IN THE MATTER OF AN ARBITRATION UNDER ARTICLE 9(16) OF THE BONOORU-MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE ICSID ADDITIONAL FACILITY RULES

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

Vemma Holdings Inc.

(“Claimant” or “Vemma”**)**

v.

The Federal Republic of Mekar

(“Respondent” or “Mekar”**)**

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF DEFINITIONS

&	And
§/§§	Section/Sections
¶/¶¶	Paragraph/Paragraphs
Art./Arts.	Article/Articles
Bonooru	The Commonwealth of Bonooru
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
Claimant	Vemma Holdings Inc.
Constitution	Constitution Act of Bonooru (1947)
ed.	Edition
Executive Order	Executive Order No. 9-2018
External Advisors	External Advisors to the Committee on Reform of Public Utilities
FET	Fair and equitable treatment
First Investigation	First Investigation conducted by the Competition Commission of Mekar
i.e.	That is to say
Ibid.	At the same place
ICSID	International Centre for Settlement of Investment Disputes
IIAs	International Investment Agreements
ILC	International Law Commission
Mekar	The Federal Republic of Mekar
Memorandum	Vemma's memorandum of association
MFN	Most Favoured Nation
MRTPA	Monopoly and Restrictive Trade Practice Act, as amended in 2009
MST	Minimum Standard of Treatment
No.	Number
Notice	Claimant's Notice of Arbitration (15-November-2020)

OECD	Organization for Economic Co-operation and Development
p./pp.	Page/Pages
PCIJ	Permanent Court of International Justice
PO	Procedural Order
PO2	Procedural Order No. 2 (01-July-2021)
PO3	Procedural Order No. 3 (16-July-2021)
Problem	FDI Moot Case 2021
Respondent	The Federal Republic of Mekar
Response	Respondent's Response to the Notice of Arbitration
Second Investigation	Second Investigation conducted by the Competition Commission of Mekar
SOE	State Owned Enterprise
Supra	Above
Uncontested Facts	Statement of Uncontested Facts
Vol.	Volume

TABLE OF TREATIES, CONVENTIONS, AND RULES

Abbreviation	Citation
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965)
ICSID-AF Rules	ICSID Additional Facility Rules (2006)
ILC Arts.	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), (2001)
Transparency Rules	UNCITRAL Rules on Transparency in Investor-State Arbitration
VCLT	Vienna Convention on the Law of Treaties (1969)

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ADF	ADF Group Inc. v. United States, ICSID Case No. ARB (AF)/00/1, Award (9-January-2003)
ADM	Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. Mexico, ICSID Case No. ARB(AF)/04/5, Award (21-November-2007)
Ampal-American	Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC., EGI-Series Investments LLC, BSS-EMG Ivestors LLC, and Mr. David Fischer v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction (01-April-2016)
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Apotex PO3	Apotex Holdings Inc. and Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party (04-March-2004)
Apotex PO4	Apotex Holdings Inc. and Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr. Barry Appleton as a Non-Disputing Party (04-March-2004)
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Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Award, (27-August-2009)
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Duke Energy	Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador, ICSID Case No. ARB/04/19, Award (18-August-2008)
Eco Oro	Eco Oro Minerals Corp. v. Colombia, ICSID Case No. ARB/16/41, Procedural Order 6 (18-Feb-2019)
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PRELIMINARY STATEMENT

1. This is a simple case of legitimate government regulation of a foreign airline, Caeli, and the misuse by the Bonooru Claimant of this proceeding to extract from the Mekari government (on the fanciful contention that it was treated unfairly and inequitably under CEPTA) some US$700 million – *i.e.*, the difference between the US$400 million Mekar already paid when Claimant freely chose to resell the airline to Mekar and an arbitrary US$1.1 billion valuation that Claimant asserts the airline was worth at some time during its relatively short life under Claimant's management. Claimant is entitled either to no damages because it was at all times afforded FET or, even if some CEPTA violation could be proven, to a much lesser figure that accounts for the correct valuation of Caeli and all diminutions in value that could never be charged against Mekar.

2. In any event, Mekar will invite this Tribunal to find that Claimant is indistinguishable from the Bonooru state and, therefore, that this is in reality a state-to-state arbitration for which no jurisdiction is available under CEPTA. In the periphery of the case also lie applications by two potential *amici* to be admitted as such. Mekar supports the admission of the one *amicus* who proposes to place before the Tribunal disturbing and very material charges of corruption by Claimant and is prepared to take no position in respect to the admission of the other who simply offers general economic information as available to Claimant as it is to anyone else.

STATEMENT OF FACTS

3. The **Federal Republic of Mekar** ("Respondent") is a country that has faced prolonged political instability.[1] Mekar's growth was stunted by ineffective economic reforms starting in 1994.[2]

4. In 1994, Mekar and Bonooru signed the 1994 Bonooru-Mekar BIT.[3] Further negotiations later led in 2016 to a more comprehensive treaty, CEPTA,[4] that better balanced investors' and host States' rights.[5]

5. In 2009, Mekar revised the MRTP Act that created the Competition Commission ("CCM"), an autonomous entity with directors independent from government influence.[6]

6. Between 1980 and 2015, the Mekari judicial system did not expand to keep pace with the staggering 80% growth of the population in Mekar.[7] At the times relevant to these proceedings, Mekar understandably prioritized criminal cases over civil or commercial matters, while still keeping the average time of judicial proceedings around two years.[8]

7. **Vemma Holding Inc**. ("Claimant") acquired a controlling 85% stake in Caeli Airways in a tender in 2011.[9] Claimant was an airline holding company incorporated in and owned in significant part by Bonooru. It also owned Royal Narnian, the Bonooru flag carrier and national airline.[10] Vemma even provided services to remote islands[11] in Bonooru to ensure under Art. 70 of the Bonooru constitution the population's mobility rights[12] that the State was under a legal obligation to protect, as Bonooru's Constitutional Court held.[13] After

1 Uncontested Facts, ¶12

2 Uncontested Facts, ¶12

3 Problem, p.69

4 Uncontested Facts, ¶32

5 PO3, ¶14

6 Uncontested Facts, ¶19

7 Uncontested Facts, ¶13

8 Uncontested Facts, ¶13

9 Uncontested Facts, ¶24

10 Uncontested Facts, ¶10

11 Uncontested Facts, ¶6

12 Uncontested Facts, ¶8; Problem, p.44

13 Problem, p.42

Claimant's purchase of Caeli, both of its fully controlled subsidiaries, Caeli and Royal Narnian, were part of the Moon Alliance.[14]

8. In connection with its purchase of Caeli, Claimant also entered into a Share Purchase Agreement and a Shareholders Agreement ("SA") with Mekar Airservices, the Mekari entity that sold Caeli in the tender.[15] The SA exchanged rights of first refusal customary in such agreements. Members of the committee in charge of the tendering process for Caeli noted that Claimant's proposal relied on an overly optimistic forecast, which did not account for serious volatility of fuel prices.[16] The CCM also sought an undertaking from Caeli in connection with its 85% purchase that it would not engage in high-level cooperation or anti-competitive behavior with other Moon Alliance members, much less with Royal Narnian which Claimant also controlled (unlike other unaffiliated members of the Alliance).[17]

9. Although it is true that Caeli became profitable after Claimant's 2011 acquisition, those profits were directed to international route and fleet expansion instead of improving the financial health of the company.[18] Caeli's losses were concentrated in the high-traffic routes between Mekar and Bonooru.[19] Indeed, representatives of Mekar Airservices, the minority shareholder in Caeli, warned Claimant repeatedly that its business approach was extravagant[20] and that it should cut back its operation.[21]

10. On the same day of 2011 on which Claimant submitted its bid proposal, a former Chair of its Board of Directors was appointed as the Bonoori Secretary of Transport and Tourism.[22] The following year, the Secretary launched the "Horizon 2020" Scheme, which offered

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14 Uncontested Facts, ¶¶11,25

15 Uncontested Facts, ¶26

16 Uncontested Facts, ¶24

17 Uncontested Facts, ¶25

18 Uncontested Facts, ¶¶31,29

19 Uncontested Facts, ¶33

20 Uncontested Facts, ¶29

21 Uncontested Facts, ¶31

22 Uncontested Facts, ¶22

recurring and generous subsidies to tourism companies, including Claimant.[23] On 28 October 2011, Claimant received its first subsidies under this Scheme.[24]

11. By 2015, Caeli had sunk again into bad financial health.[25] Nevertheless, perhaps financed by the subsidies Bonooru provided it under "Horizon 2020", Claimant continued to slash its already low airfares.[26] In 2016 the CCM was compelled to launch its first investigation to determine whether Caeli had adopted predatory pricing strategies to hinder competition.[27] The investigation was triggered in part because Caeli *and* Royal Narnian (both under Claimant's control, unlike other members of the Moon Alliance) together controlled 54% of the airline market and had engaged in secondary slot-trading practices.[28] As noted, the subsidies by Bonooru to Caeli under "Horizon 2020" were also a concern.[29] As an interim measure, the CCM placed airfare caps which were set reasonably above the rates Caeli charged on set routes and Claimant did not immediately protest or challenge.[30]

12. In December 2016, the CCM was further compelled to launch a second investigation of Caeli after a consortium of small regional airlines complained that Caeli was "squeezing" them out of the market[31] by systematically undercutting prices on certain routes to and from Phenac International airport.[32]

13. By March 2017, a currency crisis befell Mekar.[33] Caeli requested permission to denominate its airfare in US Dollars instead of MON (Mekar's currency) until the crisis abated, a request Mekari officials promptly approved.[34] However, as 2017 ended and into

23 Uncontested Facts, ¶28

24 Uncontested Facts, ¶28

25 Uncontested Facts, ¶35

26 Uncontested Facts, ¶¶34,35

27 Uncontested Facts, ¶36

28 Uncontested Facts, ¶36

29 Uncontested Facts, ¶36

30 Uncontested Facts, ¶37

31 Uncontested Facts, ¶38

32 Uncontested Facts, ¶38

33 Uncontested Facts, ¶39

34 Uncontested Facts, ¶40

2018, the economic situation and currency travails in Mekar continued to deteriorate.[35] In 2018, Mekar's government was compelled to require *all companies operating in the country* (not just Caeli and not just airlines) to price their products exclusively in MON.[36]

14. By August 2018, the CCM concluded its first investigation and found that Caeli engaged in predatory pricing, noting that the subsidies received by Claimant from Bonooru under the Horizon 2020 scheme – money is, after all, fungible – permitted Caeli to reduce its airfare below the average avoidable costs.[37] Accordingly, the CCM imposed a penalty of MON150 million on Caeli.[38] The record is barren of any facts suggesting, much less showing, that the investigation was corrupt, unmotivated, faulty, or that the relevant market that triggered it was defined unjustifiably.

15. In 2018, Caeli requested for the first time that the CCM lift the fare caps imposed in 2016. The lifting of caps was refused at least until the two pending investigations were finished.[39] Only then did Caeli seek judicial review of the CCM's airfare caps that had been set two years earlier.[40] By then however, the high volume of judicial cases stemming from the economic crisis that had worsened after 2016, made it difficult to promptly schedule such judicial review, but a hearing on Caeli's challenge to the fare caps was in fact scheduled for April 2019.[41] In June 2019, barely two months after that hearing, Mekar's high court rejected Caeli's challenge to the airfare caps.[42] The entire judicial review process took only a year and four months after Caeli chose to trigger it – six months less than the average, despite that criminal matters were being prioritized.

16. In September 2018, the Mekari President adopted Executive Order 9-2018, granting subsidies to airlines, in an attempt to alleviate some of the hardship suffered by airlines from the requirement to price in MON, while presumably much of their costs were priced in appreciating hard currency.[43] However, the Secretary of Civil Aviation, who had

35 Uncontested Facts, ¶41

36 Uncontested Facts, ¶42

37 Uncontested Facts, ¶45

38 Uncontested Facts, ¶45

39 Uncontested Facts, ¶43

40 Uncontested Facts, ¶43

41 Uncontested Facts, ¶44

42 Uncontested Facts, ¶54

43 Uncontested Facts, ¶46

discretion to grant or deny such subsidies, rejected both Caeli and Larry Air's application for subsidies[44] on grounds that these were the only two airlines owned in any significant part (directly or indirectly) by a foreign government.[45] Mekar's deputy Minister of Transportation noted the unfairness in granting subsidies to State-owned enterprises, much more so to Caeli that had recently been found to have misused the subsidies bestowed on it by its home State (Bonooru) to support anticompetitive conduct in Mekar.[46]

17. Meanwhile, rising oil prices worldwide left Caeli in a state of deeper financial distress, proving the prescience of those members of Mekar's privatization committee who back in 2011 had already warned that Vemma's bid for Caeli failed properly to account for the inherent volatility in fuel prices.[47]

18. In January 2019, the CCM completed its second investigation concluding that Caeli had abused its dominant position at the Phenac International Airport. The CCM imposed on Caeli a MON200 million fine as a result[48] and decided to keep the fare caps in place until the aggregate market share of Caeli and Royal Narnian (both jointly controlled by Claimant) had fallen below 40%.[49] By the third quarter of 2019, the market share condition to lift the caps (*i.e.*, that Caeli and Royal Narnian control less than 40% of the Mekar market) had been met, and thus the CCM promptly lifted the airfare caps.[50]

19. The record shows that Caeli applied for a US$200 million loan from a Mekari bank.[51] The bank offered a credit line at an interest rate commensurate with Caeli's CCC+ rating as determined by the IICRA. Caeli refused this loan.[52]

20. In November 2019, Claimant decided to sell its stake in Caeli and said to have secured a US$600 million offer from Hawthorne Group LLP.[53] Claimant communicated the terms of the offer to Mekar AirServices pursuant the rights of first refusal contained in the SA.

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44 Uncontested Facts, ¶¶46,47

45 Uncontested Facts, ¶47

46 Uncontested Facts, ¶46

47 Uncontested Facts, ¶48

48 Uncontested Facts, ¶49

49 Uncontested Facts, ¶49

50 Uncontested Facts, ¶55

51 Uncontested Facts, ¶51

52 Uncontested Facts, ¶51

53 Uncontested Facts, ¶56

Mekar AirServices refused, to match the price arguing that it was improperly inflated and not entered into at arm's length – a commonplace condition in rights of first refusal.[54] After failed negotiations, Mekar Airservices filed a request for arbitration with the SCC Arbitration Institute pursuant to the terms of the SA.[55] The sole arbitrator, appointed by the SCC Secretariat, rendered an award in favor of Mekar Airservices on 9 May 2020 concluding that the Hawthorne offer was not legitimate and thus did not trigger Mekar AirServices's obligation to match it.[56] This award was later set aside in the seat of arbitration (not Mekar or Bonooru) apparently in part on the basis of information from an NGO, the CILS, that the arbitrator had been bribed by Mekar AirServices.[57]

21. Mekar AirServices sought to enforce the award in Mekar, despite the award having been set aside in its venue – admittedly a rare, but not unprecedented, procedure. The High Court of Mekar hearing the application for enforcement of the award concluded that the CILS was not reliable, as its credibility was affected by foreign funding,[58] and thus enforced the award.[59] This effectively quashed the Hawthorne bogus "transaction." The sale to Hawthorne was unlikely to be consummated as it may just have been a "stalking horse" to compel Mekar AirServices to buy Vemma's stake at an inflated price – a conclusion compelled by the arbitral award that Hawthorne's offer was not generated in an arms-length transaction. Even if Hawthorne had bought Vemma's stake in Caeli, the refusal by Mekar AirServices to be "bullied" by an illegitimate offer into buying Vemma's shares would have forever cast a pall on the ownership of Caeli in Hawthorne's hands (and in the hands of any subsequent purchaser of those shares), as such ownership would remain subject to Mekar AirServices' rights under the SA.

22. Eventually, Mekar Airservices acquired from Claimant its 85% stake in Caeli for US$400 million – remarkably, a price at which Hawthorne apparently was *not* prepared *actually* to pay for those shares despite having ostensibly proposed in November 2019 to buy these very shares at a considerably higher price.[60] Under Mekari ownership and as the only

54 Uncontested Facts, ¶57

55 Uncontested Facts, ¶57

56 Uncontested Facts, ¶58

57 Uncontested Facts, ¶¶60,61

58 Problem, p.66

59 Uncontested Facts, ¶62

60 Uncontested Facts, ¶63

State airline in Mekar, Caeli was expected to undertake activities of public importance and therefore Mekar had to infuse capital into Caeli to improve its financial health going forward.[61]

23. After Claimant's departure from Caeli and Mekar, Bonooru restructured Claimant's business as it even had failed to provide services through Royal Narnian to remote islands in Bonooru to discharge the State's obligations under Art. 70 of the Bonooru Constitution.[62] Bonooru's stake in Claimant thus increased to 55%.[63] Consequently, Claimant's Board of Directors was replaced with government officials, its functions were expanded to include paramilitary activities, and state lawyers represented Claimant in this arbitration against Mekar.[64] Plainly, Claimant became what it had, in fact, been before – a shadow government entity. Indeed, as noted, Royal Narnian had openly been the national airline of Bonooru throughout the time relevant to these proceedings.

24. On 15 November 2020, Claimant filed the Request for Arbitration alleging a breach of the FET under the CEPTA and sought US$700 million in compensation.[65]

25. On the 19 April 2021, the Consortium of Bonoori Foreign Investors ("Consortium") applied to appear as an *amicus curiae*.[66] The Consortium claims to be a non-profit industry association whose objective is market development, growth of the economy, and the protection of investments and investor rights, including Claimant.[67]

26. Claimant and Lapras Legal Capital, which is advising Claimant in this proceeding against Mekar, are also members of the Consortium.[68]

27. On 28 May 2021, External Advisors filed an application to appear as *amicus curiae* in this proceeding.[69]

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61 PO3, ¶10

62 Uncontested Facts, ¶65

63 Uncontested Facts, ¶65

64 Uncontested Facts, ¶65

65 Uncontested Facts, ¶63

66 Problem, p.15

67 Problem, p.16

68 Problem, p.16

69 Problem, p.18

28. External Advisors is a Mekari civil society with focus on investment banking, having acted as an independent advisor to the government Committee in the privatization process of Caeli in 2011.[70]

29. On 15 June 2021, Claimant moved to reject the *amicus* submission of the External Advisors and to accept the application by the Consortium; and on 18 June 2021, Mekar moved conversely to bar the *amicus* submission by the Consortium and to admit the submission by External Advisors.[71] Mekar requested that the Tribunal apply the Transparency Rules to this proceeding pursuant Art. 9(20)(6) of the CEPTA.[72]

30. The Transparency Rules allows the Tribunal not only to assess whether *amicus* submissions are relevant to the proceedings, but also to analyze them in light of the objective of these rules.

31. On 1 July 2021, the Tribunal instructed the parties to address the admissibility of the *amici* submissions at this procedural stage.[73]

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70 Problem, p.19

71 Problem, pp.21-24

72 Problem, p.24

73 PO2, ¶3

PART I: ISSUE ON JURISDICTION

I. THERE IS NO JURISDICTION UNDER CHAPTER 9 OF THE CEPTA

32. Art. 9(1) of the CEPTA, defines who is an "Investor" thereunder entitled to invoke the CEPTA's dispute resolution mechanism, providing that:

> "*Investor means a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party;*
>
> *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);*(…)"[74]

33. In terms specific to this case, to qualify as an "Investor" Claimant must not only be constituted under the laws of Bonooru but it must also have substantial *business* activities in Bonooru. Alternatively, if Claimant had no such substantial business activities in Bonooru, it could qualify as in "Investor" if it were constituted in Bonooru *and* was controlled by an enterprise constituted in Bonooru that had substantial *business* activities there.

34. Claimant is not a protected "Investor" because, as shown below, it does not have substantial *business* activities in Bonooru **(A)**; and is neither owned nor controlled by an *enterprise* with substantial *business* activities in Bonooru **(B)**. Moreover, for those reasons, Claimant separately does not qualify as a "*national of another State*" pursuant Art. 2 of the ICSID-AF Rules and jurisdiction in this case is lacking for that reason as well **(C)**.

[74] CEPTA, Art.9(1)

A. Claimant does not have substantial *business* activities in Bonooru

35. Claimant activities in Bonooru are governmental, not business activities. Whether its activities are "substantial" is irrelevant if they are not of a business nature, a conclusion drawn from the very text of Art. 9(1) of the CEPTA, which Claimant attempts to gloss over by focusing on the word "substantial".

36. Two generally recognized tests are used to assess whether an entity is commercial or governmental: the structural and the functional tests.[75] These tests have been variously applied in the domestic laws of common law and civil law jurisdictions – typically addressing issues such as sovereign immunity, vicarious liability, and the like. They look, respectively, at the structure or the nature of the activities of an enterprise to determine whether it is an "*agent of the government or is discharging an essentially governmental function*".[76]

37. While the first (structural) test focuses on the entity's position in the government structure, and who or how it is controlled,[77] the second (functional) test focuses on what the entity in fact *does* – it asks, whether the functions carried out by the enterprise are commercial or governmental.[78] The tribunal in *Mafezzini* held that this test looks at factors such as "*the nature, purposes and objectives of the entity whose actions are under scrutiny*".[79] Likewise, the tribunal in *Salini* took into consideration the object of the functions provided by the ADM to determine that its activities were governmental and not commercial.[80]

38. These tests have been applied outside the scope of the ICSID convention despite its ICSID-related origins.[81] In fact, the question is not restricted to cases under the ICSID

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75 *Mafezzini Jurisdiction*, ¶¶77-80; *Salini*, ¶31; *CSOB*, ¶¶17-20; *Beijing Construction*, ¶¶32-33; *Tatneft*, ¶¶128-150; *Flemingo Jurisdiction*, ¶426; *Italy v. Cuba*, ¶161; *Masdar*, ¶170

76 BROCHES, pp. 354-355

77 *Mafezzini Jurisdiction*, ¶¶77-79; *Salini*, ¶32; *Flemingo Jurisdiction*, ¶426

78 *Mafezzini Jurisdiction*, ¶80; *Salini*, ¶33; *CSOB*, ¶20

79 *Mafezzini*, ¶76

80 *Salini*, ¶33

81 *Tatneft*, ¶¶128-150; *Italy v. Cuba*, ¶161

Convention but is rooted in the customary rules on attribution reflected in Art. 5 and 8 of the ILC Arts.[82]

39. In the present case, the record shows that Claimant exercised governmental functions on behalf of Bonooru's government when carrying out activities there. We underscore that the question under Art. 9(1)(a) of the CEPTA is whether Claimant engages in governmental activities *in Bonooru,* its own territory, not in Mekar's territory. That quoted jurisdictional clause describes an "Investor" in relevant part as: "(…) *an enterprise* (…) *under the laws of that Party and has* (…) *business activities in the territory* ***of that Party*** **(**…)" [emphasis added],[83] *i.e.,* the territory in which it is organized (*i.e.,* Bonooru in this case), not in which it seeks to make a (foreign) investment (*i.e.,* Mekar).

40. The disparate nature of Bonooru's geography resulted in major public facilities, such as healthcare and education, being concentrated only in four of its 109 islands.[84] To grant its widely-dispersed population's access to those major public facilities, Art. 70 of the Constitution provides that Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands.[85] The Constitutional Court of Bonooru held in a 1964 ruling that Art. 70 "*bestows positive obligation upon the State to assist and ensure provision of essential transportation* (…)".[86] It is Bonooru's *government* responsibility and duty to ensure these services are in fact provided, and it does so through Vemma and its subsidiary, Caeli.[87]

41. Claimant concedes that its mission in Bonooru is to be a placeholder for Bonooru's government in providing constitutionally mandated services "*for the benefit of its population in accordance with Article 70 of the Constitution Act*".[88] It does so under the direction and control of the Government and regardless of profitability, as also conceded by Bonooru's Prime Minister.[89]

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82 *Beijing Construction*, ¶34

83 CEPTA, Art. 9(1)(a)

84 Uncontested Facts, ¶5

85 Supra, ¶7; Problem, p.41

86 Uncontested Facts, ¶5

87 Uncontested Facts, ¶5

88 Problem, p.44

89 Uncontested Facts, ¶8

42. In its 1964 ruling, the Bonooru Constitutional Court was of the view that Bonooru's continued shareholding in Claimant, and the subsidies enjoyed by Royal Narnian, would ensure that Vemma and its subsidiary would continue to be used *for the public benefit.*[90] Therefore, Claimant's main objective in Bonooru was always to discharge governmental tasks under the State's supervision and direction.

43. So much so, that on 2 March 2021, when Claimant failed to provide those services under Art. 70 of the Constitution, Bonooru's government implemented a bail-out program pursuant to which it increased its stake in Vemma to 55% to ensure the continuity of those governmental activities.[91]

44. This is *a fortiori* from *Salini.* There, the tribunal looked at the nature of ADM's activities, construction, maintenance and operation of highways delegated to it by the state of Morocco.[92] The tribunal concluded that those activities were under governmental control and substituted for governmental services.[93] Therefore, they were governmental in nature, despite the fact that the same activities in another context could be purely commercial.

45. Claimant's activities in its own territory had a clear and paramount goal: acting in the name and place of Bonooru to discharge governmental activities. This is confirmed in events related to Claimant's acquisition of Caeli that impacted in Bonooru's territory. The day Claimant submitted its bid for Caeli, its former head of Board of Directors was appointed the Secretary of Transport and Tourism in Bonooru.[94] That same Bonooru official launched the Horizon 2020 scheme to subsidize the Claimant as soon as Mekar's CCM approved the acquisition.[95] The very purpose of the scheme was for Claimant to promote tourism in Bonooru by drawing more travelers from Mekar's territory – even at a loss[96] – thus enhancing mobility rights of Bonooru's population.[97] When Caeli shut down these loss-making routes in June 2019, Claimant promptly announced its intention to sell

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90 Problem, p.44

91 Uncontested Facts, ¶65

92 *Salini*, ¶33

93 *Salini*, ¶33

94 Supra, ¶10

95 Supra, ¶10

96 Uncontested Facts, ¶33

97 Uncontested Facts, ¶28; PO4, ¶6

its stake in Caeli,[98] plainly because its activities in Respondent's territory stopped being benefit *for Bonooru's government.*

46. This intertwining between Claimant and its own Bonooru government was denounced by a former high-ranking employee in Bonooru's Ministry of Transport and Tourism,[99] who complained that significant governmental resources were spent on Mekar-Bonooru routes for the benefit the State of Bonooru rather than of Claimant itself.[100]

47. Simply put, Claimant's activities in Bonooru were governmental and not of a business nature. For that reason alone, Claimant does not qualify as an enterprise with substantial *business* activities in Bonooru pursuant Art. 9(1)(a) of the CEPTA, and is for that reason not a protected "Investor" under that treaty.

B. Additionally, Claimant is neither owned nor controlled by an enterprise with substantial business activities in Bonooru

48. There is simply nothing in the record bearing on the "structural" aspect of the tests outlined above that would point towards Claimant being owned or controlled by an enterprise with substantial *business* activities in Bonooru under Art. 9(1)(b) of the CEPTA.

49. We know only that the State of Bonooru owned 31% to 38% shareholding in Claimant, and that the Bonooru's government participated in Claimant's Board of Directors.[101] No other shareholder held a stake as large in Claimant at any relevant time.[102]

50. To be sure, control cannot be established in the abstract.[103] It is a conclusion reached holistically considering together items such as shareholding, management, voting rights, influence, etc. that bear on the control over an enterprise.[104]

51. For example, owning the majority voting rights is not always determinative of control. "[C]*ontrol can also be achieved by the power to effectively decide and implement the key*

98 Supra, ¶20

99 Problem, p.55

100 Problem, p.55

101 Uncontested Facts, ¶10; PO3, ¶3

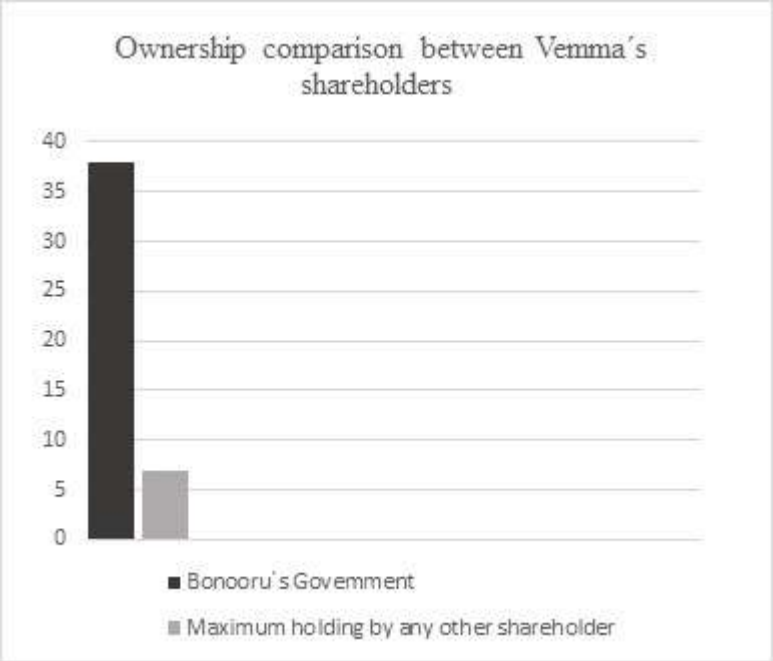
102 PO4, ¶2

103 *Vacuum*, ¶43; *Tallin*, ¶366

104 *Vacuum*, ¶44

decisions of the business activity of an enterprise (…)".[105] Control can exist despite having less than 50% ownership.[106]

52. In the present case, although Bonooru's government stake ranged between 31% and 38% from Claimant's date of incorporation until March 2020,[107] it was always the largest shareholder and no other shareholder held more than a 7% stake in the Claimant.[108] As depicted below – taking Bonooru's shareholding at 38%:



53. Bonooru's stake allowed its representatives frequently to form a voting majority on their own and thus formally exercise control despite holding less than a majority of Claimant's shares.[109]

54. Further, Bonooru held the key to Claimant's financial survival through the subsidies it provided to continue services to Bonooru's remote islands pursuant Art. 70 of the Constitution and later to encourage tourism into Bonooru.[110] This is the type of "effective" (not just structural) control such as led the tribunal in *Thunderbird* to find control by "*key involvement*" in essential decisions or activities without which the enterprise's activities

105 *Thunderbird*, ¶108; *Vento*, ¶221; *Plama*, ¶¶91,94; *B-Mex*, ¶239; *Perenco*, ¶526

106 *Thunderbird*, ¶¶107-109; *Plama*, ¶¶91,94; *B-Mex*, ¶239; *Perenco*, ¶526

107 Uncontested Facts, ¶10

108 PO4, ¶2

109 PO3, ¶3

110 Supra, ¶7; Problem, pp.43,55

could not be pursued.[111] In short, Claimant is functionally and structurally controlled by the State of Bonooru.

55. Therefore, as it is State-controlled by Bonooru, Claimant cannot meet the alternative test of 9(1)(b) either because it is not controlled by an enterprise "*mentioned in paragraph (a)*", namely an enterprise with "business" activities in Bonooru. It is controlled by the State and the State is not engaged in "business" activities. Rather, it performs governmental activities, as does Claimant in Bonooru (see discussion above).

56. Every interpretative principle of the VCLT confirms this conclusion. The CEPTA must be read according to its ordinary meaning as well as its object and purpose.[112] The term "enterprise" in Art. 9 of the CEPTA cannot normally include States or entities engaged in governmental activities, as the tribunal in *Feldman* understood in observing that an "enterprise" is "*a unit of economic organization or activity; esp. a business organization*".[113] The CEPTA drafters deliberately used the term "enterprise" in Art. 9 in preference to broader terms such as "entity" or "institution".[114] The Tribunal should not opt for a meaning different that the one that the parties reflected in their choice of language by concluding that Claimant even qualifies as an "enterprise" if it is really discharging governmental functions, as we have shown above .[115]

57. Indeed, treaties such as CEPTA and IIAs in general are understood to protect *private* foreign investment in another State.[116] To regard a State as an "enterprise" (if, as we show here, it discharges governmental functions) under the CEPTA would be inimical to the context and purpose of the treaty, absent specific expressions to the contrary, which CEPTA does not contain.

58. To regard a State as an "enterprise" under the CEPTA would permit a State in effect to bring claims against another State. This is incompatible with Art. 9(16) of the CEPTA providing for ICSID or ICSID-AF Rules arbitration, which, in turn, provide a forum only

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111 *Thunderbird*, ¶109

112 VCLT, Art.31; *Tokios*, ¶77; *Telefónica*, ¶77; *IBM*, ¶44; *Mondev*, ¶43; *Rompetrol*, ¶85; *Enron Jurisdiction*, ¶32; *Plama*, ¶¶117,147-165

113 *Feldman*, ¶96

114 CEPTA, Art. 9

115 *Saluka*, ¶241; *Hulley*, ¶431; *Mera*, ¶148; *Flemingo*, ¶295; *KT Asia*, ¶117; *Veteran*, ¶414

116 DOUGLAS, p.99¶181, p.135¶272; DOLZER&SCHREUER, p.46

for disputes between a State and a national of another State, not for State-to-State disputes.[117]

59. It is an elemental tenet of treaty interpretation to discern meaning from comparing similar terms used in various parts of a treaty.[118] The CEPTA in Art. 9(1) provides that one of the forms that an investment may take includes an "enterprise". If States were included in the concept of "enterprise", this would mean that constituting what is, in effect, a State entity in the territory of the other State party will qualify that State entity as an "Investor" under the CEPTA, which is nonsensical. Thus, an "Investor" cannot logically include a State entity under CEPTA, entirely aside from what we have shown above that Claimant here conducted governmental activities and therefore was, in effect, not engaged in "business" activities, as separately required by CEPTA to be an "Investor".

C. Claimant does not qualify as a "*national of another State*" pursuant to Art. 2 of the ICSID-AF Rules

60. As shown above, Claimant's activities in its territory were governmental. For that reason alone, Claimant does not qualify as a "national of another State" under Art. 2 of the ICSID-AF Rules.

61. Art. 9(17) and 9(16) of the CEPTA provide ICSID-AF proceedings for the settlement of disputes.[119] Art. 2 of the ICSID-AF Rules contemplates only disputes between a "*State and a national of another State*"; proceedings between two States are not contemplated.[120]

62. On that ground alone, this tribunal separately lacks jurisdiction under ICSID-AF Rules on which the Claimant relies.[121]

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117 ICSID Convention, Art.25; ICSID-AF Rules, Art.2

118 *Loewen*, ¶40; *ADF*, ¶¶164-165; *Tecmed*, ¶64

119 CEPTA, Art.9(16)-9(17)

120 ICSID-AF Rules, Art.2

121 Notice, ¶3

PART II: *AMICUS CURIAE*

63. The admission of the *amici* submissions is governed by Arts. 9(19) of the CEPTA; 41(3) of the ICSID-AF Rules and 4(3) of the Transparency Rules.[122] The *amicus* must meet the following requirements:

    a) provide a distinct perspective of the legal or factual issues than the one given by the parties;

    b) address an issue within the scope of the dispute; and

    c) demonstrate a significant interest in the arbitration proceedings,

    d) sound jurisprudence has held that it must be independent of the parties.

64. In light of the foregoing, the Tribunal should accept the *amicus* submission by the External Advisors **(I)**; and reject the submission by the Consortium **(II)**.

I. THE *AMICUS* SUBMISSION BY THE EXTERNAL ADVISORS SHOULD BE ACCEPTED

65. The *amicus* submission by the External Advisors should be accepted because it: addresses an issue within the scope of the dispute **(A)**; the proposed *amicus* has a significant interest in the proceeding **(B)**; provides a distinct factual and legal perspective than the one given by the Parties **(C)**; and the proposed *amicus* is independent of the Parties **(D)**.

A. The External Advisors address an issue well within the scope of the dispute

66. We admit, of course, that an *amicus* may not broaden the scope of the dispute.[123] It must rather help to resolve the dispute already submitted by the parties.[124] In this case, the corruption is an issue that goes to the heart of this dispute.

67. In respect to corruption issues in particular, *Infinito Gold* concluded that, even if none of the disputing parties had referred to corruption, information from the *amicus* about corruption was so important to the tribunal's jurisdiction that it should be admitted on that ground alone.[125]

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122 Supra, ¶¶29,30

123 *Apotex PO3*, ¶27; *UPS*, ¶60

124 *Philip Morris PO4*, ¶¶25-27, 30

125 *Infinito Gold*, ¶¶33, 35, 37

68. To be sure, the text of the CEPTA does not expressly refer to a requirement of investment legality. However, this requirement cannot be ignored on that basis, as it constitutes an principle of international law.[126] Investment treaties such as CEPTA seek to encourage legal and bona fide investments and any proof of corruption should at least be considered by any tribunal whose jurisdiction is drawn from CEPTA.[127]

69. In this regard, the CEPTA states in its preamble that its objective is to promote transparency, good governance, and the rule of law, and eliminate bribery and corruption in trade and investment.[128] No more is needed to underscore that the matters of corruption which the External Advisors wish to bring to this Tribunal's attention lie well within the scope of the dispute, whether or not the contending parties have referred to it explicitly.[129]

70. The participation of the *amicus* might help to bring light, and hopefully to lessen, corrupt practices that have become notorious in investment arbitration.[130] Although this Tribunal is not being asked to pass judgment as to possible corrupt practices, surely such acts may bear at least on the jurisdiction of the Tribunal as it may not wish assist the efforts of a possibly corrupt party to harvest from Mekar unjust compensation through these proceedings. The mere consideration of such issues may shine a welcome light on the investor-State arbitration process and its integrity. The proposed *amicus* submission by External Advisors should be accepted on any of these various grounds.

B. <u>The External Advisors have a significant interest in these proceedings</u>

71. "Significant interest" is shorthand for the possible effects the case or award may have on the *amicus* itself and/or on those others not immediately involved as parties.[131] Case law has looked at (a) the effects on the *amicus* itself, (b) whether the case involves possible State liability under international law, (c) the general importance and the impact of the matter, and (d) the interaction of the matter with non-economic interests.[132]

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126 *Fraport*, ¶332, *Yukos*, ¶¶1349-1352, *Ampal-American*, ¶301, *Hulley*, ¶¶1349-1352, *Veteran Petroleum*, ¶¶1349-1352

127 *Yukos*, ¶ 1352, *Hulley*, ¶1352, *Veteran Petroleum*, ¶1352

128 CEPTA, Preamble

129 *Infinito Gold*, ¶38

130 SARAVANAN, p.4

131 *Vivendi*, ¶19; *Biwater*, ¶22

132 SAVARESE, p.107

72. The resolution of this case will have *direct and significant effects* on the financial operations of the *amicus*, who regularly advises investors prospecting opportunities in Mekar and also impact on the promotion of fair business practices through anti-corruption efforts in Mekar.[133] Moreover, the present case involves a claim against a State that could involve international law liability pursuant the CEPTA. Non-economic and public interest aspects are also at issue, including the prevention of corruption and promotion of fair business practices in Mekar.[134] Furthermore, the External Advisors' submission promises to raise important issues regarding the effectiveness of investor-State dispute settlement mechanisms to address public policy issues taking the regulatory interests of the State into account.[135]

C. The submission by External Advisors provides a perspective distinct from that of the Parties

73. The knowledge, information, or expertise provided by the *amicus* must be different to that of the parties, not duplicative.[136] *Methanex v. United States* and others confirm that this criterion is related to the "*contribution of particular knowledge and expertise and likely utility to the tribunal*" beyond what the parties have provided.[137] Moreover, when a submission, such as the one of External Advisors here, addresses matters of public interest, the requirement of "different perspective" should be given a wide berth to allow the Tribunal access to the widest possible range of relevant views.[138]

74. The External Advisors are members of Mekari civil society whose professional focus is investment banking and were selected as advisors to Committee on Reform on Public Utilities on the strength of their expertise and competence.[139] Its submission addresses an issue critical to the public interest and even the jurisdiction of this Tribunal – *i.e.*, the corruption of government functionaries.[140] And, of course, the External Advisors are

133 Problem, p.19

134 Problem, p.19

135 Problem, p.19

136 *Philip Morris* PO4, ¶26; *Apotex* PO3, ¶34; *Chevron*, ¶19

137 *Methanex*, ¶48

138 *Apotex PO2*, ¶21

139 Problem, p.19

140 Problem, p.19

uniquely positioned as advisors in the privatization process in Mekar to provide new facts and evidence about the bribes Claimant paid to the Chairperson of the Committee and, therefore the business integrity of the Claimant.

D. The External Advisors are independent from the disputing Parties

75. To be sure, as a matter of common sense and under the Transparency Rules independence from the disputing Parties also bears critically on the decision to admit an *amicus*. An *amicus* should never be a secret advocate for a party's interests. That is why proposed *amici* should disclose any affiliation with a party in their petition to be admitted.[141]

76. The Rules of Transparency likewise provide outsiders who wish to act as *amici* must submit exhaustive information regarding their identity, connection to the disputing parties, sources of funding, their interest in the dispute, in addition to the arguments they would like to present.[142]

77. External Advisors have thus exhaustively detailed how they were selected for their role in the privatization of Caeli through a transparent and competitive process approved by the Cabinet of Ministers of Mekar, their tasks in the process, and the details of their compensation for a transaction that has long since been completed.[143] And there is no suggestion that External Advisors have any relation to Claimant here either, other than their aforementioned role in the privatization of Caeli. No fact in the record could materially call into question the required independence of External Advisors and therefore their capacity to act as *amici* here.

II. THE TRIBUNAL SHOULD REJECT THE *AMICUS* SUBMISSION BY THE CONSORTIUM

78. The *amicus* submission of the Consortium must be rejected because it does not bring a new perspective to the proceedings **(A)**; it is not independent from Claimant **(B)**; and it does not have a significant interest **(C)**.

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141 BERNASCONI-OSTERWALDER, p.1

142 EL-HOSSENY&VETULLI, p.81

143 Problem, p.19

A. The *Amicus* does not bring a new perspective that is different from the one given by the Parties

79. We have likewise discussed above the "different perspective or novel arguments" requirement above, and likewise do not propose to repeat it here**.** The record shows that Consortium proposes to offer the Tribunal the same information already provided by Claimant, or information of a general nature the Claimant itself could offer if it so desired.[144] And Consortium does not offer some special expertise on the issues in dispute that is unavailable to the Claimant itself, an experienced participant in the aviation industry.

B. Consortium is not independent from Claimant

80. We have likewise discussed the independence requirement above and will not repeat it here. Claimant is an active member of the Consortium proposing to appear as *amicus.*[145] Just to state that fact shows that Consortium is not independent of Claimant. In addition, precisely because Claimant is one of its members, Consortium cannot be trusted to bring to these proceedings a point of view on any matter different than the one advanced by Claimant. On that basis too Consortium's application is destined to fail.

81. Moreover, Lapras Legal Capital being a Consortium member itself debars Consortium as a suitable *amicus.* Lapras Legal is Claimant's advisor in the present dispute against Respondent.[146] As a matter of pure common sense, optics, and governing law it is preposterous to admit as *amicus* an organization that counts as its members the Claimant itself *and* the advisor to the Claimant in these very proceedings.

C. Consortium does not have a significant interest in the proceedings

82. The requirement of significant interest will not be re-elaborated here. Suffice it to say that nothing in the record even suggests that a non-profit industry association representing Bonoori investors in the Greater Narnia region and internationally has a "significant interest" in these proceedings. Anything Consortium may offer could be offered by the Claimant itself. For this reason alone, Consortium should be rejected as a possible *amicus.*

144 Problem, p.16

145 Problem, p.16

146 Problem, pp.16,87

83. In sum, Consortium offers nothing to commend itself as an *amicus* and should be rejected, particularly in light of its plain lack of independence from the Claimant and Claimant's advisor here.

PART III: LIABILITY

84. Although Mekar has been open to foreign investment since 1994, it has been careful not to weaken its right to regulate its internal affairs in the process. The CEPTA concluded between Mekar and Bonooru in 2014 expressly reserves this right.

85. The CEPTA's preamble provides that it aims at: "[promoting] *economic integration to* (…) *benefit consumers, reduce poverty and promote sustainable growth*".[147] Yet, it continues by specifically stating that its provisions "preserve the right of the Parties to regulate within their territories".[148]

86. The CEPTA goes further than a mere mention of the right to regulate in its preamble. It provides in Art. 9(8) titled "*Right to Regulate*", that: "*the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as* (…) *consumer protection*".[149] Nothing Claimant asserts here as violations of CEPTA is more than a legitimate effort by Mekar "*to regulate within* [its] *territor*[y]".

87. Further, the Mekari MRTP Act establishes in its preamble that the CCM is created for the prevention of "practices [that have] adverse effect on competition (…) to protect the interests of consumers and to ensure freedom of trade carried on by other participants in market".[150]

88. By 2014, Caeli had taken over the market through predatory pricing. It carried 35% of all Mekari citizens, up from the 15-20% share before Claimant's acquisition of Caeli three years before.[151] The record shows that Caeli engaged in predatory pricing for years to increase its market share from pre-Vemma acquisition levels.[152]

89. Offering passengers lower airfares is by no means harmful – indeed it is virtuous. If, however, this becomes a means to push other competitors out of the market, such practices must be curtailed. Caeli could afford to engage in predatory conduct because it received recurring subsidies from Bonooru under the Horizon 2020 scheme, starting from

147 CEPTA, Preamble

148 CEPTA, Preamble

149 CEPTA, Art.9(8)

150 Problem, p.47

151 Uncontested Facts, ¶34

152 Uncontested Facts, ¶34

its acquisition of Caeli in 2011 until June 2016.[153] The market share it held with its "sister" airline, Royal Narnian – both under common ownership and control – gave the two airlines jointly a dominant majority position of 54% of the market for routes to and from Phenac International Airport.[154]

90. It is for this reason that the CCM (and to protect competition and freedom of trade) began an investigation to determine if Caeli had engaged in predatory pricing strategies to hinder competition in the Mekari market.[155] The CCM placed airfare caps, set reasonably above what Caeli charged, to prevent price hikes upon market dominance.[156] Not long after, a consortium of small regional airlines in Greater Narnia complained to the CCM that Caeli was "squeezing" them by undercutting prices and exploiting the privileges it enjoyed at Phenac International Airport. A second investigation by the CCM ensued, this time focusing on price undercutting.[157]

91. Claimant laces its submission with speculation about Mekar's "envy" at Vemma's supposed success in turning Caeli into a temporarily profitable airline – as if a national state could be accused of "envy" absent extraordinarily persuasive proof, which is not the case. The uncontested *facts* paint, however, a clear picture of anticompetitive behaviour by Caeli which Mekar was compelled to curtail. If we are to rely on speculation instead of *facts* in the record, then Mekar could also indulge in inferences that Vemma made Caeli temporarily profitable through anticompetitive practices at the consumers' and competitors' expenses, which misconduct was ended eventually only because the CCM stepped in.[158] Similarly, the extravagant "valuation" Claimant relies on in its untenable demand for damages (see discussion below) could well have been the fruit of anticompetitive behaviour Mekar's are sensible inferences (not speculations) grounded in facts, not vagaries such as Claimant's charges of "envy".

92. The record shows, without contradiction, that Respondent took measures with an aim to preserve fair competition in the domestic market[159] and granted subsidies to preserve

153 Supra, ¶10; PO4, ¶6

154 Supra, ¶11

155 Supra, ¶11

156 Supra, ¶11

157 Supra, ¶12

158 Supra, ¶¶11,12,14,18

159 Supra, ¶¶11,12,14,18; Uncontested Facts, ¶¶36-38

privately owned companies operating in Mekar amid a general economic crisis.[160] Caeli was not targeted, save for its own anticompetitive conduct which required curtailing according to Mekari law, in a fair exercise of the regulatory privileges the CEPTA expressly reserved for the State.

93. Mekar accorded FET to Claimant at all times, as provided in Art. 9(9) of the CEPTA. Each of Claimant's separate arguments as to why it was not granted FET fails, as discussed below.

I. MEKAR DID NOT VIOLATE THE FET STANDARD UNDER ART. 9(9) OF THE CEPTA

94. Claimant argues that Respondent breached Art. 9(9) of the CEPTA. This is a meritless argument.

95. Art. 9(9) of the CEPTA provides:

> "*Minimum Standard of Treatment* ["MST"]
>
> *1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment (…)".*[161]
>
> *"2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitutes:*
>
> *"(a) denial of justice in criminal, civil or administrative proceedings;*
>
> *(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*
>
> *(c) arbitrary or discriminatory conduct;*
>
> *(d) abusive treatment of investors, such as coercion, duress, and harassment;*
>
> *(e) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22.*"[162]

96. Tribunals in *Waste Management*, *S.D. Myers*, *Mondev*, *ADF* and *Loewen*, concurred that a host State breaches the FET standard when the conduct exhibited is "*arbitrary, grossly*

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160 Supra, ¶16

161 CEPTA, Art.9(9)

162 CEPTA, Art.9(9)

unfair, unjust or idiosyncratic, (…) *exposes the claimant to sectional or racial prejudice, or* (…) *offends judicial propriety*".[163] In any case, such behaviour would be barred by Art. 9 of the CEPTA. Further, Mekar complied with all CEPTA requirements, even if it demands more than the historically sanctioned MST of foreign investors under international law.

97. Contrary to Claimants' arguments, Claimant could not have legitimately expected stability in the regulations affecting its business as a feature of FET **(A)**. In any event, Respondent's measures were reasonable and proportionate **(B)**. Additionally, Respondent acted in a non-discriminatory manner **(C)**, while Mekari Courts did not deny justice to Claimant **(D)**.

A. Claimant could not have legitimately expected Mekar's legal framework to remain static or frozen

98. Claimant argues that it was denied FET because Mekar violated its legitimate expectations that Mekar's regulatory framework would remain as it was when Claimant made its investment. Claimant could not have had any such "legitimate expectation" in the absence of specific assurances to that effect, which are wholly absent on this record.

99. Art. 9(9)(3) of the CEPTA, when referring to legitimate expectations, specifically provides that:

> "*a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated*."[164]

100. Art. 9(8) even states:

> "*For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section*."[165]

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163 *Myers Partial Award*, ¶263; *Mondev*, ¶127; *ADF*, ¶183; *Loewen*, ¶132; *Waste Management*, ¶98

164 CEPTA, Art.9(9)(3)

165 CEPTA, Art.9(8)

101. The CEPTA could not be clearer. The parties to the CEPTA were unwilling to recognize "legitimate expectations" of regulatory stasis except on the basis of specific representations to that effect. No such representation by Mekar to Vemma exists on the record here.

102. What constitutes a "specific representation" (as set out in Art. 9(3) of CEPTA), the violation of which may support a denial of FET claim based on disappointed "legitimate expectations", is a question of fact. In the face of the express provisions of Art. 9(8) of CEPTA, the State's merely altering the law or regulatory regime does not count as a violation of a "specific representation".

103. Likewise, encouragements, political urgings to invest, expressions of optimism as to the future, and similar generalities are plainly insufficient as "*specific"* representations.[166] In contrast, a specific promise made in business meetings by an authorized representative of a host State,[167] a signed letter of intent,[168] or a stabilization clause[169] may indeed suffice to create enforceable "legitimate expectations" under CEPTA in suitable circumstances.[170] Moreover, the legitimacy of the investor's expectation must be *objectively* assessed[171] at the time the investment was made.[172]

104. In this case, Mekar made no specific commitments to Claimant when it invested in Caeli. There were not even unilateral statements or expressions of intent. The CEPTA does not provide for any stability clauses. Expressions of encouragement by the managing director of Mekar Airservices when marketing Caeli were general marketing statements made to all potential purchasers, not specifically to Claimant.[173] And, in any event, he never promised, or could have had the authority to promise, that Mekar's regulatory regime for airlines would remain frozen.

105. Expressions of encouragement by the managing director of Mekar Airservices when marketing Caeli's core were general marketing statements made to all potential

166 *Antaris*, ¶360; *El Paso*, ¶395

167 *El Paso*, ¶376

168 *El Paso*, ¶376, *Unión Fenosa Gas*, ¶9.83

169 *Charanne*, ¶489

170 *Saluka*, ¶304

171 *FREIF*, ¶541; *RREEF*, ¶261

172 *Tecmed*, ¶154; *LG&E*, ¶127; *Duke Energy*, ¶340

173 Uncontested Facts, ¶21

purchasers, not specifically to Claimant.[174] And, in any event, he never promised, or could have had the authority to promise, that Mekar's regulatory regime for airlines would remain frozen.

106. If Claimant suffered from excessive optimism, it was a self-inflicted wound. Mekari officials warned Claimant that its proposal relied on overly optimistic forecasts without accounting for the serious volatility of fuel prices and potential takeovers of long-distance routes by competitors.[175] And when the CCM approved Claimant's acquisition, it sought an undertaking from Caeli that it would not engage in unlawful concerted action with other Moon Alliance members.[176] The CCM gave Claimant fair warning, even before its acquisition of Caeli, that unlawful or anticompetitive conduct would not remain unaddressed by authorities.

107. In short, Claimant could not have had any legitimate expectation that the Mekari regulations affecting its business would remain unchanged or unenforced.

B. <u>In any event, Mekari measures were reasonable and proportionate</u>

108. To be sure, a FET violation may be grounded on unreasonable or disproportionate State measures. But to qualify as such, these measures must be adopted outside the wide margin of discretion afforded to a State and which any investor must take into account.[177] State measures that are reasonable and proportionate do not amount to a breach of the FET standard.[178]

109. The decision regarding the fairness of State measures cannot be made in isolation, it should account for: the context of the evolution of the host State economy, the reasonableness of the challenged normative changes and their appropriateness in light of a criterion of proportionality.[179] Several tribunals have confirmed that investment treaties are not insurance policies against bad business judgments.[180]

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174 Uncontested Facts, ¶21

175 Supra, ¶8

176 Supra, ¶8

177 *El Paso*, ¶402

178 *El Paso*, ¶402

179 *Total*, ¶123

180 *Total*, ¶124; *Maffezini Award*, ¶64; *MTD*, ¶178

110. A measure is reasonable when at the time of adoption it was a good faith attempt proportionately to address a public concern, regardless of whether the measure actually had the intended effects.[181] Reasonable measures should be related to some rational policy, not caprice or fanciful expectations.[182] Of course, where a valid public policy exists in respect of a State's public interests and police powers,[183] its measures are accorded the *broadest latitude or deference* that international law affords to a host State's authority to regulate its jurisdiction.[184]

111. Proportionality is also part of FET. This requires that State measures that negatively affect the investor should be proportional to the public policy ends sought to be achieved.[185] This, in turn, requires that the measure be suitable for the ostensible goal,[186] that it be economical or restrictive in its detrimental effect on investors consistent with achieving its goal,[187] and that it balances the affected rights and the aim sought.[188]

112. None of the challenged measures here breaches any of the foregoing. All measures taken by Mekar were in pursuit of accepted public policies such as improving the macroeconomic conditions of the country, enforcing its competition laws, and protecting its consumers and its limited resources. In turn, the challenged measures were suitable for each such goal, were tailored not to invade the investors' interests unnecessarily (consistent with achieving their aims) and balanced as between the affected rights and the aims sought.

113. By March 2017, a currency crisis and rising inflation engulfed Mekar.[189] With price stability as a goal, Respondent required *all* companies operating in the country (not just Caeli) to offer goods and services denominated exclusively in MON on 30 January 2018.[190] This is a far cry from being "unreasonable" or "disproportionate".

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181 *Philip Morris Award*, ¶409

182 *Saluka*, ¶309

183 *Unglaube*, ¶246

184 *Myers Partial Award*, ¶263

185 *Electrabel*, ¶179

186 *Electrabel*, ¶179; KINGSBURY&SCHILL, pp.75-104

187 *Electrabel*, ¶179; KINGSBURY&SCHILL, pp.75-104

188 *Electrabel*, ¶179; KINGSBURY&SCHILL, pp.75-104

189 Supra, ¶13

190 Supra, ¶13

114. Regarding the CCM's investigations and the resulting fines, their main purpose was to impede Claimant of anti-competitive behaviour and to preserve fair competition in the Mekari airline market.[191] Fines and price caps in the face unchallenged findings of predatory price behavior hardly qualify as unreasonable or disproportionate measures.

115. Likewise, the maintenance of the airfare caps during the course of the Second Investigation conducted by the CCM was also reasonable and proportionate – indeed, it took Caeli some two years after the caps were imposed to "wake up" and challenge to those caps in court in court.[192]

116. In any event, those caps were put in place because Caeli's and Royal Narnian's combined market share (and dominant market position) had exceeded 50%, only to be removed in October 2019, when that market share had fallen below 40%.[193] These were measures to address legitimate predatory pricing concerns and tailored carefully not to invade the interests of those affected beyond what was necessary to achieve the intended ends. Indeed, the decision to define the relevant market as the combined markets of Caeli and Royal Narnian was itself reasonable, as both airlines were under Claimant's common control, and both operated in the affected market of routes to and from Phenac International airport. The record here is barren of evidence showing Mekar's challenged measures to have been disproportionate, unreasonable, arbitrary, excessive, or improper. They were well within the range of discretion (or "margin of appreciation", as it is sometimes called) that international law and CEPTA affords Mekar to achieve policy goals without running afoul of FET restrictions.

117. In conclusion, all of the challenged measures were reasonable and proportionate and, consequently, did not breach Mekar's FET obligation.

C. Mekar's actions were non-discriminatory

118. Discrimination justifying a FET violation exists when the State accords different treatment in like circumstances without a reasonable justification.[194] In other words, different

191 Supra, ¶¶11,12,14,18

192 Supra, ¶15

193 Supra, ¶18

194 *Crystallex*, ¶¶616,715; *Saluka*, ¶¶307,313; *Invesmart*, ¶¶403-415; *Tenaris*, ¶388; *Bayindir*, ¶399; *Cavalum*, ¶416; *Lidercon*. ¶169; *Electrable*, ¶175

treatment will be "discriminatory" if it lacks a rational justification.[195] Nothing of the sort is present here.

119. Claimant alleges that Respondent "discriminated" against Caeli when it granted subsidies to some airlines under its Executive Order 9-2018 while it denied subsidies to Caeli. However, such differential treatment was reasonably justified.

120. By September 2018, seven airlines provided services in Mekar: Caeli Airways, Tui Airways, Airasia X, WestJet, Star Wings, JetGreen and Larry Air.[196] While Respondent subsidized five of these,[197] it denied subsidies to Larry Air and Caeli[198] because they were the only two airlines owned in a significant part by a foreign government.[199] SOEs enjoy competitive advantages over privately-owned firms, such as more favourable lending rates and government support, which reduce an SOE's cost of capital[200] and do not call for Mekar government support during times of economic duress. In fact, Claimant received recurring subsidies from Bonooru under the Horizon 2020 Scheme,[201] which the CCM found financed Caeli's anticompetitive conduct in Mekar.[202]

121. The Secretary of Civil Aviation, who had discretion to grant subsidies under Executive Order 9-2018, was entitled to deny Caeli and Larry Air as it would have skewed market conditions unfairly in favour of these two enterprises.[203]

122. Therefore, the differential treatment regarding subsidies was reasonably justified. Further, this differential treatment was justifiably aimed at protecting fair market competition in the Mekari market, a specific goal established under the CEPTA preamble[204] and the MRTP Act.[205]

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195 *Saluka*, ¶460

196 Notice, ¶10; Uncontested Facts, ¶¶46-47

197 Supra, ¶16; Uncontested Facts, ¶¶46-47

198 Supra, ¶16

199 Supra, ¶16

200 OECD, p.35

201 Supra, ¶10

202 Supra, ¶¶11,14

203 Supra, ¶16; Uncontested Facts, ¶46

204 CEPTA, Preamble

205 MRTP Act, Preamble

D. Mekari Courts did not deny justice to Claimant

123. "Denial of justice" has been understood as aberrant judicial conduct,[206] a gross misadministration of justice resulting from the ill-functioning of the State's judicial system.[207] *Chevron* defined "denial of justice" as "*a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety*".[208]

124. Predictably, the test for "denial of justice" on the basis of delay – what Claimant may argue here – is one of facts and circumstances,[209] and even significant delays of up to 10 years have been found to *not* trigger a denial of justice when the circumstances of the case justified the finding.

125. For instance, *White* rejected the claim regarding the enforcement proceeding of an award pending for over 9 years.[210] The tribunal in *Toto* did not consider the delay of 7 years before the *Conseil d'Etat* to be protracted.[211] Even when it came to a 10-year delay to obtain a judgement, *Jan de Nul* held that this did not give rise to denial of justice as "*the issues were complex*".[212]

126. In the same vein, the *Frontier* tribunal held that the Regional Court proceedings taking more than 3 years without more does not constitute a breach of FET standard.[213] An inactive period of 18 months was noted to be not ideal, but at the time in question, the Czech courts were experiencing a high volume of cases, which explained the stagnation.[214]

127. Here, Caeli filed its appeal seeking review of the CCM airfare caps on 27 March 2018. The High Court ruled in June 2019, only 15 months later, during which the Court studied the pleadings, heard the parties' submissions, held a hearing, studied the evidence and issued its resolution of the case. Many practitioners would be delighted to extract a final

206 *Pantechniki*, ¶96

207 UNCTAD FET, p.80

208 *Chevron*, ¶244

209 *Toto*, ¶163; *Chevron*, ¶250

210 *White*, ¶¶10.4.24,11.4.19

211 *Toto*, ¶¶140,165

212 *Jan de Nul*, ¶204

213 *Frontier*, ¶329

214 *Frontier*, ¶336

ruling from a High Court in fifteen months. In fact, the High Court ruled in less time than it took Caeli to challenge caps that had been imposed *two years earlier*.

128. If the foregoing were insufficient, recall that Mekar's judicial system faced then a heavy caseload due to an 80% population explosion.[215] In 2015, it required the courts an average of approximately 27 months to issue final decisions on commercial matters.[216] In addition, Mekar suffered an economic crisis in 2017[217] that further increased the already high case volume Mekari courts had to cope with. It is only natural for average times to rise during a country-wide crisis, as commercial and insolvency proceedings increase accordingly. On that basis, the fifteen-months span discussed above for a commercial matter is entirely reasonable.

129. The Court Registrar's rejection of Caeli's request for a separate urgent hearing was well grounded as "*the Court lacked the resources to make this possible*".[218] Other parties had also sought immediate redress but were rejected on the same grounds[219] – Caeli was not singled out for such treatment. Mekari courts acted coherently: acting on all requests was not humanly possible, acting on some was beyond the available personnel and would have exposed the legal system to charges of arbitrariness. Abiding by the previously set hearing dates was entirely reasonable under the circumstances.

130. Finally, nothing in the record supports a possible claim of denial of justice based on the Court's dismissal of the merits of Caeli's appeal of the CCM's orders. As the facts recounted above show, the CCM was well within its range of discretion to have imposed price caps and fines on Caeli, a decision the High Court accepted. This is also supported by the Executive Order 5-2014, adopted to expedite court proceedings and alleviate the backlog in Mekari courts and allowing the High Court to dismiss cases without appeal where little chance of success on the merits was probable.[220] Furthering the case would have gone against the principle of procedural economy and hurt Mekari court proceedings generally. The record shows no hint of an egregious error that would have "*shocked*" any

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215 Supra, ¶6

216 Uncontested Facts, ¶13

217 Supra, ¶13

218 Uncontested Facts, ¶44

219 Uncontested Facts, ¶44

220 PO3, ¶8

sense of "*judicial propriety*" from the High Court's denial of Caeli's appeal. Claimant has no reasonable case on this record to support a denial of justice claim here.

PART IV: REMEDIES

131. For starters, we note that damages come into play *only* if the Tribunal holds that Claimant was somehow deprived by Mekar of CEPTA protections, and then *only* to the extent damages may be traced to the specific deprivations found to have existed. As the record stands, Claimant has not only failed in its contention that it was deprived of CEPTA protections (see discussion above), it also has failed entirely to discharge its burden to prove damages with reasonable certainty, as speculative or unproven damages are not allowed.

132. Claimant demands compensation of US$700 million, contending that it is entitled to the difference between US$1.1 billion, as set out in some Caeli valuation performed before Mekar began allegedly to violate CEPTA, and the US$400 million it received in the repurchase by Mekar of the 85% stake in Caeli owned by Claimant.[221] We show below that this method of establishing damages is wrong, extravagant, and in any event unproven on this record. The US$600 million offer from Hawthorne Group before Mekar Airservices purchased Claimant's 85% stake is equally irrelevant and, in any event, there is every reason to suspect that this "offer" was bogus.[222]

133. First, let us explore the applicable damages standard**.** Next, we will show that Respondent owes no compensation or, if it owes compensation at all, it owes only to the extent the damage to Caeli's value is traceable to a CEPTA violation by Mekar. Finally, it will be shown that nothing allows Claimant to vary the standard of damages expressly prescribed in the CEPTA.

134. Art. 9(21) of the CEPTA provides:

> "*1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination:*
>
> *(a) monetary damages at a* ***market value*** ["MV"], *except as otherwise provided for in Article 9(12)* (…)".[223] (Emphasis and definition added)

135. In turn, Art. 9(12) of the CEPTA speaks to the compensation owed in cases of expropriation, namely "fair market value" ("FMV"). That is to say, the drafters of CEPTA

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221 PO3, ¶16

222 Uncontested Facts, ¶¶56-62

223 CEPTA, Art.9(21)

distinguished clearly between MV applicable here and FMV, the latter reserved for claims of expropriation that the Claimant has chosen *not* to assert.[224] Therefore, the applicable compensation standard is MV, as expressly set out in Art. 9(21) of the CEPTA.[225] No other conclusion is possible unless one disregards entirely the "ordinary meaning" of the words deliberately chosen by the CEPTA drafters.

136. The question then is, what is the difference between MV and FMV? Regrettably, the legislative history of CEPTA, which would be the principal secondary source to elucidate the express distinction that the drafters had in mind, is unavailable. Under the VCLT we must then resort to context and ordinary meaning for the analysis. "Ordinary meaning" points unambiguously to an express difference – FMV in Art. 9(12) is not the same as MV in Art. 9(21). And to apprehend the difference based on "context", it is necessary first to explain the generally understood difference between MV and FMV.

137. MV, as defined for example by International Valuation Standards,[226] is the price for which an asset should be exchanged on a particular date between a willing buyer and seller in an arm's length transaction, after proper marketing, and where both parties are knowledgeable, prudent, and acting without compulsion.[227] In other words, it is a value determined by supply and demand forces on a particular date, in a transaction exposed to the market, and between unrelated and independent parties that are motivated (but not compelled) to buy/sell, and are reasonably informed about the asset and the state of the market on the valuation date.[228]

138. By contrast, FMV is the "right" price between two specific parties taking into account the respective advantages, disadvantages, and synergies, and analyzing future growth, future margins, and risk factors relevant to each party from the particular transaction.[229] FMV is typically used in corporate transactions applying discounted future cash flows and synergies between the two parties, resulting in a price that is "fair" between them and that may be higher than the "market price" achieved on a specific date in the broader market.

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224 PO3, ¶2

225 CEPTA, Art.9(12)

226 IVS, ¶30

227 IVS, ¶30.1; CFA JOURNAL

228 IVS, ¶30.2; CFA JOURNAL

229 CFA JOURNAL

Hence, boards of directors often require what are called "*fairness* opinions" from financial advisors to enter into such transactions with specific counterparties.

139. The differences between MV and FMV are then that the former is more unstable and variable than FMV because MV is determined by supply/demand *on each particular valuation date*, unlike FMV that remains independent of such date. That is, FMV should be the same today, tomorrow, or next week unless in the interim there is a change in the underlying assumptions about the future on which FMV turns. MV is based on current prices and most recent *actual* transactions, while FMV is independent of current data and turns critically on *future* (discounted) advantages (and disadvantages) to both parties.

140. Hence, FMV depends critically on the underlying assumptions about the future – *i.e.*, discount rates, projections about cash flows, expenses, growth (or decline) in demand and/or market share, etc. – used to calculate such "fair" value. And MV is for a theoretical willing buyer and seller, not two specific such parties;[230] FMV, on the other hand, may be very different depending on who the specific buyer and seller is.

141. In CEPTA, FMV was selected as the damage standard for expropriation probably on the sensible assumption that the expropriating State acquired (for itself or another) the expropriated asset/business for "eternity" and therefore should pay the fair value of the business taking onto consideration all available (and discounted) projections about the future of that asset/business. On the other hand, FET violations do *not* suppose that the breaching State would purchase or acquire the negatively affected asset/business. (The repurchase of Caeli by a Mekar government entity for US$400 million in this case is a factual peculiarity that CEPTA drafters had no reason to contemplate.) A FET violation would plausibly be assumed to affect the asset/business negatively on a particular date or time period; hence MV reduction *caused by the specific violation on that date or period* would be more appropriate as a measure of damages than even a well-informed speculation about the future value *ad infinitum* of the entire business which is embodied in the FMV calculation.

142. CEPTA distinctions between MV and FMV aside, general damage principles are relevant here as well. Damages (other than punitive ones) are intended simply to place the damaged party in the position it would have been *but for* the breach of misconduct causing

230 IVS, ¶30.7

the harm. Or, as is often said, damages must be so set as to restore the claimant to the *status quo ante* that would have existed *but for* the challenged conduct.[231]

143. We are aware, of course, that this Tribunal intends to enlist the assistance of independent experts to determine the amount of damages, if any, owed to Claimant if Mekar's liability were established to any extent.[232] We will, therefore, limit ourselves to showing briefly why the US$700 million demanded by Claimant lacks a reasonable evidentiary basis or any understanding of the relevant damage principles, irrespective of what the Tribunal's experts may numerally determine. We will discuss mostly principles, not numbers.

144. First, the Claimant parades a "starting valuation" (of uncertain date) of US$ 1.1 billion[233] (considerably inflated compared to the US$800 million Claimant paid for its 85% stake)[234] which it claims was done before Mekar began to impose measures alleged to have violated FET. This valuation supposedly offers a picture of Caeli's value unaffected by Mekar's alleged misconduct. But the alleged misconduct was hardly the cause for Caeli's decline in value. The market had changed substantially after 2011, when Claimant purchased its stake. For instance, when Claimant applied for a loan in 2019, the Investment Information and Credit Rating Agency gave a low rating to "*Caeli's risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatization, and large fines payable to the CCM*".[235]

145. But more importantly, it is even logically unclear what role such valuation plays at all in a legitimate estimation of damages for FET violations. As a threshold matter, the Tribunal's expert should determine the damages to Caeli caused *specifically* by *each* conduct that the Tribunal holds to be an FET violation. Those are the damages to which Vemma would be entitled, no more. The starting valuation of US$ 1.1 billion is irrelevant and is offered with baby math only to arrive at the US$700 million figure by subtracting from it the US$400 million Claimant received from its sale of Caeli. But the starting valuation is logically unnecessary where we are concededly not faced with a case of expropriation and where, as here, we must trace damages to the harm caused by specific FET violations.

231 *Chorzow*, p.47; *Azurix*, ¶417

232 PO2, ¶5

233 PO3, ¶16

234 Uncontested Facts, ¶24

235 Uncontested Facts, ¶51

Indeed, Vemma would be entitled to damages from *specific* FET violations even if it had sold its stake in Caeli at a substantial profit.

146. But even disregarding Claimant's legerdemain, that starting valuation is infected with multiple vices. We do not know its methodology, or even whether it purported to establish the FMV or MV on the date of its preparation – two numbers that could well have been very different, and the MV much lower than US$1.1 billion.

147. Second, that starting valuation is grossly out of date, particularly if it focused on MV, which is so dependent on the specific valuation date, as explained above.

148. Third, the starting valuation gives Caeli the valuation "benefit" of multiple violations of anticompetitive conduct for which it was later sanctioned and from which it was barred. Surely, the value of a company engaged in a Ponzi scheme, for example, is much higher before the scheme is unearthed by the authorities and put to a stop, as Bernie Madoff quickly learned. Indeed, it is entirely possible that the US$ 1.1 billion "value" whence Claimant starts reflects principally the worth of the anticompetitive and unfair conduct Caeli engaged in under Vemma's tutelage. All such excess should be purged of any valuation of Caeli before Claimant is even allowed to offer it in these proceedings.

149. Fourth, the starting valuation may well disregard the direct consequences of Caeli's management errors, such as the failure to foresee oil price changes and other overly optimistic assumptions, of which Mekar officials warned Vemma as early as during the bidding process for Caeli.

150. Fifth, if the starting valuation is an improper FMV exercise (in light of the MV requirement in CEPTA), none of the critical assumptions on which FMV calculation depends are disclosed on the record. FMV calculations are critically affected by the discount rates, cash flow and cost projections, and other assumption about future trajectories that "feed into" an FMV determination. The Tribunal (or its expert) may elect to disregard that valuation entirely if it concludes that it is a FMV exercise, or the expert may alter its assumptions, thus radically changing the numerical results. The starting valuation, even if improperly and illogically used here, plainly should be a MV determination as of a relevant recent date, not the unexplained number pulled out from "thin air" and offered by the Claimant here.

151. And, finally, to arrive at the US$700 million figure the Claimant implicitly supposes that the decline from the fictional US$1.1 billion is *entirely* due to the violations of FET

charged by Claimant. But at this stage of the proceedings, we do not know what, if any, violation this Tribunal may conclude has occurred, how to connect such violation to a decline in Vemma's value, and much less what numerical value to assign to each such particular violation.

152. Elemental causation principle requires a sufficient link between the treaty violation and the damage suffered.[236] That is, the Claimant should be made whole (within the CEPTA damage standards) *only for the specific negative effects caused by the specific conduct found to be a FET violation*.

153. In other words, the Tribunal may find that only the imposition of price caps was a FET violation, and only for a certain period. Or it may determine that the only FET violation was the denial of subsidies under the Executive Order. Or it may hold that one of the CCM fines (but not the other) was a FET violation, and that no other violation existed. Any combination or permutation is possible, although not probable, as we are confident that no violation of FET occurred. Until we know what, if any, FET violation occurred, no estimate of damages can or should be offered. All we can say with certainty is that Claimant's damages, if any, must be linked causally to the specific FET violations this Tribunal determines to have taken place.

154. It is even possible that if certain measures were found to be FET violations, they may not have a deleterious effect on Claimant's value. Claimant may argue that the cap on Caeli's airfares between 2016 and 2019[237] limited its profitability. While sounds at first glance "logical", it may be wrong because the airfare caps were set reasonably *above* the rates Caeli already charged,[238] and were mobile, pegged to Mekar's official inflation rate calculated by the Central Bank.[239] Without further evidence, the Claimant may not logically establish that the duty to offer its services denominated exclusively in MON as of 2018[240] injured its profitability due the MON's devaluation. Mekar had *no restriction* on currency exchanges, and therefore Claimant could have bought as much hard currency as it wished with its income in MON or hedged against the MON's devaluation.

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236 *Biwater Award*, ¶785; *Myers Second Partial Award*, ¶140; *Lemire*, ¶157; *Jaouni*, ¶200; ILC Arts., Art.31

237 Supra, ¶¶11,18

238 Supra, ¶11

239 Uncontested Facts, ¶43

240 Supra, ¶16

155. In sum, the entire exercise Claimant offers to arrive at a US$700 million figure is nothing more than a sleight of hand, a trick. Neither the starting valuation (with all its multiple vices) nor, in fact, the US$400 million sale price received by Claimant, or the bogus US$600 million offer from Hawthorne are logically relevant to a sensible damage calculation if any violation of FET is established. In fact, Claimant should be entitled to damages whether or not Claimant chose to sell Caeli at whatever price, and whoever might have been Caeli's purchaser. That Vemma chose to sell Caeli or that it sold Caeli for US$400 million to Mekar AirServices are all irrelevant, a peculiarity of this case of no consequence to damages. If Claimant still owned its stake in Caeli, or if the buyer of Vemma's 85% stake had been someone else, or if the sale price of Claimant's stake in Caeli had been different (even at a profit), Claimant's damages from actual FET violations by Mekar should be invariant.

156. The Tribunal should not waste its effort with finely parsing the many events that undoubtedly reduced the value of Caeli during Vemma's administration for which Mekar cannot be held responsible. Recall, for example, that Mekar had been suffering an economic crisis since 2017, arising from currency devaluation in 2016.[241] Surely, the consequences of such crisis cannot be charged as an FET violation against Mekar – the Claimant does not even attempt to do so in this case.

157. The International Monetary Fund reported a 2600% average inflation rate in 2020 and predicted a potential debt default in Mekar. In addition, the Ministry of Commerce disclosed that in the first trimester of 2020, bank loan defaults increased significantly in relation to 2019.[242] Surely all of this contributed to the decline in Caeli's value, but none of it can be traced directly or indirectly to any FET violation and be "charged" to Mekar. Caeli may well have been mismanaged during Vemma's tenure, also reducing Caeli's value. Likewise, Mekar should not benefit (by a reduction in damages) from such mismanagement under the damages approach we invite the Tribunal to adopt. Mekar should be financially responsible to Claimant only for the specific FET violations found to have taken place.

158. What the experts must, in the end, establish is the MV (not FMV) associated with the harm to Caeli directly traceable to the specific FET violations that the Tribunal finds were

241 Uncontested Facts, ¶39

242 PO3, ¶4

caused by Mekar. The total of those figures is the damages Claimant should receive to be made whole. All the rest is pure smoke screen.

159. Having outlined these overarching principles, we turn to debunking some of the Claimant's arguments, although as we discussed above, this is only "shadow-boxing" with irrelevancies that do not bear on the misuse of the starting valuation of US$1.1. First, Claimant mistakenly relies on the MFN clause in Art. 9(7) of the CEPTA and international law[243] to seek to import the FMV standard under Art. 13 of the Arrakis-Mekar BIT, which provides compensation at the "*fair market value of the investment immediately on the day before the measures* (...)".[244]

160. *Wintershall* is useful here.[245] The majority holds that MFN clauses include in their scope dispute resolution provisions, unless the contrary is clearly stated.[246] The minority holds to the contrary.[247] If the damage standards in CEPTA are regarded as "dispute resolution provisions" either view is damning to Claimant's position. Indeed, CEPTA Art. 9(21) expressly provides that dispute resolution provisions may not be incorporated via MFN clauses, which excludes the FMV standard of the Arrakis-Mekar BIT even under the majority view in *Wintershall* that recognizes an exception if "the contrary is clearly stated", as it plainly is in Art. 9(21). And of course, the same result obtains under the more restrictive minority view in *Wintershall*.

161. Claimant may argue that compensation standards are substantive. But they are not, as "damages" arise only in the context of "dispute resolution" processes. Although the FET standards of protection are plainly substantive, the amount of damages to be received if FET is violated must be related to a subsequent "dispute resolution" mechanism. Indeed, Art. 9(21) of CEPTA is included in section E of the treaty, titled "Settlement of Disputes" (and the same for Art. 13 of the Arrakis-Mekar BIT).

162. To conclude: as CEPTA expressly demands, damages under CEPTA here are governed by the MV standard, not by the "imported" FMV in the Arrakis-Mekar BIT.

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243 Notice, ¶30

244 Arrakis-Mekar BIT, Art.13

245 *Wintershall*, ¶179

246 *Wintershall*, ¶179; *Suez*, ¶¶62-63; *Siemens*, ¶103

247 *Wintershall*, ¶179; *Salini*, ¶¶118-119

163. Customary international law cannot separately be used to "import" a FMV standard of damages that the CEPTA expressly excludes in this case. Although both BITs and international law may bear on valuation standards,[248] international law is supplemental and used only if the express valuation standard in the relevant BIT fails to address compensation for a breach of the treaty.[249] This is plainly not the case here, as the MV standard is expressly set out in Art. 9(21) of the CEPTA.

164. In conclusion, the Tribunal should determine that the appropriate compensation standard is the MV contained in the CEPTA.

248 WRIGHT, p.6; TRENOR, p.90

249 *Gemplus*, PartXII¶3; *El Paso*, ¶700; *ADC*, ¶4

PART V: PRAYER FOR RELIEF

166. For the foregoing reasons, Respondent respectfully requests this Tribunal to:

a) Decline its jurisdiction over the dispute;

b) If jurisdiction is held to exist here, accept the *amicus* submission by the External Advisors and reject the *amicus* submission by the Consortium;

c) Declare that Respondent accorded FET to Claimant's investment;

d) Where the Tribunal does not grant the foregoing prayer, declare that the compensation standard is the "market value" standard in CEPTA;

e) Instruct its expert to calculate damages owed to Mekar under the principles outlined above; and

f) Order Claimant to pay all of the costs, attorneys' fees, and expenses of this arbitration, including Respondent's legal and expert fees, the fees and expenses of the Tribunal, ICSID's other costs, and issue such other relief as the Tribunal may consider just and proper.

Respectfully submitted on 23 September 2021

by

Team Dillard

On behalf of The Federal Republic of Mekar