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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Vemma Holdings Inc.
(Claimant)

V

The Federal Republic of Mekar

（Respondent）

MEMORIAL FOR RESPONDENT

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LIST OF ABBTRATIONS

AF rules	ICSID Arbitration Additional Facility Rules 2006
Amici submissions	Amicus submission by CBFI/External advisors of CRPU
BIT	Bilateral Investment Treaty
CIL	Customary international law
CEPTA	2014 BONOORU-MEKAR CEPTA
Facts	Statement of Uncontested Facts
FET	Fair and equitable treatment
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ISDS	Investor-State Dispute Settlement
IIA	International Investment Agreement
Notice	Notice of Arbitration
Order 1	Procedural Order 1
Order 2	Procedural Order 2
Order 3	Procedural Order 3
Order 4	Procedure Order 4
p. (pp.)	Page (Pages)
Response	Response to the Notice of Arbitration
SOE	State-Owned Enterprise
§ (§§)	Paragraph (Paragraphs)
UNCITRAL Rules	The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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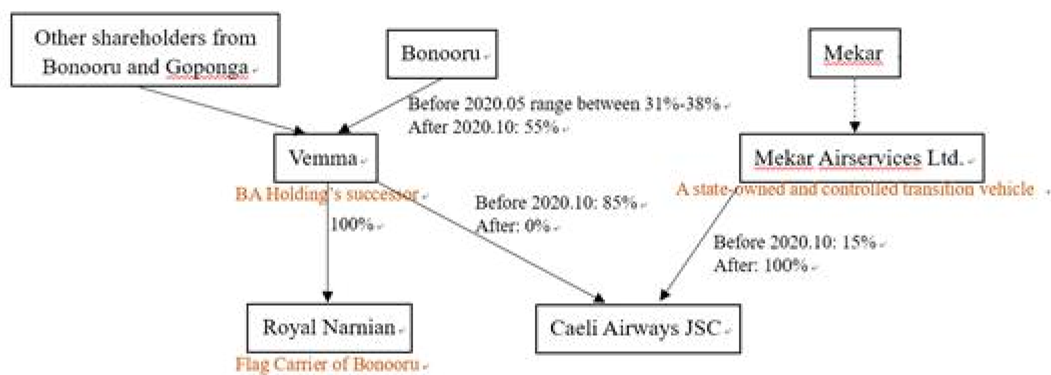
STATEMENT OF FACTS

Dramatis personae

[1] **Vemma** Holding Inc (Vemma or Claimant) is an aviation holding company registered in Commonwealth of Bonooru (Bonooru). Its predecessor, BA Holdings, is a state-owned enterprise in Bonooru. In order to increase the profitability of BA Holdings, the Civil Aviation Authority of Bonooru decided to sell 70% of the company's shares. This transaction gave birth to Vemma. In addition, BA Holding was the parent company of Bonooru Air, which monopolized the civil aviation business of Bonooru at the time. The latter became three airlines in the process of privatization. Among them, Royal Narian was designated as the national airline of Bonooru (Flag Carrier). Vemma is the wholly owned parent company of Royal Narian.

[2] **The Federal Republic of Mekar** (Mekar or Respondent) is a developed country with mass migration from the country as well as the exploitation of resource deposits by intermediate occupying powers. The civil aviation industry of Mekar was originally monopolized by two state-owned enterprises, Aer Caeli, and Caeli Airways. The two companies merged into Caeli Airways (Caeli) after 2003. The merger process was not smooth, and a large amount of debt was incurred. In order to get out of the predicament, the privatization of Caeli had become an option considered by the authorities of Mekar, but the proposal was ultimately not adopted. The 2008 economic crisis made this situation worse, and Caeli's prospects became more and more worrying. In November of the same year, Mekar held a new round of cabinet elections. The Labourer’s Party of Mekar (LPM), which was originally the dominant party, was

questioned due to its inefficiency. The Common Man's Party (CMP) had a place in the new cabinet. The new cabinet under the influence of the Populace Party passed the Emergency Recovery Act 2009, making it possible to privatize large state-owned enterprises. Due to the unstable financial situation of Caeli, the new cabinet listed it as the first batch of privatization targets and held bidding for it. After Vemma won the bid, it held 85% of Caeli's shares through an agreement, and the other 15% was held by Mekar through Mekar Airservices Ltd.



[3] Vemma acquire Caeli's stake without assessing the economic environment of Mekar

[4] Transparency International has consistently scored Mekar between 30/100 to 36/100 on its corruption perceptions index since the index's creation.

[5] Despite rising fuel prices between 2011 and 2013, Caeli's operational costs did not overwhelm its revenues.

[6] At the first annual shareholders' meetings, representatives of Mekar Airservices cautioned the new Vemma-appointed management against taking an "extravagant approach", given the volatility of demand in the region, and especially in Mekar, during fall and winter months. However, representatives of Vemma argued that to limit expansion would mean forfeiting unclaimed market share.

[7] Citing these losses, representatives of Mekar Airservices cautioned that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and hedge the liability of additional financing.

[8] In a letter addressed to Caeli, the Chairman explained that this decision was premised on the CCC+ rating assigned to Caeli by the Investment Information and Credit Rating Agency ("IICRA") earlier that month.

[9] Vemma failed to fulfil its promise for CCM.

[10] The CCM sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

SUMMARY OF ARGUMENTS

[11] **JURISDICTION.** First, this Tribunal has no jurisdiction ratione personae because Claimant is not the qualified Investor Party to the dispute and has acquired the investment with bribery. Second, this Tribunal has no jurisdiction ratione materiae since the dispute is not related to an qualified investment.

[12] **AMICUS CUIRAE.** External advisers of CRPU's submission is admissible because its opinion is within the scope of dispute.

[13] **MERITS. R**espondent did not violated Article 9.9 CEPTA because it accord FET to the Claimant's Investment. Claimant's legitimate expectations is not legitimate because it did not consider the financial status of host state.

[14] **COMPENSATION.** Respondent shall not compensate in accordance with fair market value standard because Claimant's Claim has not legal base.

RELEVANT LAW

[15] The Parties agreed that the ICSID Additional Facility Rules ("AF rules") govern this arbitration. The arbitration rules available under CEPTA article 9.17 include ICSID AF rules.

[16] Pursuant to PCA 2012 article 35(1), the disputants designate the law governing this arbitration. Order 1 indicates that the law applicable to this arbitration is the *BIT*, read with applicable international law.

[17] Both Bonooru and Mekar are parties to the Vienna Convention on Law of Treaties("***VCLT***"), the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

ARGUMENTS

I. THE TRIBUNAL HAS NO JURISDICTION OVER THE CASE BASED ON CEPTA, VCLT AND ICSID ADDITIONAL FACILITY RULES.

A. Claimant is not a qualified investor under Article 9.1 of CEPTA according to ILC Responsibility of States for Internationally Wrongful Acts ("ILC Acts"), hence cannot initiate arbitration based on CEPTA and AF rules.

1. Textual reading of the term "investor" contain in Article 9.1 of CEPTA provides: Investor means a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party; it excludes state-owned enterprises ("SOEs"). Claimant is a SOE, hence cannot be recognized as an investor of Bonooru.[1] ILC Acts addresses when a person or entity's conducts should be attributed to the State. As *Masdar* stated, the ILC Acts has already become a customary international law.[2] Therefore, the ILC Acts should be applied to decide whether Claimant is a qualified investor that could initiate the arbitration.

2. As the successor of BA Holding, a national airline, Claimant stipulates developing public functionaries as a goal in the MOA and continuously exercises governmental functions to ensure Bonooru's citizens' mobility right.[3] As MOA of Vemma provides: 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, 1947 including servicing remote communities; Claimant should be considered as a governmental agency according to Article 5 of ILC Acts.

3. In *EDF*, the Tribunal held that government's control of corporations specifically "in order to achieve a particular result" would fall within the meaning of Article 8 of the ILC Acts.[4] Given that Bonooru's representatives form a majority and enjoy

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[1] facts, p.44.
[2] *Masdar Solar*, ¶167.
[3] facts, pp.43-44.
[4] *EDF* ¶185-201.

voting rights[5] in Claimant's Board, Claimant is factually controlled by its government.

B. Claimant's investment in Mekar is not an investment protected by CEPTA and cannot be arbitrated.

Claimant's investment in Caeli is a right obtained through bribery, which violates the "good faith" principle in international law. This investment is contrary to the purpose of CEPTA which contains the elimination of bribery and corruption.6 According to the good faith principle and Article 31 of VCLT, Claimant's investment is incompatible with the purpose of CEPTA, hence should be excluded from arbitration.

C. After submitting the case to the Tribunal, Claimant has become a wholly Bonooru-controlled enterprise and a governmental agency assuming paramilitary functions.

This sort of entity is ineligible for arbitration under AF Rules. If the proceeding continues, it will essentially become an arbitration between two countries, which will actually harm Respondent's national interests. Therefore, the Tribunal has no jurisdiction over the case.

II. THE TRIBUNAL SHOULD GRANT LEAVE TO THE AMICI SUBMISSIONS FROM THE EXTERNAL ADVISORS TO THE CRPU ("EXTERNAL ADVISORS")AND REJECT THE AMICI SUBMISSIONS FROM THE CBFI.

Taking into consideration the public interest of this case in correlation with the admissibility of non-disputing party submissions, this tribunal must consider the public interest in transparency as well as the parties interest in a fair and efficient resolution of their dispute[7]. Pursuant to Article 54 of AF rules, the tribunal shall apply the rules of law designed by the parties as applicable to the substance of the dispute. Therefore, according

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[5] facts, p.86.
[6] *ibid*, p.71.
[7] *BSG* §4.

to article 9.20(6) of CEPTA which has been agreed by both parties, the tribunal shall apply UNCITRAL Rules on Transparency in Investor-State Arbitration("UNCITRAL Rules") considering the admissibility of *amici* submissions and supporting the transparency of the arbitration proceeding.

A. THE CBFI SHOULD NOT BE GRANTED AMICI CURIAE STATUS AND THE TRIBUNAL SHOULD REJECT AMICI SUBMISSIONS BY THE CBFI.

The admissibility of *amici* submissions shall depend on the specific requirements in article 41(3) of AF rules and article4(3) of UNCTRAL rules.Therefore,The Tribunal should find that the CBFI is not independent from the disputing parties(i).Secondly,the CBFI fail to explain the public interest it was seeking to address(ii).Thirdly,the CBFI cannot demonstrate a significant interest in this dispute(iii).Finally.the CBFI cannot assist the Tribunal in rendering its decision.

Article 41(3) ICSID AF Rules provides:

(3)After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

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

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submis- sion does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Article4(3)UNCITRAL Rules provides:

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing

a perspective, particular knowledge or insight that is different from that of the disputing parties.

1. The CBFI is not independent from the disputing parties.

Turning to the criteria for granting the CBFI status, the Respondent submit that the *amici* must be independent[8] and must meet the specific criteria set out both in AF rules and UNCITRAL rules which are *amici* as third parties should be non-disputing parties. However, The CBFI is not independent who does not have the appearance of being independent and the *amici* submissions should be denied on this basis. Specifically, a member of the CBFI, the Lapras Legal Capital, was allowed to participate in the discussion or votes of the *amici* submissions by CBFI while it is advising the Claimant on litigating funding strategies in the present dispute.[9] Therefore, The Respondent has sufficient grounds to doubt the CBFI's independence as *amici* when it is providing advice to the Claimant and the tribunal at the same time. The interests of the CBFI are averse to their own and aligned with those of the Claimant.

The Respondent argue that the indolence of the CBFI is further compromised by the fact that the SRB Infrastructure and Wiig Wealth Management Group as members of the CBFI are currently pursuing claims against the respondent under Chapter 9 of CEPTA.[10] The Respondent argued that the availability of another forum is relevant to the question of whether the CBFI act as *amici* in the present arbitration. The present case and the claims of these two members are distinctly the same matters involving the application of distinctly same legal frameworks. It indicates this bias opinion rewarding to the claimant claim and unfairly prejudice the Respondent. Thus, The Respondent claims that the connection between the CBFI and SRB Infrastructure or Wiig Wealth Management Group undermines their independence.

2. The CBFI failed to explain the public interest it was seeking to address.

Although the requirement of public interest to be a subject matter of the arbitration is neither expressly included in article 41(3) of AF rules nor article 4(3) of UNCITRAL rules,the FTC Statement requires that there is a public interest in the subject matter of the arbitration.

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[8] *Bernhard von Pezold* §49.

[9] Amici submissions, p.16.

[10] Amici submissions, p.16.

The FTC Statement paragraph B6 provides[11]:

a)the amicus brief would assist the tribunal in determining a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight which is different from that of the disputing parties;

b)the amicus brief would address matters within the scope of the dispute;

c)the potential amicus has a significant interest in the arbitration; and

d)there is a public interest in the subject-matter of the arbitration.

Nevertheless, BITs, such as the Canadian-Slovak BIT, do indicate that one of the issues the court must consider is if there is a public interest in the subject matter of the arbitration. Accordingly, the tribunal gave consideration to the issue of whether the subject matter of the dispute concerns public interest and the intervention of the civil society in the area of investment arbitration has to be justified by the peculiarities of a case that exceed the interests of specific parties[12].In addition, in *Suez* case, the tribunal emphasized that virtually every investment treaty arbitration involves, by definition, matters of public interest because the international legal responsibility of the Respondent State is in the issue. The tribunal's decision turned, however, on the existence of what is considered to be a 'particular public interest' in the subject matter of the dispute[13]:

The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities.

In this present case, the Respondent submits that this case presented an appropriate subject matter for the *amici* submission because it involved matters of public interest, namely eliminate corruption. However, it does not consider that the CBFI has shown any link between their submission and furtherance of the public interest. The CBFI's submission only concerns the impact of business activities in Bonooru on future capital flow and how negative consequences on the exchange of capital in Greater Narnia or the economic growth of Greater Narnia.[14] It is convinced that the public interest pursued by CBFI is *de facto* professional interest. Therefore, Public interest cannot be interpreted as business impact in any way and purely business considerations are not public interest considerations. To sum up, the CBFI does not file its *amici* in pursuit of any "public interest".

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[11] FTC Statement.

[12] Katia §558 .

[13] *Suez* §19.

[14] Amici submissions, p.17.

3. The CBFI lacked a significant interest in this dispute.

With respect to the criterion, both outlined in AF Rule 41(3)(c) and UNCTRAL rules 4(3)(a), the Respondent submits that the CBFI cannot have a significant interest because the CBFI fails to show that they has more than a “general” interest in the proceeding. However, in *Apotex v. USA* case, the tribunal considered that the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends to meet the requirement of significant interest.[15]

The CBFI rely on two grounds to substantiate their claim to have a significant interest:(1)The uncertainty generated by the invalidation of the standing of such enterprises to voice their grievances impacts future capital flows and (2) The decision of this case will affect the future investment agreements of all Bonoori businesses in Mekar.[16] The CBFI does not expand on why this gives them-or any of them-a significant interest. In its observations, the Claimant merely submits that the Tribunal’s decision on the merits will directly concern the Bonoori investors investing in the Greater Narnian region that the CBFI represent and that the arbitration concern the Claimant’s right to protect the investment treatment. In this regard, the limited and open-textured wording of the CBFI is not sufficient to establish that any such interest has been shown in connection with the specifics of the dispute that is before this Tribunal.

4. The CBFI lacked a different expertise,experience or perspective from that of the parties that could have assisted the tribunal.

The *amici* submissions should assist the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. In *Eco Oro v. Colombia* case[17], the Tribunal observed that only accept *amici* submissions from persons who establish to the Tribunal’s satisfaction that they have the expertise, experience and independence to be of assistance in this case. The Respondent argued that there is one main reason for the CBFI will not bring a perspective, particular knowledge or insight that is different from that of the disputing parties because they are not independent.

[15] *Apotex* §37-40 .

[16] Amici submissions, p.17.

[17] Eco Oro Minerals Corp §31.

Moreover, the Respondent notes that the decisions in both *Apotex v. USA case*[18]and *Bear Creek v. Peru case*[19]which require a petitioner to demonstrate a "*perspective*, *knowledge or insight*" that differs from that which has or will be provided by the international counsel and experts who have been retained by both parties. Given the other tribunals' determination above that the CBFI does not profess to have any particular experience in relation to the Mekar or investment treaty arbitration and the CBFI only intends to provide context regarding the business climate of Bonooru, corporate framework and the nature of the industry which are not directly related with the present dispute[20].

B. THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT FOR FILING AMICI SUBMISSIONS TO THE EXTERNAL ADVISORS

According to the External Advisors' submission may bring perspective, knowledge or insight distinct from that of the disputing parties, considering that the External Advisors are in a unique position to provide the specific advice of Caeli Airways. The Respondent submitted that the tribunal should accept the External Advisors' participation because the *amici* satisfy all the requirements of the *amici* submissions which will expand analysis as below:

1. The External Advisors are independent from the parties of the arbitration which is meet the standard of non-disputing party

The External Advisors are described as an independent and Mekari civil society dedicated to focusing on investment banking and were engaged as external advisors to the Committee on Reform on Public Utilities set up under the law on privatization[21]. However, the Respondent contend that the External Advisors still has the claim to being independent of the parties in circumstances where it was selected through a transparent and competitive process and based on criteria of competence as identified in the Law on Privatisation without any financial support, who themselves gained the independence status for the reasons stated above.

The Respondent argued that the External Advisors received the corresponding remuneration for participating in the deliberation of Vemma's committee for the acquisition of Caeli Airways stake which was questioned by the Claimant. Therefore,

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[18] *Apotex* Applicant §133.

[19] *Bear Creek Mining Corporation* §136&135.

[20] Amici submissions, p.16-17.

[21] Amici submissions, p.19.

not every kind of minor financial or factual relationship is, however, considered to be detrimental to independence.[22] Under the UNCITRAL draft, 20% of the annual revenue is given as an indicative threshold that should not be exceeded to be considered independent. It was, however, decided not to include that strict threshold in the official text, in order to leave room for reasonable discretion by the tribunal.[23]Indeed, the Claimant who relies solely on the External Advisors's brief description of their minor financial relationship with the Respondent cannot conclude that the External Advisors are not independent. On the contrary, support for this property in the facts of the case is simply due to the working relationship in 2010 and is not directly linked to the current dispute settlement.

2. The submissions of the External Advisors addressed matters within the scope of the dispute

One of the admissibility criteria of the *amici* is a requirement that submissions of non-disputing parties address matters within the scope of the dispute. In this present case, the Respondent submit that the *amici* submissions fails to raise a new jurisdictional question because the claims based on contracts obtained by corruption which was the investor violating the obligation of good faith contracting shall not be upheld by the Tribunal and illegality of investment are directly relevant to the issues which the Tribunal must consider. Furthermore, it must be emphasized that the role of *amici* is not to challenge arguments or evidence put forward by the Parties.[24]

In *Apotex v.USA* case[25], the tribunal made the further complaint on this issue that that tribunal considered that *it is perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspectives or insights beyond those of the disputing parties.* Furthermore, The submissions by the External Advisors assist the tribunal to determine the *ratione legis* jurisdiction and bringing a perspective, particular knowledge or insight that is different from that of the disputing parties by raising a important and factual or legal issue regarding the address public policy issues fairly and in an unbiased manner to the tribunal.

3. There was a public interest in the subject matter of the dispute and

[22] Christian §379.

[23] Report of Working Group II §49.

[24] *Suez* §25.

[25] *Apotex* Procedural Order §33.

The External Advisors explain further the public interest it was seeking to address

Amici submissions aim to protect important public interests such as environmental and health protection, human rights, workers' rights, sustainable development, cultural heritage, the fight against corruption, and governmental policies[26]. It is no doubt that the fight against corruption as the international public policy became the particular public interest in this present dispute and the general interest of the public in fighting corruption and the interest of the parties involved in the contracts have to balanced.[27]Moreover, the External Advisors, due to their independence from the parties to investment contracts, are best placed to bringing forward "issues of bribery or corruption "which is the public interest, in the context of investment contracts tainted with illegality[28].

The problem of bribery arose in the prominent investor-State arbitration case *World Duty Free v. Republic of Kenya*. In that case, the State and the claimant both acknowledged the claimant's payment of a cash bribe to the previous government. In this situation, informed *amicus curiae* can play an important role in bringing relevant allegations of corruption to the tribunal[29].Notably, the *amici* submissions submit that the Claimant rights received by Vemma Holdings were procured by means of bribes paid to the Chairperson of the Committee which is the Mekari official and the *amici* as independent external advisors involved in the entirety of the privatization process, are in the unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party.

4. The External Advisors have significant interest in the present dispute

Given that the statement of the *amici* submissions by the External Advisors, the *amici* have defined the significant interest in this arbitration. They have explained how the evidence and details information about the privatization process it may represent, might be directly or indirectly affected by the specific jurisdictional issue on which it intends to make submissions, or indeed by the outcome of the overall proceeding.

The fact that the *amici* are considering the stagnation in anti-corruption efforts in Mekar

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[26] CAMILLA GRAHAM.

[27] Hilmar Raeschke-Kessler §497.

[28] Kenneth Kinyua§43.

impacts the financial operations of the External Advisors, which will affect the potential investors to Mekar or some judicial proceedings concerning approval for privatization projects to a concrete interest as contemplated by the *amici* submissions.In addition, the *amici* may have to show a real "pecuniary interest",which means it must experience a "special damage" on their interest or an "intellectual or emotional interest" .It is convened that the assessment of the legality of Vemma's investment is crucial to the determination of the tribunal's competence. Thus, the External Advisors have a recognizable interest in *amici* submissions claims and recognizable interest in the investment arbitration cases that serve as the basis for the Tribunal settlement.

5. The External Advisors had a different expertise,experience or perspective from that of the parties that could assist the tribunal

In assessing whether the External Advisors' submission could potentially assist the Tribunal in the determination of legal or factual issues and whether the *amici* submission could provide a different perspective and a particular insight on the issues in dispute, based on either substantive knowledge or relevant expertise or experience that go beyond, or differ in some respect from, that of the disputing parties themselves. In matters of public interest, the Respondent consider that the External Advisors' submission pointed to the different expertise, experience, or perspective from that of the disputing parties ought to be construed broadly, so as to allow the Tribunal access to the widest possible range of views.

The Claimant rights received by Vemma Holdings were procured by means of bribes paid to the Mekari official. However, the External Advisors are in the unique position to adduce unbiased facts before the Tribunal that may not be obtained from either disputing party. Naturally, as the claimant position, such a stain would be concealed while the Tribunal is ignorant of the private association between the Claimant and the chairperson of the CRPU. The External Advisors' participation will offer a different perspective because evidence of corruption may not be obtained from the disputing parties.Moreover, The External Advisors have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization projects.It indicated that the External Advisors have the particular experience in relation to the Mekar or investment treaty arbitration.The External Advisors' participation by ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.

III. ACTS OF RESPONDENT DID NOT VIOLATE FAIR AND EQUITABLE TREATMENT.

A. A judgment of fair and equitable treatment ("FET") cannot be reached in the abstract and must depend on the facts of the particular case.30

Measures taken by Respondent fulfilled all requirements set out in Article 9.9 of CEPTA in the following aspects, hence, do not amount to a breach of the FET.

1. Respondent's acts did not exceed Claimant's reasonable and legitimate expectations because its expectations were not in fact reasonable and legitimate.[31] Claimant should have reasonably expected to suffer losses as a business risk that could happen to any market activity.[32] Besides, the authorities in Mekar had consistently enforced the 40% market share limit on Claimant and all other commercial entities in the territory, which Claimant should have observed to form reasonable business plans.[33]

2. Respondent has treated Claimant's investment in a non-discriminatory manner. The Tribunal must consider the confirmation of similar circumstances, the existence of discrimination, and the reasons for the justification of discrimination.[34] The decree passed in Mekar requiring all trade to be denominated in MON and the subsidiary policy implemented later applied equally on all companies operating within its territory, instead of targeting at Claimant.[35]

3. Respondent has acted with transparency[36] and followed due process of law. The CCM's investigations are public, and the interim measures were enforced for specific reasons.[37] Besides, Caeli appealed both orders of the CCM in Mekari courts.[38] Claimant's claims have been heard by two different institutions. Therefore, Respondent has complied with due process of law.

B. Taking a step back, complying with the FET does not mean that Respondent should be assessed according to high standards.

Given Respondent's limited judicial resources,[39] Claimant was accorded a reasonable treatmen. Therefore, these circumstances should not be considered as violations of the FET.

[30] *Mondev,* ¶118.
[31] *Saluka* ¶340.
[32] *ibid*, p.33.
[33] *MTD* ¶165.
[34] *supra note* 12.
[35] facts, p.35.
[36] *Metalclad* ¶154.
[37] facts, p.30, p.36.
[38] *ibid*, p.37.
[39] *ibid*, p.29.

IV. THE TRIBUNAL SHOULD APPLY THE "MARKET VALUE" STANDARD CONTAINED IN ARTICLE 9.21 OF CEPTA.

A. The "market value" standard in Article 9.21 of CEPTA should be adopted.

Based on Articles 31 and 32 of VCLT, the Tribunal shall consider the purpose, parties' intent and supplemental material of treaty while interpreting the compensation standard contained in CEPTA. Mekar decided to negotiate for CEPTA which would further limit host State's obligation after losing several claims brought by investors through the lifetime of 1994 BIT which favors investors' right. Therefore, the market value standard contained in Article 9.21 of CEPTA should be considered done purposefully and interpreted strictly. Therefore, the market value standard shall be applied.

B. Claimant has no legal basis to avail the "fair market value" ("FMV") compensation standard in respect of any alleged damage suffered.

1. Article 9.7 of CEPTA provides that substantive obligations in other international investment treaties or trade agreements do not constitute *treatment*, therefore the most favoured nation ("MFN") treatment stated in Article 9.7(1) of CEPTA cannot be applied in the case. Specifically, in *İçkale*[40], the Tribunal had turned down all possibility to apply any third-party's treaty under MFN treatment, which reflects that the invocation of MFN treatment in international arbitrations is controversial, and tribunals should decide on a case-by-case basis.

2. Considering Article 9.21 of CEPTA provides that the Tribunal can adopt the "market value" standard except as otherwise provided for Expropriation contained in Article 9.12, Claimant cannot simply invoke MFN to exclude restrictive provisions for FMV. On one hand, whether Respondent violates the MFN treatment is still debatable and cannot be directly invoked. On the other hand, Claimant shall prove that the FMV is more favorable than market value in the present case since the treaty itself does not constitute treatment. When Claimant sells its shares, there is no longer a qualified *bona fide* third-party buyer within Mekar. The only qualified buyer is Mekar Airservices. In conclusion, the market value standard should be applied.

[40] *İçkale* .

PRAYER FOR RELIEF

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

a. Decline to exercise jurisdiction due to the Claimant's status as a State-owned enterprise.

b. Find that Mekar did not violate Article 9.9 of CETPA; and

c. In case the Tribunal finds Mekar did violate Article 9.9, then the tribunal should conclude Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.