INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

MEMORIAL FOR RESPONDENT

Vemma Holdings Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

§(§)	Paragraph(s)
Art./Arts.	Article/Articles
BAK	Bakugo
BIT	Bonooru-Mekar Bilateral Investment Treaty
Bonooru	Commonwealth of Bonooru
BPB	PJSC Bonoorian People's Bank
CAA	Civil Aviation Authority
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement
CILS	Centre for Integrity in Legal Services
CMP	Mekar's Common Man's Party
CRPU	Committee on Reform on Public Utilities
FET	Fair and Equitable Treatment
FMV	Fair Market Value
GDP	Gross Domestic Product
Ibid	The same authority as above
ICSID	International Centre for Settlement of Investment Disputes
IICRA	Investment Information and Credit Rating Agency
ISDS	Investor-State Dispute Settlement
LLC	Lapras Legal Capital
Law on Privatisation	Law on Privatisation of State Property
LPM	Labourers' Party of Mekar
Mekar	Federal Republic of Mekar
MV	Market Value
NYC	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
SCC	Sinnoh Chamber of Commerce
SOE	State-Owned Enterprise
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
Vemma	Vemma Holdings Inc.

TABLE OF AUTORITIES

ICSID CASES

17.	Fouad Alghanin (¶175)	Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/13/38, Award, 2017.
18.	GEA (¶175)	GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award, 2011.
19.	GPF (¶183)	GPF GP S.à.r.l v. Poland, SCC Case No. 2014/168, Final Award, 2020.
20.	H&H (¶179)	H&H Enterprises Investments, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB 09/15, Award, 2014.
21.	Hulley (¶195)	Hulley Enterprises Ltd. v. Russian Federation, PCA Case No. 2005-03/AA226, Final Award, 2014.
22.	Hydro Energy (¶183)	Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 2020
23.	Iberdrola (¶174)	Iberdrola Energía, S.A. v. Republic of Guatemala (I), ICSID Case No. ARB/09/5, Award, 2012.
24.	Jan de Nul (¶175)	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008
25.	Krederi (¶174, ¶179)	Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award, 2018.
26.	LG&E (¶201)	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, 2007
27.	Limian Caspian Oil (¶179)	Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award (Excerpts), 2010
28.	Loewen (¶175)	Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 2003
29.	Maffezini (¶ 28, ¶ 29, ¶ 48)	Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 2000
30.	Mamidoil (¶ 118)	Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 2015
31.	Marvin Roy Feldman (¶197)	Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 2002.
32.	Masdar (¶211)	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 2018.
33.	Mercer (¶164)	Mercer International Inc. v. Government of Canada, ICSID Case No. ARB(AF)/12/3, Award, 2018.
34.	MNSS (¶164)	MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, 2016.
35.	Mondev (¶175, ¶183)	Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002

36.	Muhammet (¶164)	Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Award, 2021.
37.	MTD (¶134, ¶205, ¶206)	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 2004.
38.	Noble Ventures (¶130)	Noble Ventures, Inc v. Romania, ICSID Case No. ARB/01/11, Award, 2005.
39.	Occidental (¶165)	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 2004.
40.	Parkerings (¶134, ¶153)	Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 2007.
41.	Plama (¶ 118, ¶ 119, ¶ 120)	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 2008
42.	Pope & Talbot (¶201)	Pope & Talbot v. Government of Canada, Award in Respect of Damages, 2002.
43.	PT Ventures (¶164)	PT Ventures, SGPS, S.A. v. Republic of Cabo Verde, ICSID Case No. ARB/15/12, Decision on Jurisdiction, 2015.
44.	Reinhard (¶179)	Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, 16 May 2012
45.	Robert Azinian (¶174)	Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award, 1999.
46.	RosInvest (¶179)	RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. 079/2005, Final Award, 2010.
47.	Rumeli (¶ 179)	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 2008
48.	SCB (Hong Kong) (¶164)	Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20, Award, 2019.
49.	Siemens (¶130)	Siemens A. G. v. The Argentine R, ICSID Case No. ARB/02/82007, Award, 2007.
50.	STEAG (¶195)	STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 2020
51.	Suez (¶ 91)	Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Argentina's Application for Annulment, 2018
52.	Teinver (¶ 206)	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award, 2017
53.	Urbaser (¶164)	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 2016.
54.	Vivendi (¶195)	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija,

		S.A. and Compagnie Générale des Eaux) v. Argentine Republic (I), ICSID Case No. ARB/97/3, Award II, 2007.
55.	Von Pezold (¶ 70)	Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 2015
56.	Waste Management (¶ 162)	Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, 2000.
57.	World Duty Free (¶ 118)	World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, 2006

UNCITRAL CASES

1.	Glamis Gold (¶162)	Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 2009.
2.	Methanex (¶ 64, ¶ 92, ¶ 101, ¶165)	Methanex Corporation v. United States of America, UNCITRAL, 2005.
3.	Ronald Lauder (¶130)	Ronald S. Lauder v. The Czech Republic, UNCITRAL.
4.	Saluka (¶162, ¶188)	Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 2006.
5.	S.D. Myers (¶148, ¶169, ¶176, ¶178, ¶197, ¶201, 204)	S.D. Myers, Inc v. Government of Canada, UNCITRAL, Partial Award, 2000.
6.	Thunderbird (¶165)	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 2006.
7.	Yukos (¶ 116)	Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, 2005.

ICJ CASES

1.	ELSI (¶130, ¶175)	Elettronica Sicula S.p.A, ICJ, 1989.
2.	Nicaragua (¶ 26)	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984.

OTHER TRIBUNALS

1.	Cengiz (¶164)	Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya, ICC Case No. 21537/ZF/AYZ, 2018.
2.	Chevron (¶175)	Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, 2018.
3.	Chorzow (¶204)	Factory at Chorzów (Merits), PCIJ Series A. No 17, Judgment, 1928
4.	Cologne Case (¶187)	Parties not indicated, Cologne Oberlandesgericht, Case No. 19 Sch 15/11, Decision of 26 September 2013, in van den Berg, A. (ed.), Yearbook Commercial Arbitration – Volume XXXIX, 2014.
5.	England and Wales, Case No. RSP 06/2003 (¶189)	Diag Human S.E. v. The Czech Republic, Case No. RSP 06/2003, Judgment of the High Court of Justice of England and Wales [2014] EWHC 1639, 22 May 2014
6.	Indian Metals (¶183)	Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40, Final Award, 2019.
7.	Manchester Securities (¶195)	Manchester Securities Corporation v. Republic of Poland, PCA Case No. 2015-18, Award, 7 December 2018
8.	Mohammad Al-Bahloul (¶188)	Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2009.
9.	PV Investors (¶190)	The PV Investors v. Spain, PCA Case No. 2012-14, 2020.
10.	South American Silver (¶164)	South American Silver Limited v. Bolivia, PCA Case No. 2013-15, 2018.

ARTICLES/JOURNALS

1.	BABIĆ, KULJANIN (¶156)	BABIĆ, Danica. KULJANIN, Jovana. KALIĆ, Milica. Market share modeling in airline industry: an emerging market economies application. 17th Meeting of the EURO Working Group on Transportation, EWGT2014, 2-4 July 2014, Sevilla, Spain
2.	DUMBERRY (¶ 109)	DUMBERRY, Patrick, State of Confusion, The Doctrine of clean hands in investment arbitration and the Yukos Award, 17, n.2, Journal of World Investment and Trade.
3.	GAILLARD (¶186)	GAILLARD, E. Journal du Droit International 1033, 1997.
4.	KIMPEL (¶142)	KIMPEL, Scott. Antitrust Considerations in International Airline Alliances, 63 J. Air L. & Com. 475, 1997. https://scholar.smu.edu/jalc/vol63/iss2/7
5.	LE MOULLEC (¶ 117)	LE MOULLEC, Caroline. The Clean Hands Doctrine: a tool for Accountability of Investor Conduct and

		Inadmissibility of Investment Claims, in Stavros Brekoulakis, Arbitration, The International Journal of Arbitration Mediation and Dispute Management, volume 84, Issue 1, 2018.
6.	LEVINE (¶ 110)	LEVINE, Euginia. Amicus Curiae in International Investment Arbitration- The Implications of an Increase in Third- Party Participation, 2011.
7.	MACLAUGHLIN (¶ 22)	MACLAUGHLIN, Mark, 'Defining a State-Owned Entreprise in International Investment Agreements in in Meg Kinnear and Campbell Machlachan, ICISD Review, Foreign Investment Law Journal, Oxford University Press, 2019.
8.	SAPPINGTON (¶140, ¶152, ¶168)	SAPPINGTON, David, SIDAK, Gregory, Competition Law for Stae-Owned Enterprises, vol. 71, n. 2, Antitrust Law Journal, 2003, pp. 479-524
9.	SIMONS (¶142)	SIMONS, Michael S. Aviation Alliances: Implications for the Qantas-BA Alliance in the Asia Pacific Region, 62J. AIR L. & COM. 841, 843, 1997.
10.	TITI (¶ 96)	TITI, C., The Right to Regulate in International Investment Law, Studies in International Investment Law, 2014.
11.	VANDUZER (¶ 102)	VANDUZER, Anthony. "Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation," McGill Law Journal 52, no. 4 (Winter 2007).

BOOKS

1.	ARÉCHAGA (¶ 77)	ARÉCHAGA, Jiménez de. 'International Law in the Past Third of a Century', 159 Recueil des cours 1, 1978.
2.	BADIA (¶ 32, ¶ 33)	BADIA, Albert. Chapter 6: Attribution of conducts of state-owned Enterprises based on Control by the State', in Crina Baltag, ICSID Convention after 50 Years, Unsettled issues.
3.	BENTLEY (¶142)	BENTLEY, Diana. The European Union Has Become Antitrust Player, NAT'L L.J. 1996,
4.	BROCHES (¶ 39)	BROCHES, Aron. "The Convention on the Settlement of Investment Disputes Between States and Nationals of other States", 136 R.C.A.D.I., 1972.
5.	BROWNLIE (¶29)	BROWNLIE, Ian. System of the Law of Nations State Responsibility. Part I, 1983.
6.	CORTESI (¶ 21)	CORTESI, Giulio Alvaro. ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law. The Law and Practice of International Courts and Tribunals 16, 2017.
7.	COSSU (¶ 61)	COSSU, Monica, State Appointed Directors, Related Party Transactions Corporate Opportunities in Open State-Owned Companies, Italian Law Journal, vol. 4, n.2, p.557-588.

8.	ISHIKAWA (¶ 99)	ISHIKAWA, Tomoko, Third Party Participation in Investment Treaty Arbitration, International Comparative Law Quarterly, vol. 59, n. 2, 2010.
9.	KANG (¶ 32)	KANG, Sang Yop. 'Reenvisioning the Controlling Shareholder Regime: Why Controlling Shareholders and Minority Shareholders Often Embrace' (2014) 16 U. Pa. J. Bus. L. 843.
10.	KRONKE, NACIMIENTO, OTTO, PORT (¶189)	KRONKE, Herbert, NACIMIENTO, Patricia, OTTO, Dirk, PORT, Nicola Christine. Recognition and Enforcement of Foreign Arbitral Awards – A Global Commentary on the New York Convention / Kluwer Law International, 2010 - 2010
11.	LEE (¶ 30)	LEE, Jasmine. Trade Agreements New Frontier, Regulation of State Owned Entreprises and Outsanding Systemic Challenges, Asian Journal of WTO and International Health and Law Policy, vol. 14.
12.	MOURRE (¶ 91, ¶ 94)	MOURRE, Alexis, Are Amici Curiae the Proper. Response to the Public's Concerns on Transparency in Investment Arbitration? Law and Practice international Courts and Tribunals, vol. 5, no. 2, 2005.
13.	RAJAVUORI (¶ 57)	RAJAVUORI, Mikko. Making International Legal Persons in Investment Treaty Arbitration State Owned Entreprises Along the Person Thing Distinction, German Law Journal, vol. 18, nº5, 2017.
14.	SCHICO (¶ 21)	SCHICO, Luca, Attribution and state entities: Diverging approaches in investment arbitration, Journal of World Investment & Trade, nº2, 2011.
15.	WEERAMANTRY (¶ 67)	WEERAMANTRY, J. Romesh. Treaty Interpretation in Investment Arbitration.2012. Oxford University Press.

OTHER PUBLICATIONS

1.	ACI (¶147)	International Civil Aviation Organization. AIRPORT COMPETITION (Presented by the Airports Council International (ACI)). WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF). 2013. p. 1.
2.	Aviator Report (¶139)	Scope: Europe's big five take more than half of region's air travel market as small airlines struggle. At: https://newsroom.aviator.aero/scope-europes-big-five-take-more-than-half-of-regions-air-travel-market-as-small-airlines-struggle/
3.	FET - UNCTAD Series (¶162)	Fair And Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II, 2012, p. 82.

4.	HUANG (¶147)	HUANG, Jianwei. Airport Monopoly and Regulation: Practice and Reform in China. Advances in Social Science, Education and Humanities Research, volume 87 (ICEMEET 2016), p. 495. Publishing: http://creativecommons.org/licenses/by-nc/4.0/
5.	ILC (¶ 56, ¶ 57)	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts.
6.	OECD (¶174)	OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435, p. 29
7.	OECD Report (¶138)	OECD Report, Annex to the Summary Record of the 121st Meeting of the Competition Committee held on 18-19 June 2014 -- Executive Summary of the discussion on Airline Competition, p. 4.
8.	OECD Report on Airline Competition (¶144)	Report, Annex to the Summary Record of the 121st Meeting of the Competition Committee held on 18-19 June 2014 -- Executive Summary of the discussion
9.	Statista (¶139)	Domestic market share of leading U.S. airlines from January to December 2020. At: https://www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines/

STATEMENT OF FACTS

Parties to the Dispute

1. Vemma is a holding company with 100% ownership in the Royal Narnian airline. The foundation of the airline arises from a privatisation process in Bonooru. The government's interests in the companies were cemented by the Constitution of Bonooru, which bestows transportation related obligations on the State and Vemma's Memorandum of Association, which recognizes Bonooru's rights to hold a permanent stake in the company. Royal Narnian is a leading global airline and, along with other international airlines, created the Moon Alliance.

2. Mekar is a developing country that witnessed troubling times after its independence. Nonetheless managed to dodge high regulatory intervention by the government, which significantly contributed to Mekar's growth. Following the failure of the merger of the two state-owned airline companies, Air Caeli, and Caeli Airways, Mekar privatized part of the now united company and, by 2011, Vemma acquired an 85% stake in Caeli.

3. Bonooru and Mekar signed a BIT in 1994, however in 2014 the countries finished negotiations and agreed on the signing of a trade agreement, the CEPTA, which contains a chapter on investment protection to terminate and replace the former legal mechanism.

Vemma is Unable to Maintain Caeli a Profitable Airline

4. Caeli's sale happened because of a privatisation initiative from Mekar, which created a bidding process won by Vemma. After the completion of the sale to Vemma, Mekar still retained 15% of Caeli's shares through Mekar Airservices.

5. After being acquired, a new business strategy was instituted for Caeli, which caused severe economic consequences for the company's long-term future. Practices such as predatory pricing, that led to suspiciously rapid market growth, caught the attention of Mekari regulatory authorities. The CCM ran two investigations on Caeli to properly enforce domestic law, resulting in fines and airfare caps, which were never protested by Caeli. The caps were released as soon as the company's market share turned below 40%.

6. Besides its anticompetitive behavior, when the 2016 economic crisis erupted, the business model enforced by Caeli could not sustain the losses provided by the MON currency's usage. In 2018, as a means of protecting the economy of the civil aviation market, Respondent decided to allocate taxpayer's subsidies to the industry's members that did

not have direct economic ties to other countries. Caeli was receiving subsidies directly from Bonooru through the Horizon 2020 Program and was also partially owned by the neighboring country, therefore it did not legally qualify for the subsidies.

Vemma attempts to unlawfully sell its investment

7. Dissatisfied with its self-inflicted economic stress, Caeli decided to take legal action against Respondent, however, its claims were rightfully dismissed by the High Court of Mekar.

8. Afterwards, without mitigating any losses, Claimant opted to sell its investment by trying to accept an unlawful bid made by the Hawthorne Group, which is part of the same airline alliance as Vemma. An arbitration was conducted, and it was concluded that the offer was invalid, resulting in the sale of Caeli to Mekar Airservices for 400M USD.

The request for arbitration under ICSID Additional Facility Rules

9. Claimant filed a request for arbitration with Vemma under the ICSID Additional Facility Rules on 15 November 2020 to seek compensation for its alleged losses due to Caeli's sale, under the CEPTA.

The Tribunal Receives Two Applications to File *Amicus* Submissions

10. The CBFI applied for leave to file a non-disputing party submission with the intention of providing information on economic and commercial matters of the Greater Narnian region.

11. The External Advisors to the CRPU requested leave from the Tribunal to submit an *amicus curiae* brief to present a matter of public interest concerning allegations of corruption.

APPLICABLE LAW

12. This Tribunal shall apply the CEPTA to the current dispute, as Vemma Holdings, a national of Boonoru, has brought a claim against the country of Mekar.

13. Pursuant to Article 9.16 of the CEPTA, the Parties agree that the present proceedings will follow the ICSID Additional Facility Rules[1]. The Official Rules shall prevail over any inconsistencies between the two.

14. Bonooru and Mekar are parties to the VCLT and the NYC[2]. The arbitration laws of both countries are based on UNCITRAL Model Law[3] and UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration, which shall apply to any international arbitration proceedings initiated under the treaties. The interpretation of the treaties must be made in good faith, in accordance with Article 31 VCLT.

[1] 2014 CEPTA, Art. 9.16.

[2] Uncontested Facts, ¶ 66, p. 40.

[3] Ibid.

SUMMARY OF ARGUMENTS

15. **JURISDICTION: THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE**. This dispute constitutes a State-to-State Arbitration. Vemma is not entitled to bring its claims under the ICSID Additional Facility Rules and CEPTA Chapter 9, as Mekar has not consented to arbitrate claims brought by SOEs under the applicable law with Bonooru. Vemma acts as an agent for the government of Bonooru and discharges a governmental function.

16. **JURISDICTION: THE EXTERNAL ADVISORS TO THE CRPU *AMICUS CURIAE* SUBMISSION IS ADMISSIBLE AND THE CBFI SUBMISSION IS NOT.** The Tribunal should not grant the leave sought by the CBFI to file *amicus* submission because its application is not filed in pursuit of public interest nor offers any new arguments. The CBFI is not independent from the parties and its participation raises a conflict of interest. The Tribunal should grant the leave sought by the External Advisors to the CRPU to file *amicus* submission because it contains information within public interest and addresses issues within the scope of the dispute.

17. **MERITS: RESPONDENT DID NOT VIOLATE THE FET STANDARD UNDER ART. 9.9 OF THE CEPTA.** The Tribunal should not consider a breach of FET under Art. 9.9 to have occurred. The actions taken by Mekar were not arbitrary and did not inhibit Claimant from profiting from its investment. All measures were legitimate and non-discriminatory, and Claimant was provided full access to justice through the Mekari Courts, corroborating with the principle of due process.

18. **MERITS: CLAIMANT SHOULD NOT RECEIVE PAYMENT FOR DAMAGES BY RESPONDENT.** Even if the Tribunal considers that a breach of FET has occurred, it should not grant Claimant any compensation, since MV is the applicable standard, and for full compensation to be achieved, a specific analysis of impending factors that lead to the investor's demise must be made. The impact on Claimant's investment was caused by risky business strategies and an economic crisis, which makes awarding 700M USD in damages unjustifiable. Instead, the Tribunal should consider that all payments required have already been made when Respondent acquired Caeli for 400M USD.

19. **REMEDY**: The Tribunal does not have jurisdiction. Mekar did not violate Chapter 9 of the CEPTA and does not owe Vemma compensation. Alternatively, if found that Mekar did violate the CEPTA, compensation should be bestowed based on the MV standard.

1. JURISDICTION: THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE

20. This Tribunal lacks jurisdiction to hear the present dispute because (A) The Dispute is a State-to-State Arbitration; and (B) Mekar has not consented to arbitrate claims brought by SOEs under the applicable law.

A. The Dispute is a State-to-State Arbitration

21. The present dispute constitutes a State-to-State Arbitration, once Vemma should be considered an SOE. An SOE is an autonomous instrumentality of the state that possesses legal distinct personality[4]. While government-owned companies may qualify as nationals of a contracting state, those whose links with the state are so solid that they cannot be considered as distinct entities, do not[5].

B. Vemma is an SOE

22. Likewise, an SOE can be defined as any corporate entity recognized by law as an enterprise in which the state exercises ownership. Ownership is defined in terms of control, with full or majority voting rights or an equivalent degree of control. An example of such equivalent control is significant minority ownership, accompanied by articles of association that guarantee continued state control over the enterprise or its board of directors. Minority shareholding confers control when the corporate or shareholding structures result in an 'effective controlling influence by the state[6].

23. Alternatively, if the distinction between private and public investment were to be based on the source of the capital, while the Tribunal might consider Vemma was not an SOE at the time it made its investment in Mekar, it surely acquired this status by March 2021[7].

C. Bonooru controls Vemma directly

24. After audacious and ill planned business strategies[8], to secure the governmental function of assuring its citizens rights under Art. 70 of the Constitution, Bonooru increased its interest in Vemma to a controlling 55% stake[9].

---

[4] SCHICO, p. 283-298.
[5] CORTESI, p. 108–138.
[6] MACLAUGHLIN, p. 592-625.
[7] Response to Notice of Arbitration, p. 6, ¶4.
[8] Response to Notice of Arbitration, p. 7, ¶11.
[9] Response to Notice of Arbitration, p. 6, ¶4.

25. Under pressure, Bonooru implemented a large-scale restructuring of Vemma, replacing its board of directors with government functionaries, expanding its roles to include paramilitary activities, and equipping its legal team with lawyers from Bonooru's justice department to assist in its arbitration against Mekar[10].

26. The fact that a state is responsible for "all acts committed by persons forming part of its armed forces is a rule of customary international law", set forth in Article 3 of the 1907 Hague Convention and in Article 91 of Additional Protocol I. The armed forces are a state organ, like any other entity of the executive, legislative or judicial branch of government. Therefore, a company under which activities are performed must be considered as so[11][12].

27. These facts, alone or considered in combination with Vemma's existing ties with the government of Bonooru, indicate that Vemma qualifies as an SOE. Thus, the arbitration would in effect be between Bonooru and Mekar.

D. Subsidiarily Bonooru controls Vemma indirectly

28. *Maffezini* was submitted by a private party against Spain due to alleged violations of the MFN clause in the Argentina-Spain BIT. In this case, the issue of jurisdiction refers to the Respondent's contention that the dispute was not between Spain and the Claimant, but between the Claimant and a private corporation[13].

29. The Tribunal applied standards and rules of international law to decide whether an entity is considered a state body[14], such as: ownership, control, nature, purposes, objectives, and character of the actions taken[15].

30. There are three components to determine if a company is an SOE: (i) the activities must be meant for profit; (ii) the good or service is supplied in the relevant market in quantities; and (iii) the SOE is able to determine the price on its own[16].

31. Bonooru is the only governmental shareholder in Vemma, and no other shareholder holds more than a 7% stake in Vemma[17]. Furthermore, Vemma is controlled by Bonooru through three different approaches, directly and indirectly: (i) ownership; (ii) effective control; (iii) authorization.

---

[10] Uncontested Facts, p. 40, ¶65.
[11] Hague Convention (IV), Article 3 (cited in Vol. II. Ch. 42, ¶ 1); Additional Protocol I, Article 91.
[12] ICJ Nicaragua, p. 392.
[13] Maffezini, ¶65.
[14] Maffezini, ¶76.
[15] BROWNLIE, p.132.
[16] LEE, p. 33-72.
[17] Procedural Order No. 4, ¶2.

32. Ownership refers to Bonooru's constant participation in Vemma's corporate structure, regardless of any constructive control[18]. The level of ownership does not always serve as a reliable indicator of level of control, because a variety of voting leverage mechanisms can be used to provide certain shareholders with a disproportionate amount of decision-making power[19]. Hence the necessity of the concepts of effective control and authorization.

33. Effective control refers to states' direct or indirect power to oversee the management and policies of the company[20]. In the present case, Vemma's Board of Directors passes decisions by a majority vote[21]. Vemma's Articles of Incorporation require 50 percent of voting shares for a quorum at regular meetings, which include meetings for electing directors.

34. Bonooru's representatives on Vemma's board are present at every meeting. Therefore, they often form most members present and voting[22], meaning Bonooru exercises all three forms of control specified.

35. Bonooru, however, does not limit its participation in Vemma through direct means of control. A clear example is the fact that Ms. Sabrina Blue, head of Vemma's board of directors in 2010, was appointed Secretary of Transport and Tourism by the government of Bonooru[23] and was responsible for offering Vemma subsidies under the "Horizon 2020" Scheme to encourage flights from Mekar to Bonooru.

36. Bonooru's Ministry of Transport and Tourism recorded recurring payments made to Vemma under the Scheme between October 2011 and June 2016. In a press conference on 31 May 2016, Ms. Blue lauded Vemma's "*contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of our population within the Greater Narnian region. Vemma has certainly lived up to the standards set by its predecessor in Bonooru*"[24].

---

[18] BADIA, p.189-208.
[19] KANG, p. 843.
[20] BADIA, p. 189-208.
[21] Procedural Order No. 3, ¶ 3.
[22] Procedural Order No. 3, ¶ 3.
[23] Uncontested Facts, p. 31, ¶22.
[24] Procedural Order No. 4, ¶6.

37. From its date of incorporation until May 2020, Bonooru retained considerable stake in Vemma, which ranged between 31% to 38%[25]. However, the distinction between private and public investment, based solely on the source of the capital is outdated[26].

38. In a more functional approach and based on the decision of the Tribunal in *CSOB* [27], which applied Professor Aron Broches' test, it was determined that state ownership of the shares was not enough to decide whether the Claimant had standing under the Convention as a national of a Contracting State and if the activities themselves were "*essentially commercial rather than governmental in nature*"[28].

39. Consequently, to determine if Vemma can be considered a national of another country the Tribunal must analyze whether **(i)** it discharges an essentially governmental function; or **(ii)** acts as an agent for the government[29], as well as verify the above-mentioned formal standards.

i. Vemma Discharges an Essentially Governmental Function

40. Governmental function can be described as an activity that is expressly or implicitly mandated or authorized by Constitution or other law. It includes an activity performed on public or private property by a sworn law enforcement officer within the scope of its authority, as directed or assigned by the employer for the purpose of public safety.

41. Art. 70 of the Constitution of Bonooru[30] explicitly confers obligations upon the State to assist and ensure provisions of essential transportation to the population, either by sea or air modals[31].

42. Bonooru is an archipelago of 109 islands that span over 5000 square kilometers in which only four are considered major islands[32]. To promote equitable development through the country and tackle disproportionate distribution, the Constitutional Court of Bonooru assigned special importance to its population's mobility rights[33].

---

[25] Uncontested Facts, p. 29, ¶10.
[26] BUCG, ¶ 33.
[27] CSOB, p. 250.
[28] Ibid, ¶ 20.
[29] BROCHES, p. 331-355.
[30] Annex I, p. 41.
[31] Uncontested Facts, p. 28, ¶5.
[32] Ibid.
[33] Ibid.

43. Article 70 of the Constitution of Bonooru bestows positive obligations upon the State to assist and ensure the provision of essential transportation to the population living in remote areas[34].

44. Historically, Bonoori citizens residing in remote areas depended solely on waterways transportation to access the major islands. With the increased viability of commercial aviation, Bonooru channelled its resources towards developing a robust network of domestic airways[35].

45. The CAA, a branch of Bonooru's Ministry of Transport and Tourism regulates all civil aviation and up until 1979 was responsible for the management of Bonooru Air, the national carrier and monopoly civil airline[36], owned by the state company BA Holdings[37].

46. Under the PEA, Bonooru Air was split into three airlines. Royal Narnian was the company chosen as the flag carrier of Bonooru, which is owned and operated by Vemma, BA Holdings' successor[38], a former complete SOE[39].

47. Since its creation, the government of Bonnoru consistently maintained a sizeable stake in the company[40]. This participation is well-established in Vemma's founding documents[41]. As it acts as a substitute to BA Holdings, Vemma continues to perform its predecessor's governmental functions, as mandated by Article 70, and as determined by Art. 3 (h) of Vemma's Memorandum of Association[42].

48. According to the *Maffezini* Tribunal's understanding, even private corporations operating for profit if discharging essentially governmental functions delegated by the state could be considered as a public organ and thus be subject to the state's international responsibility for wrongful acts[43].

49. While not all companies which provide transportation services to the population of Bonooru are considered as performers of governmental functions, practices maintained for the fulfillment of governmental duties, such as access to remote areas, without

---

[34] Ibid.
[35] Uncontested Facts, p. 28, ¶6.
[36] Ibid.
[37] Uncontested Facts, p. 29, ¶7.
[38] Uncontested Facts, p. 29, ¶9.
[39] Uncontested Facts, p. 29, ¶7.
[40] Notice of Arbitration, p. 5, ¶18.
[41] Response to the Notice of Arbitration, p. 6, ¶3.
[42] Annex IV, p. 44: "*3. The objectives for which the Company is established are h) 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;*".
[43] Maffezini, ¶ 80.

expectation of profit or other form of financial return, cannot be considered commercial activities.

50. Phenac Business Today Podcast[44] interview with Ms. Misty Kasumi, former high-ranking employee of Bonooru's Ministry of Tourism, clearly demonstrates that several of Vemma's activities are not meant for profit.

51. Royal Narnian receives a significant amount of state aid, which is part of the reason why it is so profitable, and Caeli Airways' flight patterns show that significant resources are put into flights between Mekar and Bonooru, even though such routes are not profitable for the company but benefit Bonooru rather than Vemma or Caeli[45].

52. Because Vemma meets both the formal requirements of state ownership and the functional test, it performs activities of a public nature. Respondent requests that the Tribunal finds Vemma is a state entity performing governmental functions on behalf of Bonooru.

ii. Vemma Acts as an Agent for the Government of Bonooru

53. The term Government Agent stands for an unincorporated person or body of persons whose functions are exercisable on behalf of the state, in which the use of public resourses is delegated by law.

54. The Tribunal *BUCG*, a dispute submitted to the ICSID pursuant a disagreement under the laws of the China-Yemen BIT, had its jurisdiction challenged by the Respondent through objections *ratione personae* and *ratione materiae*[46].

55. The *rationae personae* objection referred to the question of whether the Claimant could be considered as a national of another contracting state. The *BUCG* Tribunal noted the issue is not the corporate framework of an SOE, but whether it functions as an agent of the state in the specific context[47]. While also applying the Broches test, the Tribunal understood that its factors are mirror images of the rules set out in Articles 5 and 8 of the ILC's Articles on State Responsibility[48].

56. Art. 5 provides that the conduct of a person or entity which is not an organ of the state, but which is empowered by the law of that state to exercise elements of the government authority, shall be considered an act of the state, provided the person or entity is acting in

[44] Annex VII, p. 54.
[45] Ibid.
[46] BUCG, ¶ 28.
[47] Ibid, p. 39.
[48] Ibid, p. 34.

that capacity in the particular instance[49]. The *BUCG* Tribunal understood that the emphasis should be on the words "*in the particular instance*"[50].

57. In the same sense, Art. 8 provides that the conduct of a person or group of persons shall be considered an act of a State, if it is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct[51].

58. The fact that the Claimant was a publicly funded and wholly state-owned entity by the Chinese Government is expressly addressed by the Tribunal, however as its activities were essentially commercial in nature, it concluded that the Claimant was in fact a national of another Contracting State[52].

59. As previously analyzed, Vemma's actions are not limited by merely commercial activities. Ms. Kasumi stated that Bonooru's companies tend not to be independent from the government as they receive significant State aid resulting in profits beyond expected[53].

60. A cited example was Caeli's flights between Mekar and Bonooru since these routes are not profitable for Caeli Airways[54]. Meaning that the significant resources put into flights on these routes benefit Bonooru more than Vemma or Caelli[55].

61. Ms. Blue worked for the Government of Bonooru and used public money to invest in the company, which in return acted as a branch of the Ministry of Transport, not fulfilling her obligations, as a member of the board of directors, to be independent and vote according to the company's commercial interests[56].

62. As provided, Bonooru directly influences Vemma's actions to fulfill its own interests. Bonooru's government takes advantage of granting subsidies, besides interfering in decisions made by the board of directors that should exclusively promote commercial purposes.

63. For the above-mentioned reasons, Vemma should be considered an agent working for the government of Bonooru and must be disqualified as a national of Bonooru.

---

[49] ILC, Art. 5.
[50] BUCG, p. 31.
[51] ILC, Art. 8. and RAJAVUORI, p. 1183-1228
[52] Ibid, p. 147.
[53] Annex VII, p. 55.
[54] Ibid.
[55] Uncontested Facts, p. 32, ¶28.
[56] COSSU, p. 557-588.

E. Mekar has not consented to arbitrate claims brought by SOEs under the applicable law

64. While the 1994 BIT stated that an enterprise meant any entity constituted or organized under applicable law, whether for profit or not and whether privately-owned or government-owned[57], the CEPTA, specifically Art. 1.6, determined that all the rights and obligations derived from the BIT ceased to have effect on the date of its entry into force[58].

SCOPE OF APPLICATION OF THE AGREEMENTS	
1994 BIT	**2014 CEPTA**
Article 1 "For the purpose of this Agreement: (a) "enterprise" means any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or government-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association; and a branch of any such entity; (...) (d) "investor" means a natural person possessing the citizenship of or permanently residing in one State in accordance with its laws, or any enterprise incorporated or duly constituted in accordance with applicable laws in that State, who makes the investment in the territory of the other State:"	**Article 9.1: Definitions** "For the purpose of this Chapter: Investor means a Party, a natural person, or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party; For the purposes of this definition, an enterprise of a Party is: (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);"

65. Furthermore, paragraphs 1 and 2 of Art. 1.6, state, respectively, that all investments made under the BIT were to be governed by the CEPTA from the date it entered into force and that no investor has the right to bring a claim under the revoked treaty[59].

66. The scope of application of the agreement extends to the definition of an enterprise and, according to the CEPTA, an enterprise is "*[…] constituted or organized under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)*".

[57] 1994 BIT, Art. 1(a).
[58] 2014 CEPTA, Art. 1.6.
[59] CEPTA, Art. 1.6, ¶1 and 2.

67. Article 31 of the VCLT contains four paragraphs, intended to be read together as one general rule of interpretation of treaties to be applied in all situations[60]. A thorough application of this rule requires the application of all the requirements of Art. 31, ¶1.

68. Such requirements are: an interpretation based on good faith; the ordinary meaning of the treaty terms, in those terms' context, and in the light of the treaty's object and purpose; giving consideration, where applicable, to the preamble, annexes, and agreements or instruments connected with the treaty's conclusion (Art. 31, ¶2 VCLT); taking into account post-treaty agreements, practice, relevant rules of international law (Art. 31, ¶3 VCLT); and any special meaning intended by the parties (Art. 31, ¶4 VCLT)[61].

69. The parties' intention was clearly to exclude SOEs from the scope of investors which could have their investments protected under the CEPTA and the BIT. Considering the BIT was consensually terminated and the CEPTA excludes SOEs from the scope of eligible investors, it is clear there was no intention to consent to arbitrate their claims.

70. It should also be mentioned that investors do not have legal certainty as a guarantee. According to the CEPTA, the fact that a Party regulates, including through modification of its laws, even if it negatively affects an investment or interferes with an investor's expectations, does not amount to a breach of an obligation[62].

71. Art. 25 VCLT provides for a simple notification as the appropriate means for States to express the intention not to become a party to the treaty. Furthermore, Art. 59 VCLT provides that, in cases where it is established by the parties, they no longer intend for that matter to be governed by a specific treaty, it shall be considered terminated.

72. In the present case, the parties to the CEPTA doubtlessly intended, applying the ordinary meaning and purpose standard of art. 31.1 VCLT, to terminate the BIT so that it no longer governs relationships between the parties and their respective investors. Art. XI BIT states that if ten years have passed since the treaties' ratification, and one year's notice is provided before termination, the treaty is no longer applicable or binding to the parties.

73. Furthermore, art. 1.6.1 CEPTA states that, once it has entered into force, the rights and obligations deriving from the BIT will cease to have effect. Parties clearly intended for investments made under the 1994 BIT, which includes Claimant's investment, to be governed by the CEPTA. Art. 1.6.2 CEPTA states no investor has a right to bring a claim

---

[60] WEERAMANTRY, p. 345.
[61] Ibid.
[62] CEPTA, Art. 9.8.2.

under the BIT after the CEPTA has entered into force. With termination of the BIT, Respondent withdrew its consent to arbitrate claims brought by SOEs.

74. Considering the change in public sentiment in Mekar which became contrary to the application of the BIT, that was freely deemed the "worst BIT in the history of BITs", the parties have freely terminated the BIT and it is no longer applicable under the VCLT[63].

75. The express inclusion of SOEs in the BIT within the definition of eligible investors, is a significant indication of the parties' consent to arbitrate disputes involving State-controlled claimants, which is absent in the present case, as the BIT is no longer in force. Both Bonooru and Mekar chose to exclude State-owned investors from treaty protection. Pursuant to Art. 26 VCLT, all these provisions are binding.

76. The *Methanex* Tribunal observed that "*the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation*"[64].

77. In the present case, the objectives behind the change in the wording of what would constitute as an investor is based upon the party's intention of leaving certain terms more elastic and open ended, subject to change and susceptible to receiving the meaning they might acquire in the subsequent development of the law[65].

78. Therefore, the Claimant's invocation of the CEPTA is an assertion of jurisdiction not within the scope of Mekar's consent to arbitration. The possibility of ICSID jurisdiction must fall within the reasonable contemplation of the parties involved, reiterating that consent is the cornerstone of the ICSID system.

79. Hence, consent should be limited to circumstances that a Contracting State can reasonably contemplate[66]. Considering the foregoing, Respondent submits that Vemma is not entitled to bring the present claims under the ICSID Additional Facility Rules and CEPTA Chapter 9.

80. The ICSID Additional Facility Rules only contemplate proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, pursuant to Article 2 of the ICSID Additional Facility Rules. Mekar has not consented to State-State arbitration with Bonooru under Chapter 9 of CEPTA either. Therefore, Vemma does not

[63] Procedural Order No. 3, ¶ 14.
[64] UNCITRAL Methanex, ¶ 18
[65] ARÉCHAGA, p. 49.
[66] Aguas, ¶ 194.

qualify as a national of another contracting state and consequently the Tribunal does not have jurisdiction.

Issue I: Jurisdiction of the Tribunal Conclusion

81. This Tribunal lacks jurisdiction to hear Claimant's arguments. Mekar only consented to Investor-State proceedings.

2. JURISDICTION: THE EXTERNAL ADVISORS TO THE CRPU *AMICUS CURIAE* SUBMISSION IS ADMISSIBLE AND THE CBFI SUBMISSION IS NOT

82. The Tribunal should not grant the leave sought by the CBFI to file *amicus* submissionecause **(A)** the CBFI is not independent from the disputing parties and its participation raises a conflict of interest; and **(B)** the CBFI does not file its *amicus* application in pursuit of any public interest matters, neither does it offer new arguments to the Tribunal.

83. The Tribunal should grant the External Advisors to the CRPU to file *amicus* submission ecause **(C)** CRPU's submission is in the public interest and addresses issues within the scope of the dispute.

84. The admission of *amici curiae* in investment arbitration should comply with the principles established by Article 41 of the ICSID Arbitration Additional Facility Rules and Article 9.19 CEPTA.

A. The CBFI is not Independent from the Disputing Parties

85. The CBFI is a non-profit industry association that represents Bonoori investors and the national leader in public policy advocacy on national and international business issues[67]. Vemma and LLC are members of the CBFI in good standing. LLC is advising Vemma on funding strategies with respect to its claim against Respondent[68].

86. This *amicus* file supposedly intended to provide context regarding the business climate of Bonooru, its corporate framework, the nature of the aviation industry and the impact of uncertainty on access to capital in Greater Narnia[69].

87. An essential attribute of *amici curiae* is independence from the disputing parties. The Tribunal of *Von Pezold*[70] determined that the independency requirement does not clash with the necessity of possessing significant interest in the proceedings.

88. Similarly to the present case, in *Von Pezold,* the applicants were associated with the Respondent party due to a relationship between one of the members of the body presenting the *amici* submission and the Respondent.

---

[67] Amicus Submission by the CBFI, p. 16, ¶2,
[68] Ibid.
[69] Ibid.
[70] Von Pezold, ¶62.

89. The Tribunal understood that in view of such circumstances surrounding the Petitioners, the Claimants would have been unfairly prejudiced by their participation and their application was denied.

90. The participation of LLC in this arbitration through CBFI raises a conflict of interest, considering Vemma and LLC are both members of the CBFI and that the latter is advising Vemma on funding strategies with respect to its claim against Respondent[71].

i. Expertise, Experience, and Independence

91. The Tribunal should only accept *amicus* submissions from persons who prove that they have the expertise, experience, and independence to be of assistance[72].While *amici* are not expected to be completely impartial, they must present their point of view in a way which is independent from the parties' procedural strategies[73].

92. An *amicus* should be expected to put forward its point of view in a way which is independent from the parties' procedural strategies, which means it cannot be invited and much less financed by them[74].

ii. Conflict of Interest

93. A conflict of interest is presumed to exist when an Executive Committee member "*is a party to the case or has a direct financial interest in the outcome of the case*"[75]. Although the CBFI's *Amicus* Brief Submission Guidelines state that members of the CBFI's Executive Committee are forbidden to participate in discussions or vote in relation to disputes where they have a conflict of interest, it resolved unanimously that Executive Committee member Horatio Velveteen, CFO of LLC, could vote in respect of the *amicus* submission in Vemma's claim against Mekar[76].

94. Granting the leave sought by the CBFI would be a violation of the independency requirement and would potentially favor deviations that could be detrimental to the fairness of the procedure[77].

---

[71] Amicus Submission by the CBFI, p. 16, ¶ 2.
[72] Suez, ¶ 13.
[73] MOURRE, p. 257-272.
[74] UNCITRAL Methanex.
[75] Procedural Order No. 3, ¶ 12.
[76] Ibid.
[77] MOURRE, p. 257-272.

B. The CBFI does not file its *Amicus* Application in Pursuit of Public Interest

95. The admission of *amicus curiae* in investment arbitration relies on two main points: the difference between investment and commercial arbitration and issues regarding legitimacy and fairness[78].

96. One of the purposes of investment arbitration is the review of governmental conduct, which means it fundamentally affects public interest although it uses the rules and procedures of commercial arbitration[79]. Public interest is a reasonable defense against an investor's exceeded claims for breach of treaty standards of protections[80].

97. In any case, Vemma is completely capable of bringing all relevant aspects of the controversy and the none of the issues mentioned by the CBFI are original in their nature, in a way which could not me brought by Vemma directly to the Tribunal's attention, as it has access to all knowledge, evidence, resources, and expertise to properly develop a defense, and most importantly, assist the Tribunal in deciding on the merits of the dispute.

C. The CBFI's *Amicus* Application does not Offer New Arguments

98. Another requirement to attest the necessity of an *amicus curiae* application is its ability to assist the Tribunal by offering a different point of view from that of the disputing parties, which the CBFI's application fails to do.

99. *Amici Curiae* must have sufficient information on the subject matter of the dispute to provide perspectives, expertise and arguments which are pertinent and thus likely to be of assistance to the Tribunal[81].

100. While the CBFI is composed of numerous businesses in Bonooru who may be considered experts[82], its admission as *amicus curiae* is not considered a necessity because it does not offer any new arguments[83].

---

[78] Ibid.
[79] Ibid.
[80] TITI, p. 101.
[81] ISHIKAWA, p. 373-412.
[82] Amicus Submission by the CBFI, p. 16, ¶2.
[83] Mekar's Application to Bar the Amicus Submission by the CBFI, p. 24, ¶1.

D. The External Advisors to the CRPU's Submission Addresses Issues within the Scope of the Dispute

101. The intervention of *amici curiae* is appropriate to render the procedure more transparent, and to favor the public's acceptance of the legitimacy of international arbitration in investment matters[84].

102. Tribunals have recognized that greater openness of investor-state proceedings would contribute significantly to improved public perceptions regarding the legitimacy of the investments and eventual disputes[85].

103. *Amici* are members of Mekari civil society whose professional focus is investment banking and were engaged as external advisors to the CRPU set up under the Law on Privatisation to advise on the privatisation, liquidation, and/or restructuring of Caeli[86].

104. Its tasks included performing an analysis of the technical and financial performance of Caeli, bringing indicators in the financial statements in line with accounting standards, the determination of the attractiveness of the enterprise for investors and ways to improve it, setting of the initial price and the preparation of an information package on the airlines, as well as identification of potential investors[87].

105. Its submission involves certain evidence that the rights received by Vemma were procured by means of bribes. According to the *Amicus*, as an independent organ of the CRPU and advisors involved in the entirety of the privatisation process, they are in the unique position to adduce unbiased facts before the Tribunal that may not be obtained from either disputing party. Their admission can help once the assessment of the legality of Vemma's investment is crucial to determine the Tribunal's jurisdiction.

E. The External Advisors to the CRPU's Submission is in the Public Interest

106. Additionally, the *Amicus* have a general interest in promoting fair business practices in Mekar. The *Amicus* have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects.

---

[84] UNCITRAL Methanex.
[85] VANDUZER, p. 681-724.
[86] Amicus Submission by External Advisors to the CRPU, p. 19.
[87] Ibid.

107. Finally, stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the *Amicus*, who regularly advise potential investors prospecting opportunities in Mekar[88].

108. The CEPTA includes a provision determining that protected investments are those made in accordance with the law of the host state, therefore, an investment not made in accordance with the host state's law will not be considered as protected under the Agreement[89].

109. As stated in *Salini*, the primary objective of such provision is to prevent the treaties from protecting investments that should not be protected, particularly because they would be illegal[90], known as the Clean Hands Doctrine.

110. The External Advisors to the CRPU's submission raises a question concerning public interest. Especially when considering issues of bribery or corruption, as informed, a*mici curiae* can play an important role in bringing relevant allegations of corruption to the Tribunal[91].

i. Evidence and Suspicion of Corruption

111. The evidence that the rights received by Vemma were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of Mekar's CRPU grants the *amicus* an unbiased position, as they are independent advisors and can provide information that could not be obtained from either disputing party[92].

112. The submission by the External Advisors to the CRPU raises inescapable jurisdictional implications. In the event an investment is proven to be the product of unlawful negotiation mechanisms, both customary international law and previous international investment tribunals have established that both parties lose access to the jurisdictional means of resolving their disputes.

113. In the present case, Mr. Umbridge has been singled out as the agent involved in the illegal transaction[93]. Considering the reasoning in *World Duty Free,* both should be treated as separate entities. However, the consequence of losing access to jurisdiction applies equally to states and investors.

---

[88] Ibid.
[89] 2014 CEPTA, Art. 9.
[90] DUMBERRY, p. 229-260.
[91] LEVINE, p. 218.
[92] Amicus Submission by External Advisors to the CRPU, p. 19.
[93] Application for leave to file a non-disputing party Amicus Curiae Submission by the External Advisors to the CRPU, p. 19.

114. If proven, and there has already been *suo moto* cognizance by the Constitutional Court of Bonooru[94], the consequence is that the claim becomes inadmissible and both parties lose access to jurisdiction for the resolution of their claims. Allocation of costs should be done according to each Party's involvement, treating the State entity separately from the agent that participated in the unlawful transaction.

115. Additionally, the *Amicus* has an interest in promoting fair business practices in Mekar, once stagnation in anti-corruption efforts also impacts the financial operations of the *Amicus,* who regularly advise potential investors prospecting opportunities in Mekar[95].

116. Likewise, the *Yukos* Tribunal stated that the imposition of obligations on fairness and transparency seek to encourage legal and *bona fide* investments[96]. Accordingly, if Vemma secures the investment in Caeli by acting in bad faith or in violation of the laws of Mekar, it should not be allowed to benefit from the CEPTA.

i. The Clean Hands Doctrine

117. The Clean Hands Doctrine has been consistently applied by tribunals faced with investments arising out of corruption[97]. In *World Duty Free*[98], the tribunal dismissed the claim as the bribery of the President of Kenya, which had the objective of enabling and reducing the cost of the investment, was a violation of the domestic law of both the host and home nations and international law.

118. The tribunal's reasoning centered around the fact that this violation of public policy would render the award unenforceable. This conclusion is accompanied by the tribunals in *Mamidoil*[99] and *Plama*[100] regarding the impossibility of granting protection to unlawful investments under the ECT. Furthermore, tribunals including *Spentex Netherlands* and *World Duty Free* have used corruption as a criterion for the allocation of costs.

119. The *Plama* Tribunal stated that the substantive protections of the applicable law cannot apply to investments made contrary to it[101]. Therefore, even if the CEPTA did not contain a provision requiring the conformity of the investment with a particular law, this does not

---

[94] Procedural Order n. 3, p. 87.
[95] Amicus Submission by External Advisors to the CRPU, p. 19.
[96] UNCITRAL Yukos, ¶ 1352.
[97] LE MOULLEC, p.22
[98] World Duty Free, ¶ 148.
[99] Mamidoil, ¶ 820.
[100] Plama, ¶ 273.
[101] Plama, ¶ 139.

mean that the protections provided by the Agreement cover all kinds of investments, including those contrary to domestic and international law[102].

120. In this case, granting protection to the Claimant would be contrary to the *nemo auditor propriam turpitudinem allegans* principle and the basic notion of international public policy—that a contract obtained by wrongful means (should not be enforced by a tribunal[103].

121. Despite the consequence of the parties withdrawing access to jurisdiction, the tribunal in *World Duty Free* recognized the need to treat the individual involved in the bribery separately from the state entity, which is a party to the treaty subject to its provisions and the host of the investment.

122. Nevertheless, the External Advisors to the CRPU are members of Mekari civil society and experts in investment banking, selected through a transparent and competitive procedure to advise on the restructuring of Caeli Airways[104].

123. Thus, we request the Tribunal to reject the CBFI's submission and admit the one submitted by the External Advisors to Mekar's CRPU, recognizing the public interest only in the admittance of the latter.

Issue II: Amicus Curiae Submission

124. This Tribunal should grant the leave sought by the CRPU for filing amicus submission and refuse CBFI's submission.

[102] Plama, ¶ 138.
[103] Plama, ¶ 143.
[104] Amicus Submission by External Advisors to the CRPU, p. 19.

3. RESPONDENT DID NOT VIOLATE CHAPTER 9 CEPTA

125. Claimant alleges that the maintenance of airfare caps by the CCM was arbitrary and illegal. It also holds that not offering subsidies to Caeli while being controlled by Vemma was discriminatory

126. It further argues that claims related to these allegations were prematurely dismissed by the Mekari Courts and that Mekar could not have enforced an arbitral award that was set aside in the country that was the seat of arbitration, despite its legality.

127. There was no breach of Chapter 9 CEPTA because (A) the actions taken by the CCM were non-arbitrary and did not inhibit Claimant from profiting from its investment; (B) the Executive Order 9-2018 was legitimate and non-discriminatory against Claimant; (C) Claimant was provided full access to justice through the Mekari Courts; and (D) Respondent had full discretion to enforce the award set aside by the Supreme Court of Sinnoh.

A. The actions taken by the CCM were non-arbitrary and did not inhibit Claimant of profiting from its investment

128. Claimant contends that the CCM's investigations prevented Caeli of profiting from its investment, hindering its performance on the market. However, Claimant's allegations of the unlawfulness of the investigations conducted by the CCM, and Respondent's consequent arbitrariness, are unfounded since (i) the investigations were reasonable and non-discriminatory, and (ii) the actions taken by Caeli justified the investigations.

i. The investigations were reasonable and non-discriminatory

129. When considering the concept of arbitrariness, the *EDF Services*[105] tribunal relied on an elaborate test, provided by Professor Christopher Schreuer, to determine whether state measures are arbitrary or not. Namely, four criteria were provided to discover if a measure was arbitrary enough to be unreasonable or discriminatory, which are:

a. A measure that inflicts damage on the investor without serving any apparent legitimate purpose;
b. A measure that is not based on legal standards but on discretion, prejudice, or personal preference;
c. A measure taken for reasons that are different from those put forward by the decision maker; or

[105] EDF, ¶ 303-304.

d. A measure taken in willful disregard of due process and proper procedure.

130. Paramount to that, the tribunal in ELSI concluded that arbitrariness is a willful disregard of due process of law, an act which shocks, or at least surprises, in a sense of juridical propriety[106]. This approach has been followed by many investment tribunals thereafter[107].

131. Furthermore, to determine the scope of the standard, the tribunal in *Electrabel* considered that a measure is not arbitrary if it is necessary to ensure that an appropriate parallel is made between the state's public policy, and the actions adopted by the state to achieve such policy[108].

132. Therefore, in the present case the measure itself must be analyzed. The investigations conducted by the CCM had a clear and legitimate purpose, which was to prevent anticompetitive behavior from Caeli. The enforcement of Mekari antitrust law should be expected by investors, and its rightful application should not offer surprises, since consumer protection is provided both in the preamble and in Art. 9.8.1 CEPTA[109].

133. Alongside this, the preamble establishes that the CEPTA should promote sustainable growth, which cannot occur if antitrust practices are taking place[110]. To prevent those practices in Mekar is to ensure that the nation has freedom to develop its economy, concurrently with its population.

134. An informed investor should be aware of the general scope of the law of the country where it decides to invest. Thus, the state is not responsible for the consequences of the investor's lack of diligence and unwise business decisions[111].

135. Claimant cited the MRTPA to argue that the CCM could never have launched the investigations because Caeli Airways' market share was 42%[112]. This interpretation of the MRTPA does not follow, and the measures were based on preexisting legislation.

136. Although Chapter III, (2), (a) of the MRTPA provides that the CCM may open investigations surrounding anticompetitive behavior of corporations that have a market share greater than 50%, there is no express limitation towards it. In fact, the provision specifically stipulates that "*the CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share*".

---

[106] ELSI, ¶ 128.
[107] Siemens, ¶318-319; Noble Ventures, ¶ 176; Lauder, ¶219.
[108] Electrabel, ¶ 179.
[109] CEPTA, pp. 71, 76.
[110] CEPTA, p. 71.
[111] PARKERINGS, ¶ 308; MTD, ¶ 167
[112] Notice of Arbitration, p. 3

137. The civil aviation industry is undoubtedly one of the sectors that always needs to be endowed with that discretion, primarily because of its preeminence of giving birth to monopolies, given the relatively small number of contenders in the market[113]. In the long-term, anticompetitive practices within this industry fundamentally deter the efficiency and cost of aerial transportation for all citizens.

138. For example, frequent-flyer programs have been recognized by an OECD report as a potential threat against competition protection, since it raises the cost for the consumer to change between airlines[114]. Caeli had not only implemented this for the average consumer, like many airlines have done before, but also provided for a corporate-discount scheme offered to small and mid-sized enterprises. This led to it becoming the only profitable carrier on most of the routes of the biggest airport in Mekar[115].

139. It is important to notice that 42% market share is considered a large number for most regions. According to *Statista*, the biggest market share for an airline in the USA in 2020 was of 19.3% for American Airlines[116]. Another example is Europe, where it took the combined market share of five major companies to reach the threshold of 50% in 2019[117]. Thus, Caeli's market share exceeded normality within Mekar's civil aviation industry, which could not be overlooked by authorities.

140. Not only this, but Claimant's status as an SOE heightens the possibility of anticompetitive behavior, relative to private counterparts, since incentives to aggressively compete on the market can exist because of specific governmental policy objectives[118]. These activities include setting prices below competitor's costs[119], which Caeli had done to ensure its rapid economic growth.

141. As was previously stated, Bonooru is known to take great interest in the civil aviation industry, since the country's population is largely tied to aerial transportation, given that Bonooru is an archipelago composed of 109 islands[120].That concern is even found on Art. 70 of the Constitution Act of Bonooru, which proves Bonooru awareness of the industry.

142. However, even if it is considered that the mark of 50% market share must be met, the investigation did not only reach Caeli, but also the Royal Narnian. The Moon Alliance

---

[113] Achille, 2017, p. 51.
[114] OECD Report, p. 4.
[115] Statement of Uncontested Facts, p. 34.
[116] Statista
[117] Aviator Report
[118] SAPPINGTON, pp. 479, 517
[119] Ibid, p. 479.
[120] Statement of Uncontested Facts, p. 28.

classifies as a joint venture aerial alliance, since there is no ownership between the companies, existing to advance the carriers' specific objectives[121]. Although there is no proprietorship involved, joint venture alliances are not exempt from antitrust scrutiny[122].

143. The two companies were strategic business partners, connected by the Moon Alliance[123]. The sum of their market shares exceeded 54% at the time the investigations began[124], which further proves the effect that Caeli had in Mekar's civil aviation activities.

144. In fact, antitrust risks regarding airline alliances usually concentrate on issues related to the overlap of different routes in each airport, as well as network dynamics[125]. Evidence of preferential slot-trading between the two companies was found, meeting this criterion, and leading to the first investigation conducted by the CCM.

145. Caeli was the focus of the investigation since it held most of the market share being scrutinized. Therefore, it posed a larger threat to the economic stability of the market, which constitutes the reasonableness of the measure.

ii. The actions taken by Caeli justified the investigation

146. The CCM's actions were justified and transparent. It was a culmination of factors that gave rise to the investigations: the rapid expansion of Caeli Airways' market share, the evidence of preferential secondary slot-trading between the Royal Narnian and Caeli, foreign subsidies provided to the company received by Vemma under the Horizon 2020 program, predatory pricing, and unfair subsidization. All those factors were publicly stated as reasons by CCM vice-president Iroh Iwamatsu[126].

147. In the airline industry, companies must compete for so-called natural monopolies, which are monopolies that arise through natural conditions in a free market. According to the International Civil Aviation Organization, airports are considered natural monopolies[127], since most of the time they are singular for each region, and many airports fail to price their services in a manner consistent with the outcomes of a working competitive market[128].

148. In June 2016, Caeli's business practices culminated in a breach of this competition at the most important airport in Mekar, as it became the only profitable carrier for Phenac

[121] KIMPEL, p. 476; SIMONS, pp. 841, 843.
[122] KIMPEL, p. 478; BENTLEY, p. B1.
[123] Statement of Uncontested Facts, ¶ 27, p. 32.
[124] Statement of Uncontested Facts, ¶ 36, p. 34.
[125] OECD Report on Airline Competition, p. 6.
[126] Statement of Uncontested Facts, ¶ 36, p. 34.
[127] ACI, p. 1.
[128] HUANG, p. 495.

International Airport on over half of the provided routes[129]. Therefore, the airline competition in Mekar suffered because of Caeli's predominant control over the most important natural monopoly in the country.

149. These elements enabled the CCM to legally take the measures it did to protect Mekar's economy within the civil aviation industry's archetype. During the time in which the investigations were conducted, proper procedure was always followed. Chapter III, (4), (d), MRTPA provides that any structural remedies may be imposed, as long as there is no equally effective behavioral remedy available.

150. As provided by Ms. Misty Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism, Caeli's entire business structure was based on undercutting its competition with lower prices[130], which could only be solved through systematic changes in the company's business model. Claimant itself admits that its pricing strategy led to an extremely rapid expansion of Caeli[131].

151. Moreover, the Horizon 2020 Scheme was another major issue that led to the investigations, since it provided additional subsidies that facilitated the use of an excessively low-pricing strategy by Caeli.

152. SOEs are known to have substantial advantages to recoup any losses from price-cap regulations, through direct expenditures from the public treasury[132]. Therefore, Horizon 2020 was a system that could allow Caeli to recover from any sizable loss in revenue created by the investigations, which were never unbalanced.

153. The tribunal in *Parkerings* rightfully delivered the understanding that a State has the right to enact a law at its own discretion[133]. It also provided that the investor must anticipate that the circumstances surrounding a state's legislative power could change[134]. The tribunal in *Genin* similarly concluded that state measures that reflect a clear and legitimate public purpose cannot be considered arbitrary[135].

154. As previously stated, the enforcement of Chapter III, (2), (a) MRTPA for companies that have a lower market share than 50% is possible, and Claimant should have predicted that, would it not structure its investment differently. Consonantly, the control of antitrust practices in Mekar is without a doubt a matter of public interest. The MRTPA expressly

[129] Statement of Uncontested Facts, p. 34.
[130] Annex VII, p. 54.
[131] Notice of Arbitration, ¶ 9-10, p. 3.
[132] SAPPINGTON, p. 515.
[133] PARKERINGS, ¶ 332.
[134] Ibid, ¶333.
[135] Genin, ¶ 370.

stipulates in Chapter IV, under "Factors to be considered", (h) that consumer welfare and public interest are included as essential elements contemplated by the provisions[136].

155. Moreover, the second investigation conducted by the CCM happened on the grounds of a complaint made by a consortium of smaller regional airlines that were finding it impossible to compete with Caeli because of a rise on the company's use of specific regional routes.

156. It is important to understand that frequency and destination of air travel are factors that are assessed when calculating the market share of airlines[137]. The rise on Caeli's market share also meant that other companies had less routes to choose from when booking new flights with costumers, which would eventually eliminate smaller players from the market.

157. Therefore, the CCM had no option other than to investigate and impose structural remedies on Caeli, such as airfare caps. Urgent action had to be taken to protect the market from antitrust practices, which could have caused serious and irreparable damage to the civil aviation industry, all of which was encapsulated on the MRTPA. Consequently, the measures conveyed by Claimant are not arbitrary and could never amount to a breach of FET.

B. The Executive Order 9-2018 was legitimate and non-discriminatory against Claimant

158. Claimant contends that Mekar should have granted monetary subsidies to Caeli within the Executive Order 9-2018, despite Bonooru having control over Vemma and providing financial resources to Caeli through Horizon 2020[138], which cannot follow.

159. Claimant's predatory, yet fragile business model, lead the company to a financial outbreak of its own making. The objective of the Executive Order 9-2018 was to stabilize the civil aviation industry in general. It cannot be contended that it should, even if indirectly, give aid to companies directly linked to foreign nations through stake ownership.

160. Mekar has complete discretion to take action to prevent further economic crises, not only within the civil aviation industry, but the entire nation. The use of its regulatory powers does not in any way amount to discrimination as provided by Art. 9.9.2, (c) CEPTA.

---

[136] Annex V, MRTPA, p. 50
[137] BABIĆ, KULJANIN, p. 385.
[138] Notice of Arbitration, p. 4.

161. In fact, it is protected by Art. 9.8.1, which provides for the right to regulate. This shall be utilized to achieve public policy objectives, such as consumer protection. Consonantly, Art. 9.8.2 determines that no breach of obligations is incurred by making use of Mekar's discretionary powers for these purposes, even if it negatively affects an investor's expectations of profit.

162. Moreover, the threshold drawn by tribunals when considering the discrimination substandard of FET is very high. The tribunal in *Saluka*[139] established that discriminatory behavior from the host state of an investment is only determined in instances where similar cases are treated differently at no reasonable justification. Moreover, the content of the actions taken by the state need to amount to a systematic conspiracy to destroy the investment[140], which was never proven through Claimant's submissions.

163. Furthermore, the MFN clause provided in art. 9.7 CEPTA provides that the treatment should be no less favorable than the treatment it accords in like situations, to investors of a third country and to their investments[141]. Parallel to that, Art. 9.6 concerns the national treatment of the state towards its own investors and to their investments, also in like situations.

164. The "likeness" test indicates the similarity between the investor and a set national or foreign investor or investment, in regards to the measure taken by the contracting state[142]. Factually, the situation that surrounded Caeli was very particular, given its status as an SOE. The tribunal in *De Levi* established that the differences amidst companies operating in the same industry can be found through an analysis of the market segment, as well as other relevant factors that affect the likeness between companies[143].

165. Furthermore, according to *Bayindir*, the requirements for like circumstances are objective, pertaining specifically to the facts that differentiated the companies when the measure was taken[144]. Other tribunals have also used this classification to analyze national treatment and MFN obligations[145].

---

[139] Saluka, ¶313.
[140] Glamis, footnote 1087 to ¶ 542; Waste Management, ¶138; FET - Unctad Series, p. 82.
[141] *CEPTA, p. 76.*
[142] Muhammet, ¶781; PT Ventures, ¶416; SCB (Hong Kong), ¶395; South American Silver, ¶710-711; Cengiz, ¶525; Mercer, ¶7.6; Urbaser, ¶1088; MNSS, ¶ 358.
[143] De Levi, ¶ 397.
[144] Bayindir, ¶ 309-310.
[145] Occidental, ¶ 174-176; Methanex, ¶ 35, 37; Thunderbird, ¶ 176-178.

166. Therefore, through the "likeness" test, Caeli and Larry Air are the only ones that fall under like situations concerning this measure, since Larry Air was also controlled by a foreign state. Using this logic, Respondent did not grant subsidies to either company.

167. Caeli was not the only investor not to receive financial assistance. Therefore, there is a central reason why the two companies did not receive financial aid from the Mekari government, which could never trigger discrimination against them.

168. The reasonable justification was to not utilize taxpayers' money for the purpose of enriching another nation, especially in the context of an economic crisis, such as the one Mekar has been suffering since 2016. SOEs often have specific assignments that go further than profitability[146]. As the two companies were integrated with foreign governments, the subsidies provided by Mekar would eventually revert into revenue for those countries' administrations, would they have been delivered.

169. Finally, protectionist motive and intent are factors that should be considered in the context of national treatment[147]. State measures do not amount to a breach if they produce no adverse effect onto the investment[148] and a measure cannot be considered arbitrary if it was the best response to a time of crisis[149].

170. Respondent was uniquely concerned to ensure that the economic strength of the industry would be maintained in order to protect the state's economy, specifically because it was dealing with a crisis that could produce irreversible effects onto the country.

171. The reasoning behind the Executive Order 9-2018 was simply to provide aid to companies which could not have been supported by the countries in which the investment began. As such, it should be considered that it was a legitimate and non-discriminatory act, taken by Respondent within the extent of its discretionary powers.

172. There was no intentions of causing nor adversely affecting Caeli. The subsidies provided to the company by the Horizon 2020 Scheme were public. Besides, the lack of subsidies granted by Mekar did not particularly affect the company's frameworks or its revenue flow.

C. Claimant was provided full access to justice through the Mekari Courts

173. Claimant alleges that it was denied justice by the Mekari Courts because of delays and a premature dismissal of its claim in the merits, which regarded the airfare caps executed

---

[146] SAPPINGTON, p. 499.
[147] S.D. Myers, ¶ 252-253.
[148] Ibid, ¶ 254.
[149] Enron, ¶ 281.

by the CCM and the fine to be paid by Claimant as a result of the second CCM investigation. However, it fails to consider the factual matters regarding the judicial proceedings at hand.

174. Denial of justice can only be found in particular circumstances, such as a refusal to entertain a legal claim, unjustified and excessive delays, or if the administration of justice is seriously and utterly inadequate, or with malicious misapplication of law[150]. The tribunal in *Krederi* provided that most frequently, denial of justice results from a serious defect in the adjudicative process, such as a violation of equal treatment of the parties or of various other core rights of litigants, for example the right to be heard and to present evidence[151].

175. The tribunal in *ELSI* set a high threshold for establishing denial of justice by fixing that it must encompass "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"[152]. Many other tribunals have used the same exact standard[153].

176. This has not occurred in the present case. The factual background provided by Claimant does not demonstrate or prove that any of these situations happened within the legal proceedings surrounding Claimant. Firstly, regarding the alleged delays, the average length of judicial proceedings in Mekar for commercial matters is 27 months. However, there is no evidence that the length of proceedings was excessive in this case. Caeli appealed against the measures taken by the CCM on 20 January 2019, while the final decision was made by Mekar's High Court on 15 June 2019, which amounts to less than five months.

177. Secondly, when considering the supposed premature dismissal of the claims in the merits, written by the honorable Justice VanDuzer, all fundamental issues encompassed by the CCM's actions were promptly analyzed, in a range of "reasonable conclusions given the facts before it"[154]. Therefore, any other claims regarding the CCM's actions would necessarily pass through the same reasoning and lead to an equivalent conclusion, regarding the interpretation of Mekari law.

---

[150] Azinian, ¶102-103; Krederi, ¶ 449; Iberdrola, ¶ 432; OECD, p. 29, 2004.
[151] Krederi, ¶ 449.
[152] ELSI, ¶128.
[153] Agility, ¶209; EBO, ¶ 473; Chevron, ¶ 8.26; Fouad Alghanin, ¶ 471; Mamidoil, ¶ 769; Bosh, ¶ 280; GEA, ¶ 312; Jan de Nul, ¶ 192-193; Loewen, ¶ 132; Mondev, ¶ 127.
[154] Statement of Uncontested Facts, ¶54, p. 38.

178. Since all aspects of the case were regarded in the decision, there was clearly no sight of malicious misapplications of legal standards nor any denial in analyzing the case to its fullest. Mekari civil procedure was respected at all times, and the fact that the case reached the highest courts of Mekar demonstrates that the lawsuit was taken seriously by the judiciary officials.

179. It is important to highlight that investment arbitration tribunals do not hold the power to sit as appellate instances to rule on the correctness of a domestic court decision[155]. Denial of justice is only procedural[156], and the decision made by the domestic courts can only be used to help determine whether there was a major deficiency in due process[157].

180. However, Claimant did not present any arguments that can substantiate that the decision made by Justice VanDuzer was lacking procedural efficiency, only mentioning that the claims on the merits were dismissed prematurely[158]. Claimant argues that the decision triggered a breach of FET, based solely on the fact that it did not rule in Claimant's favor, which is not at all sufficient for denial of justice to be present.

181. Therefore, the denial of justice standard provided in art. 9.9 of the CEPTA was never triggered by Respondent. The Mekari courts always acted diligently and in good faith, while analyzing all of Claimant's accusations against the CCM in full.

D. Respondent had full discretion to enforce the award set aside by the Supreme Court of Sinnoh

182. The enforcement of an award that is set aside in another country is not a valid ground for a fundamental breach of due process. Claimant's allegations of a breach of FET only stem from the fact that it intended to take an invalid offer given by its Moon Alliance partner, the Hawthorne Group.

183. Due process in the context of FET is usually tied to procedural propriety[159], transparency[160] and proportionality[161]. None are factors that were disregarded by the Mekari courts when enforcing the award that sought the illegality of Hawthorne Group's offer to acquire Caeli.

---

[155] Krederi, ¶ 486; Bridgestone, ¶ 410
[156] Reinhard, ¶ 273; Rumeli, ¶ 652-653.
[157] Liman Caspian Oil, ¶ 279; RosInvest, ¶ 279; H&H, ¶ 404.
[158] Notice of Arbitration, p. 4.
[159] Indian Metals, ¶ 226; Mondev, ¶ 127.
[160] Hydro Energy, ¶ 575; GPF, ¶ 543.
[161] Indian Metals, ¶ 226.

184. Both Bonooru and Mekar are signatories of the NYC, which deals with the enforcement of foreign arbitral awards. Art. V.1, (e) NYC provides that the recognition and enforcement of the award may be refused if the award has been set aside by a competent authority of the country where the award was made. The wording of this provision does not impose an obligation, but a possibility of abiding by the decision of annulment from the seat of arbitration.

185. Meanwhile, art. VII.1. NYC provides that the provisions of the Convention shall not "*deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon*". Namely, decisions regarding enforcement of awards may not be accepted, based on the laws of each individual country. Since Mekar's domestic law views the matter of the enforcement of the specific award brought upon this Tribunal by Claimant, it has all discretion necessary to enforce it.

186. This has been widely accepted by tribunals, such as in *Norsolor*. In that context, the award was set aside by the Vienna Court of Appeal in Austria, which was the seat of arbitration. However, the French Cour de Cassation provided for a landmark decision, by enforcing the award in France and establishing the principle that art. VII takes precedent in controversies regarding art. V NYC[162].

187. The same interpretation is widespread by signatory countries of the NYC. For example, the Higher Court of Cologne enforced an award that was to be reviewed in the seat of arbitration because the Parties had not previously and expressly agreed with the review of the award, which bound the parties to the award in Germany, given its own public policy and arbitration law[163]. Since German law was more lenient in that specific case, the award was enforced in the country.

188. The tribunals in *Al-Bahloul* and *Saluka* have both recognized that a facet of the breach of due process is the obligation to not use powers for improper purposes, for example those not covered by the law authorizing the powers[164]. This has not happened in the present case.

189. Not only does the NYC have an underlying principle of pro-enforcement[165], but so does the long-standing jurisprudence of the Mekari Courts on Mekar's Commercial Arbitration

[162] GAILLARD, p. 21.
[163] Cologne Case, pp. 399-400, ¶ *6.*
[164] Al-Bahloul, ¶ 221; Saluka, ¶ 307.
[165] KRONKE, NACIMIENTO, OTTO, PORT, pp. 331-41.

Act, as was stated in the decision[166]. The High Court of Justice of England and Wales, when deciding about *Diag Human S.E.* also confirmed that enforcement shall be addressed exclusively through the law of the court of the country where it is sought, not dependent on the seat of arbitration[167].

190. The courts decided that alleged leaks were not enough to prove that the enforcement should not occur[168]. Once more based on Mekari precedents, it was ruled that only substantial proof would be enough to effectively ascertain that the award was tainted by corruption, which Claimant could not provide at the time[169].

191. In this sense, the tribunal shall deem that there was no breach of the due process by the enforcement of the award that invalidated the Hawthorne Group's offer for the purchase of Caeli. All other standards provided by art. 9.9 of the CEPTA have also been respected by Respondent, leading the tribunal to the conclusion that FET has not been breached.

Issue III: Chapter 9 CEPTA

192. Respondent did not breach Chapter 9 CEPTA by violating the FET towards Claimant.

[166] Annex XIV, p. 66.
[167] England and Wales, Case No. RSP 06/2003
[168] Annex XIV, p. 66.
[169] Annex XIV, p. 66.

4. CLAIMANT SHOULD NOT RECEIVE PAYMENT FOR DAMAGES BY RESPONDENT

193. Mekar has not violated the CEPTA and owes Claimant no compensation. However, even if the Tribunal decides that Chapter 9 CEPTA has been breached, Claimant is still not entitled to receive compensation, because (a) the market value of Caeli is the only appropriate standard to measure the value of Claimant's investment; and (b) Respondent has already paid for Caeli when it acquired the company for 400M USD.

A. The market value of Caeli is the only appropriate standard to measure the value of Claimant's investment

194. Considering the applicable provisions of the CEPTA, MV can and should be used as the compensation standard in the present case. This shall occur because: (i) the *Lex Specialis* should be upheld by the arbitral tribunal, and (ii) the CEPTA provides MV as the compensation standard for a breach of FET.

i. The Lex Specialis should be upheld by the arbitral tribunal.

195. General principles of law are often used to determine compensation, but only when the *Lex Specialis* provided by the applicable Treaty is silent on the matter[170]. Following the same logic, the CEPTA expressly requires the application of the MV for anything other than unlawful expropriation, through its *Lex Specialis*, it becomes clear that that there is no room for the application of FMV in the present case. Therefore, the MV is the only appropriate compensation standard.

196. Compensation based on the supposed breach of FET can only amount to the MV of the investment through the CEPTA, which encompasses two provisions regarding compensation. Art. 9.21.1(a) provides for monetary damages at a MV, except as otherwise provided in Art. 9.12. The former does not address the type of breach that is compensable through MV. Art. 9.12.2, on the other hand, specifically targets compensation for unlawful expropriation, in which case the FMV standard is applicable.

ii. The CEPTA provides the market value as the compensation standard for a breach of FET

197. A requirement to pay compensation can take many forms. Most treaties are silent when it comes to compensation for non-expropriation violations, and tribunals have decided to choose based on the specific circumstances of each case[171]. One instance of this is the

[170] STEAG, ¶ 742; Manchester Security, ¶ 503; Hulley, ¶ 113; ADM, ¶ 118; Vivendi, ¶ 8.2.7.
[171] Marvin Roy Feldman, ¶195; S.D. Myers, ¶308-309

NAFTA, which only provides for compensation for Art. 1110, an expropriation related provision. The tribunal in *S.D. Myers* fittingly noted that the drafters of that convention intentionally left this issue open for tribunals to decide the best suited standard to be followed in each specific case[172].

198. Another type of treaty does not provide for a specific compensation standard, instead developing standalone clauses that include guidelines for the tribunal on what should be considered on matters of compensation. A great example is Art. 21(2) of the Iran-Slovakia BIT, which provides that compensation shall not include losses which are not incurred nor provable, or unreal profits, but it does not specify which standard should be used by tribunals[173].

199. The CEPTA falls on neither of those models, as it follows a much more direct approach. It expressly provides the circumstances in which each compensation standard is applicable. Art. 9.21.1(a) CEPTA is very clear to determine that monetary compensation shall be guided by MV, apart only from expropriation violations.

200. Claimant did not plead for expropriation of its investment. If the Tribunal does not find that Respondent breached Art. 9.12 CEPTA, regarding expropriation, it must deny any compensation made with the use of FMV. Therefore, the MV standard should be utilized in the present case.

201. Consonantly, when considering FMV under treaties that provided for its use only when attached to expropriations, tribunals have decided not to use the standard, but instead chose to use other methods that best suited their cases[174]. The tribunal in *Burlington* found a similar issue about whether it was possible to utilize customary international law to apply the FMV standard, but for lawful expropriation. It was decided to be possible, but only given the absence of a secondary rule in the United States – Ecuador BIT.

202. Since there is no absence to be found under the CEPTA, the appropriate compensation standard to be followed is that of the MV of the company. Therefore, no compensation should be paid to Claimant in the present moment as the MV of Caeli was previously paid for.

---

[172] SD Myers Inc, ¶309
[173] Islamic Republic of Iran-Slovakia BIT (2016).
[174] S.D. Myers, ¶307; LG&E, ¶37; Pope & Talbot, ¶ 81-90

B. Respondent has already paid for Caeli Airways when it acquired the company for 400M USD

203. Claimant requested to receive compensation in the amount of 700M USD, completely disregarding the fact that Respondent has already paid 400M USD for the legal purchase of its stake in Caeli on 8 October 2020. The MV of Claimant's investment has already been paid in full, so any possible compensation will not amount to any further payment.

204. In this sense, the *Chorzów* principle shall apply. Namely, the general rule that was established by the ICJ that "*reparation must, as far as possible, wipe out all the consequences of the illegal act*"[175]. As various tribunals have used the Chorzow Principle for compensation based on FET[176], Respondent does not object to this standard. However, there are underlying factors that shall be considered by this arbitral tribunal to attain the appropriate value of compensation, which is none.

205. The award issued by the tribunal in *MTD* applied the Chorzów standard to indicate that factors that reduce compensation should also be taken into consideration for the analysis of the consequences of a breach of FET, namely the business risks incurred by the investors[177].

206. Although there was a breach of FET, the tribunal decided that the Claimants failed to protect themselves from business risks inherent to their investment in Chile, which should be endured by themselves. An offer made by a shareholder for MTD's EPSA shares in the value of US$ 10,069,206 was attributed entirely to Claimants' fault. In addition, 50% from all other eligible expenditures valued by the tribunal were deducted from the compensation[178]. Consonantly, the tribunal in *Teinver* considered that it would be "disproportionate" to have the State pay for "indirect or remote" damages[179] .

207. In the present case, according to the Aviation Analytics of June 7, 2019, Caeli benefited from low oil prices without considering the risks and expanded, instead of giving the appropriate focus on its impending debt. As soon as the oil prices got higher because of the economic crisis, Caeli's weak business foundations easily collapsed[180].

[175] Chorzow, p. 47.
[176] S.D. Myers, ¶307.
[177] MTD, ¶ 241-242
[178] Ibid, ¶ 242-246
[179] Teinver, ¶ 1089.
[180] Annex IX, p. 57.

208. As previously stated, Ms. Kasumi did not condone Caeli's commercial model, warning as early as 2014 that if the number of consumers were to drop, or if the operating costs were to rise, it would likely affect Caeli's stability in the market[181].

209. Moreover, longstanding remarks made by members of the CRPU were ignored by Claimant. In 2011, right after the bidding process for Caeli was over, Vemma was warned by those members that its forecast was overly optimistic about the volatility of fuel prices and the potential takeover of the long-distance routes by competitors[182].

210. Claimant overlooked all these risks, although they were known by outside sources like Ms. Misty. An informed investor would not have ignored all the warnings and therefore the compensation claimed shall not be deemed attributable to Respondent, even if this tribunal decides in favor of a breach of FET.

211. Moreover, not every violation of the FET standard justifies damages for loss of future profit, and tribunals have taken this into consideration, even more when considering the context of economic crisis[183]. The application of the Chorzów principle entitles the Tribunal to consider the regulatory character of Mekari measures and public purpose characterizing each of the measures to equitably reduce the amount of compensation.

212. In *ESPF*, the Respondent pleaded for something similar, and the tribunal did not agree, but only because it did not consider the Respondent to bear an economic crisis at the time of that investment[184]. The tribunal made the disclaimer that if a financial crisis affects the entire economy, it becomes impossible to determine which losses are attributable to the regulatory measures, and which of them stem from the crisis itself[185].

213. In the present scenario, the economic crisis was prevalent in Mekar, being a factor that lowered Caeli's overall value. This is consonant to the fact that Caeli's business model could not fundamentally withstand the nation's financial unrest. Therefore, the tribunal should further reduce the eligible expenditures to a point equal to, or lower than the 400M USD, which have already been paid to claimant.

214. Furthermore, the application of *Chorzów* usually predicts a "willing buyer, willing seller" scenario, which never existed in the present case. As previously stated, the Hawthorne

---

[181] Annex VII, p. 54.
[182] Uncontested Facts, p. 31.
[183] Eiser, ¶ 365; Masdar, ¶ 508; PV Investors, ¶ 592; Marzal, 2021, p. 302.
[184] ESPF, ¶ 857
[185] Ibid

Group had no claim over the sale of Caeli's stakes, falling completely outside the scope of the aforementioned standard.

215. Instead of doing so at a reasonable price, Claimant attempted to sell its investment for a blatantly inflated price to a business partner from the Moon Alliance, through an invalid offer, by account of Mekari law. Selling Caeli for the price of 400M USD was the only possible legal scenario for Claimant, and it amounted to the MV of the company, considering the entire history of Caeli's performance in the market, ever since it was acquired by Claimant.

216. In this sense, Respondent has already paid for any due compensation that this Tribunal may find suitable. As the MV is being used as the compensation standard, Claimant does not have the right for additional compensation. Consequently, the price previously paid by Respondent is equal to any possible compensation for alleged breaches of FET provided by Chapter 9 CEPTA.

Issue IV: Compensation Standard

217. Even if the Tribunal decides that Chapter 9 CEPTA was breached by Respondent, the Tribunal should conclude that Mekar has already purchased the Claimant's investment at MV and award the Claimant no compensation.

PRAYER FOR RELIEF

Respondent respectfully requests this Tribunal to:

1. Decline to exercise jurisdiction due to the Claimant's status as an SOE;
2. Grant the leave sought by the External Advisors to the CRPU for filing *amicus* submissions and refuse CBFI's submission;
3. Find that Mekar did not violate Chapter 9 CEPTA;
4. In case the Tribunal finds Mekar violated Chapter 9, then the tribunal should conclude that Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation;
   4.1. In the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

Respectfully submitted on 23 September 2021

By:

Team Córdova

On Behalf of Respondent

The Federal Republic of Mekar