halt of its profits. Indeed, Vemma alone decided to compose the great majority of its fleet of Boeings,[314] affecting Caeli's regional operations when these were

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306 *Azurix*, ¶427.

307 SoUF, P33:¶31:L1109-1110.

308 SoUF, Footnote 2, P33.

309 A-VII, PP54-55:L1847,1891.

310 *Stati*, ¶1332; *Abengoa*, ¶670.

311 *Stati*, ¶1332.

312 *Lemire*, ¶163.

313 NoA, P3:¶12:L60-63.

314 SoUF, P32:¶27:L1066-1068.

grounded for consumers' safety.[315] Additionally, if Vemma had heeded Mekar's advise to focus on developing domestic flights in the initial years following privatisation, instead of adding 20 new destinations,[316] its losses would not have occurred. Vemma would not have been in a situation where it had to return aircrafts to their lessors, lay off 30% of its staff, cancel existing purchase orders, ground large part of its fleet, and adopt cost cutting measures.[317] Undoubtedly, Vemma's decisions solely contributed to its loss of profitability.

272. Mekar asks the Tribunal to consider Vemma's behaviour as a cause of its injury and to consequently reduce Vemma's compensation.

B. Compensation should also be reduced on account of the ongoing economic crisis

273. While Mekar vigorously contests Claimant's allegations on the merits, should the Tribunal establish a breach of the CEPTA and that additional compensation is warranted, any compensation awarded should be reduced on account of the economic crisis.[318]

274. The deterioration of Mekar's economy began in 2016 with the MON's devaluation[319] followed by a currency crisis and high inflation.[320] This crisis, which to this date is plunging Mekar in economic turmoil, is the setback against which Claimant's compensation needs to be appreciated.

275. Investors must accept the risk of operating in a particular set of economic and political circumstances. As was eloquently observed in the *Oscar Chinn* case: "*No enterprise* […] *can escape from the chances and hazards resulting from general economic conditions*."[321] Furthermore, the *CMS* tribunal noted that "[international investment

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315 SoUF, P37:¶48:L1270-1273.

316 SoUF, P33:¶29:L1095.

317 SoUF, P38:¶53:L1314-1318.

318 RNoA, P9:¶22:L300-301, 309-311.

319 SoUF, P35:¶39:L1183.

320 SoUF, P35:¶39:L1187-1188.

321 *Oscar Chinn*, P88.

treaties] *cannot entirely isolate foreign investments from the general economic situation of a country.*"[322]

276. Tribunals have observed the compensation-reducing effect of an economic crisis. The *Enron, CMS* and *Sempra* tribunals found that, while an economic crisis did not excuse the breach of the relevant investment treaty, it should be reflected in determining compensation.[323] Particularly, the *Sempra* tribunal observed that:

> "*the manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society. This is the measure of justice that the Tribunal is bound to respect. The Tribunal will accordingly take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.*"[324]

277. These tribunals reverted to 'actual' and 'but-for' scenarios to isolate the effects of the sole economic crisis on the investment.[325]

278. Accordingly, Mekar's economic crisis ought to be considered for compensation purposes. Moreover, the analysis of the 'but-for' scenario will showcase that Vemma suffered losses attributable to the economic crisis.

279. First, Vemma would have suffered higher operational costs which would have impacted its revenues. Indeed, in 2018 the oil prices rose to the highest since 2013,[326] increasing substantially Vemma's operational costs. This development was even more impactful since Vemma relied on old aircrafts[327] which were not fuel efficient and for which the

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322 *CMS (Jurisdiction)*, ¶29.

323 *Enron*, ¶232; *CMS*, ¶356; *Sempra*, ¶397.

324 *Sempra*, ¶397.

325 *Enron*, ¶¶380,389; *CMS*, ¶¶422-423; *Sempra*, ¶¶412-415.

326 SoUF, P37:¶48:L1269-1270.

327 SoUF, P37:¶48:L1270-1271.

flying hours were increased in 2015 only when the oil prices had decreased.[328] Also, Vemma had to service costs relating to repair and storage facilities,[329] airport services and landing and navigation fees.[330] Further, Vemma's expenses relating to its employees would have known an exponential increase. Finally, the meals served during flights would also have been significantly more expensive due to the surge in costs.

280. Second, Vemma would have been impacted by a decrease in demand. As of March 2017, there was a reduction in consumer power in Mekar[331] which would decrease the demand for leisure purchases such as air travel. Indeed, Mekari customers would not have been able to travel on the same frequency as before the crisis due to reduced disposable incomes. Particularly, Mekari companies would have reduced their business travel expenses, impacting Caeli which serviced routes used by such business travellers.[332] Additionally, even prior to the crisis, Vemma faced a volatile demand during the fall and winter seasons.[333] During high inflation, this demand would have further decreased all year-long. Moreover, during the already volatile winter and fall seasons, the majority of customers were from Mekar further substantiating this decrease.[334] Moreover, Caeli's business model was focused on offering low pricing which allowed it to gain a greater footfall than its competitors despite not turning as large a profit.[335] When faced with high inflation, Vemma would have increased considerably its airfares to transfer the risk to consumers thus departing from its model and consequently, suffering a decreasing footfall.

281. Third, the conjunction of a decreasing demand and increasing operational costs would have impacted Caeli. Indeed, the operational costs of a flight are fixed since they do not vary with the number of passengers. Consequently, an airline's profitability depends on its footfall. Indeed, the higher the footfall, the more an airline can spread its fixed costs

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328 SoUF, P34:¶35:L1138-1140.

329 SoUF, P31:¶23:L1027-1029.

330 SoUF, P32:¶26:L1053-1056.

331 SoUF, P35:¶39:L1187-1188.

332 SoUF, P32:¶28:L1073-1076.

333 SoUF, P33:¶29:L1097-1098.

334 SoUF, P35:¶40:L1193-1196.

335 SoUF, P34:¶34:L1127-1129.

amongst passengers. In the present case, due to a lower footfall Vemma would have received lesser revenues to service its increasing costs. Thus, Vemma would have suffered losses during each flight.

282. Therefore, Vemma's losses since the end of 2016 were partially caused by the high inflation in Mekar.

283. Pursuant to Article 36 of the ILC Draft Articles and its commentary, the determination of compensation depends on the identification of the damage caused by Respondent's wrongful acts and its function is "*to address the actual losses incurred as a result of the internationally wrongful act.*"[336]

284. Accordingly, any compensation to be accorded to Vemma ought to be limited to losses actually incurred because of Mekar's measures. However, Vemma's compensation claim of USD 700 million[337] is not reflective of the losses occurred solely by Mekar's measures. Indeed, it does not account for losses attributable to high inflation. Consequently, the claimed compensation should be reduced to exclude any losses attributable to high inflation alone which Mekar is not bound to compensate.

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336 Art. 36, Commentary (4), ILC Articles.

337 NoA, P5:¶30:L154-156.

PRAYER FOR RELIEF

285. In light of the above submissions, Mekar respectfully requests this Tribunal to find that:

(i) The Tribunal has no jurisdiction over the present dispute;

(ii) Mekar did not violate Article 9.9 CEPTA;

(iii) Vemma is not entitled to compensation;

(iv) Should the Tribunal find that there is a breach, that Vemma has been already properly compensated through the price of sale of the investment and should such compensation be deemed insufficient that a reduction of compensation is warranted on account of Vemma's contributory fault and the ongoing economic crisis;

(v) Mekar is entitled to all costs associated with these proceedings, including all legal and other professional fees and disbursements;

(vi) Mekar is entitled to payment by Vemma of pre- and post-award interest at a rate to be fixed by the Tribunal;

(vii) The *amicus* application submitted by CBFI should be dismissed and leave should be granted to the External Advisors' Application;

Respectfully submitted on 23 September 2021

On behalf of Respondent

The Federal Republic of Mekar

By Team CASTILLA.