TEAM ELDINE

KOREAN COMMERCIAL ARBITRATION BOARD INTERNATIONAL

THE 2021 FOREIGN DIRECT INVESTMENT
INTERNATIONAL ARBITRATION MOOT

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES
AND ADDITIONAL FACILITY RULES (2006)

IN PROCEEDING BETWEEN

Vemma Holdings Inc.
(Claimant)

v.

The Republic of Mekar
(Respondent)

MEMORIAL FOR RESPONDENT

INDEX OF AUTHORITIES

ARBITRAL DECISIONS

ICSID

Abbreviation	Full Citation
ADC	*ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, Award of the Tribunal, 2 October 2006*
AES	*AES Summit Generation Limited and AES-Tisza Eromu Kft. v. Republic of Hungary, Award, 23 September 2010*
AES, Admissibility	*AES Corporation v. Argentine Republic, Decision on Jurisdiction, 26 April 2005*
AHCA	*African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo, Award on the Objections to Jurisdiction and Admissibility, 29 July 2008*
Aguas De Provinciales	*Sociedad General de Aguas de Barcelona S.A. e Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, Order in Response to a Petition for Participation as Amicus Curiae, March 17, 2006*
Al-Bahloul	*Mohammad Ammar Al-Bahloul v. Tajikistan, Final Award, 8 June 2010; Partial Award on Jurisdiction and Liability, 2 September 2009*
Alicia Grace	*Alicia Grace v United Mexican States, Procedural Order No.4, June 24, 2009*
Al Tamini	*Adel A Hamadi Al Tamimi v. Sultanate of Oman, Award, 3 November 2015*
Apotex, Appleton	*Apotex Holdings Inc. & Apotex Inc. v. United States of America, Procedural Order on the Participation of the Applicant, Mr. Berry Appleton, as a Non-Disputing Party, March 4, 2013*
Apotex, BNM	*Apotex Holdings Inc. & Apotex Inc. v. United States of America, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, March 4, 2013*
AIG	*AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, 7 October 2003*

Arif	*Mr. Franck Charles Arif v. Republic of Moldova, 8 April 2013*
Aven	*David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica, Final Award, 18 September 2018*
Bayview	*Bayview Irrigation District and others v. United Mexican States, Final Award, 19 June 2007*
BG Group	*Group BG Group Plc v. The Republic of Argentina, Award, 24 December 2007*
Biwater	*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award 24 July 2008*
Chevron	*Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II), Second Partial Award on Track II, 30 August 2018; Decision on Track 1B, 23 September 2009*
Continental	*Continental Casualty Company v. The Argentine Republic, Award, 5 September, 2008*
Corona Materials	*Corona Materials LLC v. Dominican Republic, Award 31 May 2016*
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela, Award, 4 April 2016*
CSOB	*Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999*
Cube Infrastructure	*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, Final Award, 29 June 2019*
Eastern Sugar	*Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC, Partial Award, 27 March 2007*
Eco Oro	*Eco Oro Mineral Corp. V.Republic of Colombia, Procedural Order No.6 on Non-Disputing Parties Application, 18 February 2019*
EDF	*EDF (Services) Limited v. Romania, Award, 8 October, 2009*
Generation Ukraine	*Generation Ukraine, Inc. v. Ukraine, Award, 16 September 2003*
Ickale	*Ickale Insaat Limited Sirketi v. Turkmenistan, Award, 8 March 2016*
Karkey Karadeniz	*Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, Award 22 August 2017*

Lao Holdings	*Lao Holdings N.V. v. Lao People's Democratic Republic, 6 August 2019*
LG&E	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, Decision on Liability, 3 October 2006*
Lidercón	*Lidercón, S.L. v. Republic of Peru, Award, 6 March 2020*
Micula	*Ioan Micula, Viorel Micula and others v. Romania (I), Judgment by the Supreme Court of the United Kingdom, 19 February 2020*
Middle East Cement Shipping and Handling Co	*Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, Award, 12 April 2002*
MTD Equity Sdn. Bhd. and MTD Chile S. A	*MTD Equity Sdn. Bhd. and MTD Chile S.A v. Republic of Chile, Award, 25 May 2004*
Nykomb	*Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, Arbitral Award, 16 December 2003*
Orascom	*Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, Decision on Annulment, 17 September 2020*
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania, Award, 11 September 2007*
Petrobart	*Petrobart Limited v. The Kyrgyz Republic, Arbitral Award, 29 March 2005*
Phillip Morris	*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Award, 8 July 2016*
Philip Morris, Admissibility	*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Procedural Order No. 3, February 17, 2015*
Pope & Talbot	*Pope & Talbot v. Canada, Interim Award, 26 June 2000*
RFCC	*R.F.C.C. v. Kingdom of Morocco, Award, December 22, 2003*
Saluka	*Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006*
S.D Myers	*S.D. Myers, Inc. v. Government of Canada, Partial Award (Merits), 13 November 2000*

Sempra	*Sempra Energy International v. Argentina, Award of 28 September 2007*
Suez	*Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission Feb 12, 2007*
Supervision	*Supervision y Control S.A. v. Republic of Costa Rica, Award, 18 January 2017*
Tanzania Electric Supply Company Limited	*Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited, 12 July 2001*
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, Award, 29 May 2003*
Teinver	*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, Award, 21 July 2017*
Telenor	*Telenor Mobile Communications A.S. v. The Republic of Hungary, Award, 13 September 2006*
Tethyan Copper	*Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, Award, 12 July, 2019*
Thunderbird	*International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award, 26 January, 2006*
Tokios Tokelés	*Tokios Tokelés v. Ukraine, Decision on Jurisdiction, 29 April 2004*
Total	*Total v. Argentina, Decision on Liability, 27 December 2010*
OEPC	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, Award, 5 October, 2012*
UAB	*UAB E energija (Lithuania) v. Republic of Latvia, Award of the Tribunal, 22 December 2017*
Union Fenosa	*Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, Award, 31 August 2018*
Vivendi	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v. Argentine Republic (I), Decision on Jurisdiction, 14 November 2005*

Von Pezold	*Bernhard von Pezold and others v. Republic of Zimbabwe, Procedural Order No. 2, June 26, 2012*
Waste Management	*Waste Management v. Mexico No. 2, Final Award, 30 April 2004*
White Industries	*White Industries Australia Limited v. The Republic of India, Final Awar, 30 November, 2011*
World Duty Free	*World Duty Free Company v. Republic of Kenya, Award, 4 October 2006*

UNCITRAL

Abbreviation	Full Citation
CME	*CME Czech Republic B.V. v. The Czech Republic, Final Award, 14 March 2003*

INTERNATIONAL COURT DECISIONS

Abbreviation	Full Form
ECE	*ECE Project Management v. The Czech Republic, Award, 19 September 2013*

BOOKS/JOURNALS

Abbreviation	Full Form
Alford	*Roger P. Alford, Notre Dame Law School, International Decisions: Well Blowout Control Claim. UN Doc. S/AC.2/DEC.40, 36 ILM 1343 (1997). United Nations Compensation Commission, Governing Council, 1998.*
A. S. Komarov	*A. S. Komarov, "Mitigation of Damages"; in Dossier of the ICC Institute of World Business Law: Evaluation of Damages in International Arbitration, ICC Publication (2006)*
Black's Law (9th Ed.)	*Bryan A. Garner, Black's Law Dictionary 9th Edition, West (2009)*
Brodley/Hay	*Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards, Cornell Law Review, Volume 66, Article 3, Issue 4, April 1981*

Bottini	*Gabriella Bottini, Chapter 15: Indirect Shareholder Claims, in Kinnear, M., Fischer, G.R., Almeida, J.M., Torres, L.F. and Bidegain, M.U. (eds.), Building International Investment Law: The First 50 years of ICSID, Kluwer Law International (2015)*
Crawford (2002)	*James Crawford, The International Law Commission's Article on State Responsibility: Introduction, Text, and Commentaries, Cambridge University Press (2002)*
De Brabandere, E	*De Brabandere, Eric, Amicus Curiae (Investment Arbitration) (October 14, 2018). ''Amicus Curiae (Investment Arbitration) in Hélène Ruiz-Fabri, Max Planck Encyclopedia of International Procedural Law (Oxford: Oxford University Press, 2019)*
HM Treasury	*HM Treasury, Guidance on how to assess the competition effects of subsidies, January 2007*
Kleiner/Costamagna	*Caroline Kleiner and Francesco Costamagna, Territoriality in Investment Arbitration: The Case of Financial Instruments, Journal of International Dispute Settlement, Vol. 9, Issue 2 (2018)*
Manual on the Regulation of International Air Transport on Slot Allocation	*Manual on the Regulation of the International Air Transport (Doc 9626, Third Edition – 2016)*
Marboe	*Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (Oxford University Press, 2009)*
Newcombe/Paradell	*Newcombe, Paradell - Law and Practice of Investment Treaties: Standards of Treatment, 2009*
Nicolette Butler	*Butler N. Non-Disputing Party Participation in ICSID Disputes: Faux Amici? Netherlands International Law Review (Springer Science & Business Media BV). 2019*
OECD Guidelines	*OECD, Guidelines on Corporate Governance of State-Owned Enterprises, 2015*
OECD Guidelines, Admissibility	*OECD, A Policy Maker's Guide to Privatisation, Corporate Governance, 2019*
Paparinski	*Paparinski, The International Minimum Standard and FET, 2013*

Petrochilos	*Georgios Petrochilos, "Attribution", Arbitration under International Investment Agreements: A Guide to the Key Issues (Katia Yannaca-Small ed., Oxford 2010)*
Pietrowski	*Pietrowski, R., Evidence in International Arbitration, Arbitration International, 2006, Vol. 22, pp. 379-380*
Ripinsky/Williams	*Sergey Ripinsky, Kevin Williams, Damages in International Investment Law, BIICL (2008).*
Schill	*International Investment Law and Comparative Public Law, 219 (Stephan W. Schill ed., 2010)*
S. Ripinsky	*S. Ripinsky, "Assessing Damages in Investment Disputes: Practice in Search of Perfect", 10 J. World Investment & Trade 5 (2009)*
Tamar	*Meshel, Tamar, The Use and Misuse of the Corruption Defence in International Investment Arbitration (June 1, 2013). 30(3) Journal of International Arbitration (2013)*
The Implementation of Secondary Slot Trading	*The Implementation of Secondary Slot Trading, Civil Aviation Authority CAA House, 45-59 Kingsway, London WC2B 6TE, November 2001*
Titi	*Catherine Titi, the Right to Regulate in International Law Investment Law (2014)*
UNCTAD	*United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, 2012*
Williams, J.,	*John Burr Williams, "The Theory of Investment Value", (1938)*
Yu-Hern Chang/Pei-Chi Shao	*Operation Cost Control Strategies for Airlines, Department of Transportation and Communication Management Science, July 2010*
Zheng	*Christopher R Zheng, The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism, Singapore Law Review, Vol. 34 (2016)*

MISCELLANEOUS

Abbreviation	Full Form
ILC Articles	*Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001*
ILC Commentary	*Commentary on Draft articles on Responsibility of States for*

	Internationally Wrongful Acts, 2001
Draft articles on Most Favoured Nation	*Commentary on Draft articles on Most Favoured Nation clauses, 1978*
IVS Council	*International Valuation Standards, Framework & Requirements, 2013*
New York Convention	*1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

LIST OF ABBREVIATIONS

Abbreviation	Full Form
¶/¶¶	*Paragraph(s)*
%	*Percent*
Annex I	*Constitution Act of Bonooru, 1947*
Annex II	*Constitutional Court of Bonooru on Mobility Rights (excerpts)*
Annex III	*Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts)*
Annex IV	*Memorandum of Association of Vemma Holdings Inc.* *Articles of Association of Vemma Holdings Inc.*
Annex V	*Monopoly and Restrictive Trade Practice Act, as Amended 2009*
Annex VI	*Shareholders' Agreement relating to Caeli Airways*
Annex VII	*Phenac Business Today Podcast Transcript, 17 November 2014*
Annex VIII	*Executive Order 9-2018*
Annex IX	*Aviation Analytics June 7, 2019*
Annex X	*Right of First Refusal Offer Notice*
Annex XI	*Arbitration Rules of the Sinnoh Chamber of Commerce (effective 28 December 2017)*
Annex XII	*14 June 2020 Centre for Integrity in Legal Services Report*
Annex XIII	*Supreme Arbitrazh Court of Sinnogard Ruling*
Annex XIV	*High Commercial Court of Mekar ruling- 23 August 2020*
Annex XV	*Superior Court of Mekar ruling- 25 September 2020*

CBFI	*Consortium of Bonooru Foreing Investor*
CRPU-EA	*External Advisor's for Committee on Reform*
ICSID AFR	*ICSID (Additional Facility) Rule*
Id.	*The same*
infra	*below*
MFN	*Most Favoured Nation*
MST	*Minimum Standard of Treatment*
No.	*Number*
p.	*Page No.*
PO1	*Procedural Order No.1*
PO2	*Procedural Order No.2*
PO3	*Procedural Order No.3*
PO4	*Procedural Order No.4*
Respondent	*The Federal Republic of Mekar*
SOE	*State Owned Enterprise*
supra	*above*

STATEMENT OF FACTS

PARTIES TO THE DISPUTE

1. The Federal Republic of Mekar **["Mekar" or "Respondent"]** is a developing country that has witnessed political instability and an exploitation of resource deposits by intermediate occupying powers.[1] In April 2014, Respondent and the Commonwealth of Bonooru **["Bonooru"]** signed the Comprehensive Economic Partnership and Trade Agreement **["CEPTA"]**, which entered into force on 15 October 2014.

2. Vemma Holdings Inc. **["Vemma" or "Claimant"]** is an airline holding company incorporated pursuant to the laws of Bonooru.[2] On 29 March 2011, Claimant entered into a Share Purchase Agreement **["SPA'']** with Mekar Airservices Ltd., allowing it to acquire the investment through the purchase of 85% stake in Caeli Airways JSC **["Caeli"]**.[3]

RESPONDENT'S MEASURES

3. Claimant made its investment in the territory of Mekar in 2011 and inherited debt liabilities associated with Caeli. Given Claimant's experience in the aviation industry in its home state and worldwide, it should have done its due diligence on the investment risk it has assumed.[4] Despite clear warnings from Mekari representatives on Caeli's board, Claimant pursued an extravagant approach to investment through rapid expansion and ill-advised business plans rather than focusing on long-term financial health.[5] As a result, Claimant suffered financial distress when the economic downturn hit Mekar.

4. The anti-competition expansion of Caeli inevitably caught the attention of Mekar's Competition Commission **["CCM"]** and Caeli's competitors.[6] Accordingly, the CCM's

[1] Facts, ¶12, p.29
[2] NOA, ¶1, p.2; Facts, ¶10, p.29
[3] Facts, ¶25, p.32
[4] RNOA, ¶11, p.7
[5] *Ibid.*
[6] RNOA, ¶12, p.7

two investigations and fines levied on Caeli were merely the proper implementation of Mekar's domestic laws in effect at the time Claimant made its investment.[7]

5. The CCM imposed airfare caps on Caeli to avoid supra-competitive profits which remained in effect due to overwhelming evidence of anti-competitive behavior.[8] Mekar lifted the airfare caps as soon as Caeli's market share (when combined with Royal Narnian's market share) fell below 40%.[9] Moreover, the denomination exclusively in MON is an intrinsic right of Mekar to minimize capital outflows and secure the macroeconomic situation, given the currency's fragility.[10]

6. Respondent has been continuously engulfed in economic crises and has no obligation to cater to Claimant's whimsical demands. Not a single act or omission taken by Mekar can be construed to give rise to a breach of the Fair and Equitable Treatment **["FET"]** in the CEPTA.[11]

7. At the time the Claimant decided to sell off its stake in Caeli, it still enjoyed a considerable market share in Mekar, which would have allowed it to make quick recoveries when the crisis abated. Not only did Claimant run Caeli into the ground, but it also abandoned the enterprise at its own volition.[12]

REFERRAL TO ARBITRATION

8. The ICSID Additional Facility Rules **["ICSID AFR"]** only contemplate proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, pursuant to Article 2 of the ICSID AFR. Respondent has not consented to State-to-State arbitration with Bonooru under Chapter 9 of CEPTA either. In light of the foregoing,

[7] *Ibid.*
[8] RNOA, ¶13, pp.7-8
[9] *Ibid.*
[10] RNOA, ¶14, p.8
[11] *Id*, ¶17, p.8
[12] *Id*, ¶18, p.8

Respondent submits that Vemma is not entitled to bring the present claims under the ICSID AFR and CEPTA Chapter 9.[13]

ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER CHAPTER 9 OF THE CEPTA

9. Respondent respectfully submits that this Tribunal must decline to exercise jurisdiction over the unfounded claims for compensation of Claimant[14] as Respondent has not subjected Claimant's investment in Caeli to unfair treatment,[15] specifically not by its courts and administrative bodies,[16] nor by the government of Mekar,[17] in a manner inconsistent with its obligations under the CEPTA.**[18]**

10. Specifically, this Tribunal lacks jurisdiction over the current dispute,[19] as **|A|** Claimant has no *ius standi* to invoke treaty protection, and **|B|** the present dispute is a state-state arbitration.[20]

A. THE JURISDICTIONAL REQUISITES ARE NOT FULFILLED

11. In April 2014, Claimant and Respondent signed the CEPTA in an attempt to establish a free trade area, and has been invoked by the Claimant to bring these claims.[21] According to Article 9 of the CEPTA, this Tribunal's jurisdiction is limited to disputes involving an investment in the territory of a Contracting Party by an investor of another Party in

[13] RNOA, ¶¶5-6, p.6
[14] *Id*, ¶23, p.9
[15] NOA, ¶5, p.2
[16] *Id*, ¶20, p.4
[17] *Id*, ¶11, p.4
[18] RNOA, ¶7, p.7
[19] *Id*, ¶2, p.6
[20] *Id*, ¶3, p.6
[21] CEPTA, Article 1.2, p.71

existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter.[22]

12. Claimant indeed invested in Caeli when it purchased 85% stake in the company.[23] Accordingly, the important question is whether such investment constitutes a '*covered investment*' that allows the investor to file a specific claim against the host state in this instance under CEPTA, and not merely as an '*investment*' in broad terms which must solely be brought before Respondent's domestic courts.[24]

13. In this vein, Respondent submits that; **|1|** Claimant is not a protected investor since **|2|** the shares in Caeli have been liquidated.[25] As a consequence, **|3|** the territorial requirement is likewise unsatisfied.

1. Claimant is not a protected investor as the term *'has made an investment'* must be interpreted restrictively

14. In determining whether the Claimant qualifies as an investor under the CEPTA, the present Tribunal must undertake an analysis on whether it falls within the scope of the definition of an '*investor*' under Article 9.1 of the CEPTA which provides:

"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."[26]

15. In the present case, Respondent argues that the jurisdiction *ratione personae* requirement is not fulfilled. The tribunal in *Aven* affirmed that an investor that transfers its ownership of the investment in question prior to the arbitral proceedings should be barred from claiming protection under the treaty.[27] It is generally accepted that the date on which such

[22] CEPTA, Article 9.1, p.73
[23] Facts, ¶26, p.32
[24] *Bayview*, ¶91
[25] Facts, ¶63, p.40
[26] CEPTA, Article 9.1, p.73
[27] *Aven*, ¶301

proceedings are deemed to have been instituted is relevant to determine whether a party has standing for purposes of jurisdiction,[28] and the inability to demonstrate such will not qualify it as an investor for the purposes of these claims.[29]

16. In this sense, this Tribunal must not regard Claimant as a protected investor, considering that Claimant has sold its stake in Caeli to Mekar Services on 8 October 2020 and simultaneously filed a notice of arbitration against Respondent on 15 November 2020 to seek compensation,[30] proving that Respondent is the owner of Caeli at the time this proceeding was instituted.[31]

2. Claimant's shares in Caeli have been liquidated, thus there is no longer any asset to protect

17. Even if the Tribunal finds the jurisdiction *ratione personae* requirement to be present, Claimant's claims are inadmissible, as its investment must likewise conform with the *chapeau* of the definition of a *'covered investment'* under Article 9.1 in order to submit a claim for protection under the CEPTA.[32]

18. Article 9.1 of the CEPTA, defines *'covered investment'* as:

> *"an investment in its territory by an investor of another Party in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter;"*[33]

19. The foregoing provision must be interpreted to mean that only *'existing investments'* are protected under the treaty. The tribunal in *CSOB* determined that because the claimant initiated the proceedings before the transfer of rights were completed, the tribunal had

[28] *Vivendi*, ¶60
[29] *Aven*, ¶301
[30] Facts, ¶63, p.40
[31] *Ibid.*
[32] CEPTA, Article 9.1, p.73
[33] *Ibid.*

jurisdiction to hear this matter regardless of the legal effect it may have on the claimant's standing.[34]

20. In contrast to the *CSOB* case, Claimant initiated proceedings after voluntarily transferring its shares in Caeli back to Mekar Airservices,[35] effectively depriving the Tribunal the jurisdiction to hear the matter as the subject matter requirement is no longer fulfilled. Therefore, as Claimant's investment does not fulfill the elements stipulated under Article 9.1 of the CEPTA,[36] this Tribunal has no jurisdiction over Claimant's investment which has been sold to Respondent for 400 million USD. [37]

3. The territorial requirement is likewise unsatisfied

21. Generally, for an investment to be protected by an investment agreement, the investment must be *'in the territory'* of the contracting State,[38] therefore, at the time the investment materialises, there must be a territorial *nexus* with the host State.[39]

22. The tribunal in *Al-Bahloul* has held that since all of the investments at sites located within the territory of the Republic, it is equally evident that they constitute '*investments*' in the '*area*' of the Contracting Party, '*area'* being defined as territory under the Contracting Party's sovereignty.[40]

23. However, *in casu,* considering that Claimant has transferred its investment to Mekar Airservices,[41] the Tribunal must find that its right over the investment in Respondent's territory has been relinquished. Hence, the jurisdiction *ratione loci* requirement is not fulfilled as Claimant is no longer the owner of Caeli.[42]

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[34] *CSOB*, ¶31
[35] Facts, ¶63, p.40
[36] CEPTA, Article 9.1, p.73
[37] Facts, ¶63, p.40
[38] Kleiner/Costamagna, p.319; Zheng, p.141
[39] *Ibid.*
[40] *Al-Bahloul*, ¶140
[41] Facts, ¶63, p.40
[42] *Ibid.*

24. Conclusively, as Claimant does not satisfy any jurisdictional requisites, this Tribunal must reject the present claims for lack of jurisdiction as stipulated by Chapter 9 of the CEPTA.

B. MOREOVER, THE PRESENT DISPUTE IS CONSTITUTED BETWEEN STATES, THUS IT MUST BE REGARDED AS A STATE-STATE ARBITRATION

25. If this Tribunal finds that Claimant's investment nevertheless fulfilled the jurisdictional requisites, Respondent contends that Claimant is not entitled to bring claims under the ICSID AFR and CEPTA Chapter 9 as it is a State owned enterprise **["SOE"]**.[43] The ICSID Convention prevents tribunals from arbitrating State-to-State disputes or disputes between private parties,[44] as ICSID tribunals only have jurisdiction in relation to a legal dispute arising "*directly out of an investment, between a Contracting State and a national of another Contracting State*."[45]

26. In light of this, Respondent respectfully requests this Tribunal to decline to exercise jurisdiction as |**1**| Bonooru's sizable ownership in Vemma, makes it the rightful party of interest in the present dispute. Moreover, Claimant |**2**| has been carrying out governmental functions, |**3**| operating under Bonooru's control as the successor of Bonooru Air.[46] Lastly, |**4**| Bonooru's 55% ownership in Claimant[47] requires piercing of corporate veil.

1. Bonooru's sizeable ownership in Vemma makes it the rightful party in interest

27. Claimant lacks legal standing to pursue its claims, given that Bonooru, the only governmental shareholder,[48] owning 55% shares of Vemma, should be acknowledged as the legitimate party accorded with the capacity to pursue Claimant's claims.[49] Not only has Bonooru undoubtedly maintained a significant interest in Vemma, but during an

[43] RNOA, ¶¶2-6, p.6
[44] Article 25 ¶1 of ICSID Convention
[45] *Ibid.*
[46] RNOA, ¶3, p.6
[47] *Id*, ¶4, p.6
[48] PO4, ¶2, p.89
[49] Facts, ¶65, p.40

interview with a former high-ranking official of Bonooru's Ministry of Tourism, considerable resources were invested into flights between Mekar and Bonooru which appears to benefit Bonooru more than Vemma or Caeli.[50]

28. In light of this, Claimant is not the party of interest in the present proceeding, but rather Bonooru. Claimant is an SOE that is under the control of Bonooru, which is the ultimate beneficial owner of the majority voting shares[51] and Caeli.

29. In any case, even if Claimant insists on pressing its restitution claims, Bonooru should espouse its claims before the International Court of Justice or the World Trade Organization, given that the underlying dispute is between states. Conclusively, this Tribunal must rule that, under the CEPTA, claims brought by Claimant are inadmissible.

2. Claimant is an agent of Bonooru that has been carrying out governmental functions

30. Furthermore, Respondent asserts that Claimant's intention to invoke the Broches test to determine whether it has capacity to seek treaty protection does not extend to Claimant's condition as a state agent. The tribunal in *Maffezini* noted that under the Broches test, a private corporation operating for profit while performing essentially governmental functions delegated to it by the State could be considered an organ of the State.[52]

31. Presently, Claimant is not a private company, but is in fact an SOE, which has been discharging governmental functions to fulfill the company's objectives:

> *"To assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities"*[53]

[50] Annex VII, p.55
[51] OECD Guidelines, p.14
[52] *Maffezini*, ¶52
[53] Annex VII, p.55

32. Annex IV further provides that the goal will be accomplished through Royal Narnian, Bonooru's flag carrier,[54] which is wholly owned and operated by Claimant.[55] Regardless of the activities performed by Royal Narnian or Caeli, which Claimant also owned a majority stake,[56] their activities are wholly attributed to Claimant. This signifies that Claimant has been operating as an entity that performed governmental functions in addition to its commercial operations as an airline.[57]

33. Additionally, Bonooru's Ministry of Transport and Tourism recorded recurring payments made to Claimant under the Horizon 2020 scheme between October 2011 and June 2016.[58] Ms. Sabrina Blue stated at a press conference on 31 May 2016 that Vemma has lived up to the standards established by its predecessor in Bonooru by contributing to the enhancement of Bonooru's tourism infrastructure and improving the population's mobility rights throughout the Greater Narnian area.[59]

34. Moreover, the provision of recurrent subsidies to companies investing in tourism-related infrastructure in Bonooru was a significant element of the Horizon 2020 Scheme, and Claimant received the first subsidy on 28 October 2011.[60] Receiving funding under the state program implies that Claimant carries out an overwhelming responsibility to fulfill Bonooru's objective of maintaining mobility rights and encouraging tourism that is being protected under Article 70 of the Constitution Act of Bonooru.[61]

35. Although Claimant argues that only Royal Narnian will be responsible to ensure the mobility rights of Bonooru's nationals,[62] Respondent contends that it is unnecessary for both its airlines to be exercising governmental function to substantiate that Claimant is an agent of Bonooru. It is sufficient for only one airline to perform governmental function

[54] Annex III, ¶59, p.43
[55] Facts, ¶10, p.29
[56] *Ibid.*
[57] RNOA, ¶3, p.6
[58] PO4, ¶6, p.89
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid,* Annex I, ¶1, p.41
[62] Annex III, p.43

for Claimant to be regarded as a state agent. Claimant therefore lacks standing in this proceeding, because Claimant's commercial operations still protect movement rights in Bonooru.[63] Thus, they are essentially still performing governmental functions.

3. Claimant is operating under Bonooru's control as the successor of Bonooru Air

36. From its inception until March 2020, Bonooru maintained a minority shareholding in Vemma ranging from 31% to 38%,[64] which was later increased to 55%.[65] There is a general presumption that a majority shareholder also controls the company, and this presumption can only be rebutted if there are special elements which create doubts about the owner's control.[66]

37. Article 5 ARSIWA stipulates that:

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law."

38. In the case of *Toto*, the investor signed a contract with CEPG,[67] an entity that performs tasks mandated by the Council of Ministers.[68] The tribunal ruled that because CEPG was managed under the Ministry's direction, it was *personne morale de droit public* and was thus formed and empowered by the Lebanese government to execute aspects of governmental authority under state responsibility in accordance with Article 5 ARSIWA.[69]

39. Prior to the privatization of Bonooru Air, the Prime Minister remarked that the successor will be directed to accommodate public interest. In fact, the proposed privatization will

[63] *Ibid.*
[64] Facts, ¶10, p.29
[65] Facts, ¶65, p.40; RNOA, ¶3, p.6
[66] *Supervision*, ¶328
[67] *Toto*, ¶43
[68] *Id*, ¶51
[69] *Id*, ¶52

allow Claimant to be more efficient and provide quality services to Bonooru's citizens than ever before.[70] In order to ensure the people's mobility rights, the Bonoori government has delegated such duties to Vemma through its airline subsidiaries, Royal Narnian and Caeli.[71]

40. In 1964, the Constitutional Court of Bonooru certainly determined that Article 70 imposes positive obligations on the state to assist and assure the provision of essential transportation to the population living in remote areas.[72] Furthermore, Bonooru's Prime Minister stated on 10 November 1980:

> *"[...] Our government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability."*[73]

41. Moreover, as to control, it has been ascertained that the Company shall form its Board of Directors,[74] which will be the Company's decision-making power.[75] Such fact indicates that Claimant will implement and carry out their operation according to the will of its Board of Directors' directions, which are mainly composed of Bonooru's governmental bodies.[76]

42. Respondent therefore urges this tribunal to decline jurisdiction and to hold that Bonooru is the legitimate party who must bring claims on behalf of Claimant in a State-to-State dispute before the appropriate dispute settlement body.

4. Bonooru's 55% ownership in Vemma requires piercing of the corporate veil

43. Having established that Bonooru has a significant ownership in Vemma that has been discharging governmental functions under Bonooru's control, it is only right for

[70] *Ibid.*
[71] Annex III, ¶59, p.43
[72] Facts, ¶5, p.28
[73] *Id*, ¶8, p.29
[74] Annex IV, ¶152, p.45
[75] *Ibid.*
[76] Facts, ¶65, p.40

Respondent to submit that piercing of the corporate veil is required in this present proceeding.

44. Claimant may argue that such approach is unsubstantiated since tribunals are only permitted to implement piercing of the veil in cases where there is evidence of an unlawful act, such as fraud.[77] Respondent submits that Claimant has violated the Monopoly Act by having over 50% market share, which exceeds the restrictions, prompting the CCM to begin a *suo moto* investigation against its operation.[78] As such, Bonooru is the legitimate party to the present dispute vested with the rights to invoke claims considering that it is the owner of Vemma, whose rights had ultimately been forfeited as a result of the sale of Caeli[79] and the increase of Bonooru's shares to 55% through the Airway Infrastructure Rescue Act on 2 March 2021.

45. In the light of the foregoing, Respondent asserts that Claimant is not entitled to bring the present claims under the ICSID AFR and Chapter 9 of the CEPTA.[80]

II. THE TRIBUNAL SHOULD ONLY GRANT LEAVE TO THE CRPU-EA *AMICUS* SUBMISSION

46. In case this Tribunal is unconvinced and instead affirms jurisdiction over the present dispute, Respondent requests the Tribunal to grant leave to the External Advisors for the Committee on Reforms for Public Utilities **["CRPU-EA"]** *amicus* submission, as it will provide relevant and important insight that will assist the Tribunal to attain the optimal decision for all the parties concerned.[81]

47. Presently, there are two *amici* that filed applications with their submission attached. The first *amicus* is the Consortium of Bonooru Foreign Investor **["CBFI"]**, a non-profit

[77] *Pathak*, ¶373; *Gambrinus*, ¶142
[78] Facts, ¶8, p.29
[79] Facts, ¶65, p.40
[80] RNOA, ¶6, p.6
[81] PO2, ¶2, p.26

industry association that represents the Bonooru Foreign investors.[82] The second *amicus* is the CRPU-EA, who are advisors to the Committee on Reform of Public Utilities is the deliberations for Claimant's purchase of 85% stake in Caeli.[83]

48. Both submissions are subjected to scrutiny to ensure admissibility, however Respondent requests this Tribunal to only grant leave to the CRPU-EA as **|A|** it is the only qualified *amicus*, as opposed to **|B|** the CBFI who will not effectively serve as *"the friend of the court"*.[84]

A. CRPU-EA IS THE ONLY QUALIFIED *AMICUS*

49. Article 41 (3) ICSID AFR have established the criteria for the admissibility of *amicus* submission, which are:

> *"(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
> *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the proceeding.*
> *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party"*[85]

50. Under the language of the forgoing clause, Respondent submits that the **|1|** CRPU-EA are independent **|2|** with significant interest over the current proceeding. **|3|** Moreover, their submission will assist the Tribunal by giving new knowledge that addresses a matter within the scope of the dispute. Lastly, **|4|** the admission of CRPU-EA submission will not cause undue burden or unfair prejudice.

[82] CBFI Submission, ¶2, p.16
[83] CRPU-EA Submission, Line 615-620, p.19
[84] De Brabandere, E. p.1
[85] Article 41(3) ICSID AFR

1. CRPU-EA is a non-disputing party

51. *Firstly*, as the *amicus* role is to become the *"friend of the court"*, it is imperative that the *amicus* needs to be independent, a determination which this Tribunal must first make before moving to examine the substance of the relevant submissions.[86]

52. The *Von Pezold* tribunal has held that a potential *amicus* is effectively not independent when it has a relationship with either disputing party that raises a conflict of interest. One such relationship is when the *amicus* is effectively an organ of the state, which can be proven when it is performing a state function.[87]

53. *In casu*, no such conflict exists even though the CRPU-EA was hired by the Respondent to take part in the privatisation process of Caeli and continue to be retained for other privatisation projects.[88] Here, Respondent's retention of their consulting services does not mean that the advisors are effectively acting as a state organ because the role of the CRPU-EA remains to be primarily advisory in nature.

54. It is perfectly normal for a state to hire external advisors who play an active role in the sales preparation phase and implementation phase in the privatisation of SOE. Within these phases, the external advisors' activities could include, "*review the SOE's business and finances, its accounting practices and to advise on matters such as preparation of the company books"* and even, *"solicit interest from potential buyers, preparing the transaction documents and helping market the company to the potential investors."*[89]

55. Indeed, such activities were carried out by the CRPU-EA that led to the acquisition by Claimant of its Caeli 85% stake.[90] However, the final decision to approve the purchase, the relevant governmental function, remained with and was exercised by Respondent.

[86] De Brabandere, E. p.1
[87] *Von Pezold*, ¶¶50-53, pp.16-17
[88] CRPU-EA Submission, Line 615-625, p.19
[89] OECD, admissibility, pp.73-74
[90] CRPU-EA Submission, Line 625-630, p.19

Accordingly, the CRPU-EA cannot be deemed to be performing an essentially governmental function that gives rise to conflict of interest between the advisors and the Respondent.

2. CRPU-EA has significant interest in the proceedings

56. The Tribunal should only grant the CRPU-EA submission to allow the advisors to voice their opinion in regard to the issue of corruption that advisors seek to prohibit and defend against.

57. The *Eco Oro* tribunal has held that significant interest comprises more than a general interest in the proceeding, requiring the *amicus* to demonstrate that the outcome of the proceedings will have direct or indirect impact on the rights or principles that *amicus* defends and represents.[91]

58. The current Tribunal will consider if Claimant has the right to invoke treaty protection under the CEPTA. Such deliberation goes to the very issue of admissibility of claims.[92] While this Tribunal may have jurisdiction over the case Pursuant to Article 9.16 CEPTA, but if it is proven that indeed the admission of Claimant's investment was through corruption, and it should be barred from invoking treaty protection and should leave Claimant as it is, without any treaty protection.[93]

59. Such a ruling could aid efforts against corruption,[94] a principle that the advisor seeks to defend. They have significant interest in ensuring that no protection can be extended to tainted investments obtained through corruption, and that such investments must be barred from claiming a breach of FET as they are disqualified from such protection under the CEPTA.

[91] *Eco Oro*, ¶34
[92] *Orascom*, ¶254
[93] *World Duty Free*, ¶157
[94] Tamar, pp.279-281

3. CRPU-EA submission will assist the tribunal by giving new knowledge that address a matter within the scope of the dispute

60. Moreover, the CRPU-EA *amicus* submission will assist the Tribunal by giving a new contextual perspective regarding Claimant's illegal conduct to acquire Caeli.

61. In *Alicia Grace* case, for submission to be admitted, *it has to facilitate the "process of inquiry into, understanding of, and resolving that very dispute which has been submitted to them in accordance with the consent"*.[95] As Claimant has in fact raised corruption as the basis for its allegation of denial of justice, it must be deemed to have likewise given its consent for Respondent to raise the very same issue, even if it is to bar the Claimant from treaty protection.

62. Past tribunals have accepted submission as they can provide materially different insight on a subject matter within the scope of the dispute, on the basis of *amici's* substantive knowledge or relevant experience and expertise that places it in a position to provide information not furnished by the disputing parties.[96] One such way is when an *amicus* has relevant experience that places it in a position to provide information not furnished by the disputing parties.[97]

63. Here, the CRPU-EA will provide information on Claimant's actual corrupt activities, specifically the bribe made by Claimant to Mr. Dorian Umbridge, the head of The Committee on Reform for Public Utilities **["CRPU"]**,[98] information only advisors can provide since they served as consultant to the CRPU when it privatized Caeli.[99]

[95] *Alicia Grace*, ¶51
[96] *Apotex*, BNM, ¶23
[97] *Philip Morris, Admissibility*, ¶¶24-25
[98] CRPU-EA Submission, Line 635-640, p.19
[99] *Id.*, Line 615-620, p.19

4. Admission of CRPU-EA submission will not cause undue burden or unfair prejudice

64. Lastly, the admission of CRPU-EA submission will not prejudice the parties, if accepted, as the Tribunal retains the inherent right to rely or to disregard any *amicus* submission when deciding or ruling on the dispute.[100] In any case, Claimant will not be unduly burdened as it can easily incorporate defense in its argument against the information to be provided by the CRPU as it has already conducted extensive research on corruption as it is the core basis of its denial of justice claim.[101] As such, Claimant will not need additional time to research on this issue.

65. In any case, Respondent requests this Tribunal to ensure that there are procedural safeguards very early on so that undue burden and unfair prejudice could be avoided.[102]

B. CBFI will not effectively be acting as a "*friend of the court"*

66. While CRPU-EA is a qualified *amicus*, the same cannot be said for CBFI since **|1|** it will not assist the Tribunal as the knowledge and insight by CBFI is already within the public domain, which will not address a matter within the scope of the dispute. **|2|** Likewise, the CBFI has no significant interest in the present proceedings.

1. CBFI knowledge and insight are already within the public domain and are immaterial to the determination of Claimant's standing

67. While CBFI is a national leader in public policy advocacy on national and international business issues and has extensive knowledge and insights on the treatment of investment in Bonooru,[103] Respondent submits that they are already within the public domain as the

[100] Nicolette Butler, p.172
[101] *infra*, ¶121-124
[102] *Aguas de provinciales*, ¶15
[103] CBFI Submission, ¶2, p.16

treatment of investment is in fact governed by Bonooru's legal framework. Hence, the CBFI will not provide anything materially different from those to be presented by the disputing parties.[104]

68. Additionally, even if the CBFI will provide factual information regarding Bonooru's business that operate without governmental instruction or direction irrespective of private or public ownership structure,[105] and that Bonooru's business landscape is a free market one anchored on the nature of the activities and not their purpose,[106] they are not material to the Tribunal's determination of the issue of whether the present dispute is a state-to-state dispute arbitration.

69. This is because the Tribunal is tasked to assess whether the Claimant itself is an SOE who must be deemed to be deprived of standing as it is either a state agent or performing governmental functions, *supra*.[107] Thus even if the CBFI has knowledge on how SOEs operate in Bonooru, they are immaterial as the Tribunal must look at the facts specific to Claimant, particularly its Memorandum of Association,[108] and its operation and unique relationship with the government of Bonooru in regard to the provision of the constitutionally guaranteed mobility rights.[109]

2. CBFI has no significant interest in the proceeding

70. Additionally, the CBFI does not have significant interest over the present dispute, as the award of the Tribunal does not have any impact on it, being only limited to the parties which are Respondent and Claimant. The *Apotex* tribunal has held that an *amicus* must have more than a general interest in the proceeding and must prove the impact of the award on it.[110]

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[104] *Apotex*, Appleton, ¶34
[105] CBFI Submission, ¶10, p.17
[106] *Ibid.*
[107] *supra*, ¶¶29-34
[108] Annex IV, p.44
[109] Annex III, ¶59, p.43
[110] *Apotex*, Appleton, ¶38

71. Presently, the CBFI has merely expressed its fear that to arbitrarily carve out enterprises with formal or informal links to their countries of origins, a model that underpins the economies of most nations in the Greater Narnian region, would deal a death knell to the collective growth of the region.[111] It further asserted that the interpretation of investor-State dispute settlement provisions of current and future investment agreements in Respondent holds significant interest for all Bonooru businesses, which are frequent investors in the country and have made sizable contributions of capital in Mekar.[112]

72. This fear expressed by the CBFI is not significant and is even misplaced as there is no system of precedent under international investment arbitration law.[113] Any ruling of this Tribunal will only be binding between Respondent and Claimant. Moreover, this Tribunal must be presumed to be impartial and independent[114] and will decide on the merits of the specific case before it and the applicable laws and not to act arbitrarily by carving out exemptions without applying the appropriate tests under international law for determining whether in fact, Claimant is an SOE who must be deprived of its standing and protections under the CEPTA.

73. Respondent hereby submits that the CBFI submission must be rejected.

III. RESPONDENT DID NOT VIOLATE ITS OBLIGATION OF FAIR AND EQUITABLE TREATMENT UNDER ARTICLE 9.9 OF THE CEPTA

74. Even if this Tribunal were to accept that Claimant made a protected investment under the CEPTA, Respondent submits that it has consistently accorded Claimant FET.

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[111] CBFI Submission, ¶8, p.16
[112] *Id*, ¶9, p.16
[113] *AES*, Admissibility, ¶23
[114] Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, '*Arbitrator Independence and Impartiality: Examining the Dual Role of arbitrator and counsel*' (2011) International Institute for Sustainable Development (IISD)

75. Article 9.9 of the CEPTA contains the FET standard which requires *"each party to accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment […]."*[115] The FET standard is autonomous and is interpreted on a case-by-case basis[116] regardless of whether Respondent's measures were taken in a *bona fide* manner.[117] The *Waste* tribunal recognizes multiple components of the FET clause which includes the obligation to act transparently, with due process, to refrain from taking arbitrary and discriminatory measures, and to abstain from frustrating the investor's legitimate expectations.[118]

76. Nevertheless, the Tribunal should also note that under Article 9.8 of the CEPTA,[119] Respondent bears the sovereign right to exercise its legislative power and to regulate its law.[120] As such, Respondent has not exceeded the regulatory authority and has abided by the FET standard under the Minimum Standard of Treatment **["MST"]** clause.

77. Claimant's contention concerning the violation of Article 9.9 of the CEPTA should be dismissed by this Tribunal since **|A|** Respondent's measures based on Claimant's membership in the Moon Alliance did not violate due process and were not arbitrary. **|B|** The refusal to grant Caeli subsidy under Executive Order 9-2018 **["EO 9-2018"]** was non-discriminatory. Subsequently, **|C|** the proceedings before the Mekari courts and the enforcement of the arbitral award already set aside by the Sinnoh Court do not constitute a denial of justice. Lastly, **|D|** Respondent's measures taken collectively, do not constitute a denial of justice.

A. RESPONDENT'S MEASURES DID NOT VIOLATE DUE PROCESS AND WERE NOT ARBITRARY

[115] CEPTA, Article 9.9, p.76
[116] *Saluka*, ¶291
[117] *Azurix*, ¶372
[118] *Waste*, ¶98
[119] CEPTA, Article 9.8, p.37
[120] *Parkerings*, ¶332

78. Respondent acknowledges that the FET standard requires the host State to accord due process and to refrain from acting arbitrarily.[121] However, Claimant's 54% market share breached Respondent's domestic law - the Monopoly and Restrictive Trade Practice Act, through secondary slot trading with Royal Narnia, a fellow Moon Alliance member.[122] Additionally, Claimant's rapid expansion was ill-advised[123] since Claimant engaged in monopolistic behaviour which prompted Respondent to launch the *suo moto* investigation.

79. It was only reasonable that Respondent imposed the fines and kept the airfare caps as such actions were necessary to prevent supra-competitive profits. Claimant did not object to the imposition as it had no negative impact on Claimant's profits,[124] *infra.*[125] For this reason, Justice VanDuzer dismissed Claimant's appeal to remove the caps.[126] Respondent further points that Claimant's inability to weather the crisis was due to Claimant's failure to focus on its debts and reliance on overly optimistic forecasts, not the maintenance of the caps.

80. Moreover, Respondent has always abided by the CEPTA in promoting fair competition in the free trade area.[127] Hence, **|1|** CCM's *suo moto* investigation of Caeli and the interim hearing did not amount to a fundamental breach of due process. Claimant's anti-competitive behaviour forced Respondent to establish several measures, and this Tribunal must find that **|2|** the maintenance of caps and the MON denomination were not arbitrary.

1. CCM's *suo moto* investigation of Caeli and the interim hearing did not amount to a fundamental breach of due process

[121] Schill, p.80
[122] Facts, ¶27, p.32
[123] Annex IX, p.57
[124] Facts, ¶37, p.34
[125] *infra*, ¶¶155,157-158
[126] Facts, ¶54, p.38
[127] CEPTA, Article 1.3 (1)(b), p.72

81. Due process as set out in the *AIG* tribunal is when a measure is implemented in accordance with the state's domestic legislation.[128] However, this should not be done in isolation of internationally recognized principles of due process, which must also be complied with.[129]

82. Respondent's actions in this case were consistent with due process because Respondent had adhered to the relevant domestic law which is [130] Monopoly and Restrictive Act by launching the *suo moto* investigation,[131] and even has gone so far to fulfill the international *"minimum standard in the administration of justice".*[132] The investigation successfully addressed substantive correctness and accorded Claimant to international procedural fairness,[133] because **|a|** the assessment of the measure had factual basis and **|b|** did not neglect proper procedures.

a. The investigations were compliant with Mekari Law

83. Respondent has objectively and legally determined that Claimant's alliance with the Royal Narnian monopolized the slots for domestic and international flights in Mekar by 21% from 2010 to 2013 and 17% by 2010 and 2013 respectively.[134] This is more apparent through the preferential slot trading in the Moon Alliance which impacts Claimant's market share to exceed more than 54% by 2016, surpassing 11% of its stated limit according to the Act.[135] In addition to a large market share, Claimant's supra-competitive profits destroyed the industry by benefiting only Bonooru, and exposing other airlines to the danger of being driven out of the market.[136]

84. Even if Claimant argues that the market share at the time being was 43%, the CCM still had the competence to exercise its authority under the Monopoly and Restrictive Act

[128] UNCTAD Investment Series, p.51
[129] Newcombe/Paradell, p.376; UNCTAD Investment Series, p.51
[130] *Ibid.*
[131] Annex V, p.47
[132] Paparinskis, p.72-73; Newcombe/Paradell, p.376; *Lidercón*, ¶167
[133] *Petrobart*, ¶133
[134] Facts, ¶30, p.33
[135] Annex V, p.47
[136] Annex VII, p.55

Chapter III (2)(a). Whereupon a corporation owns a lower market share, as is the case here,[137] the CCM may exceptionally investigate based on its competition law.[138]

85. Secondary slot trading concerns the transfer or exchange of slots between airlines. This mechanism provides an incentive for a single airline (or alliance) to acquire all or most of the slots at a congested airport, therefore increasing market share.[139] The assessment by Compagnie Africaine d'Aviation found slot trading to have a relevant connection with the competition law[140] because it is the most frequently cited potential problem for abuse of dominance.[141]

86. Respondent emphasized that the preferential secondary slot trading enabled Claimant and Royal Narnian to exchange and transfer slots solely between the two, based on the demands of their schedule. This particularly benefits the two airlines in concert, as they can avoid additional expenses for delays (*i.e.,* fuel, crew, maintenance, aircraft ownership and others). Secondary slot trading is effective in targeting travelers since it provides a more enticing service by aligning their departure and arrival schedules.[142] This allowed Claimant and Royal Narnian to dispatch more fleet and sell more tickets, resulting in undeniably larger profit.

87. CCM gave a clear warning to Caeli during the tendering process to strictly avoid Caeli from participating in cooperation in competitive parameters with factors that include pricing, timetables, capacity, facilities, and other sensitive information.[143] As such, secondary slot trading is prohibited as it concerns those factors.

88. Respondent further argues that Caeli's enjoyment of various Moon Alliance privileges allowed Claimant to have lower operational costs in the industry. Claimant exploited both

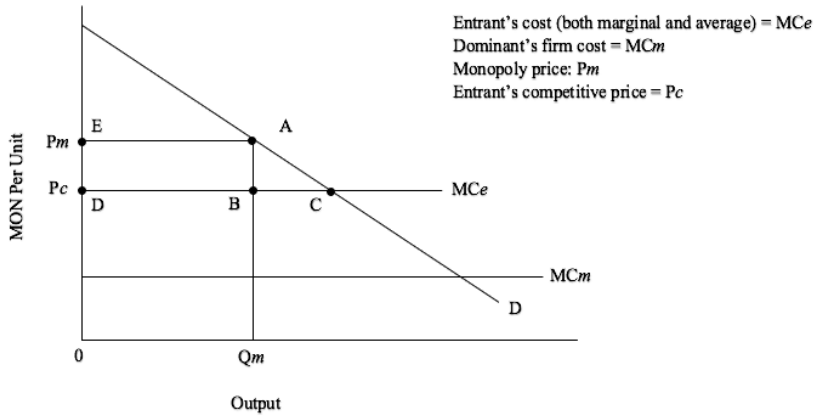
[137] Facts, ¶36, p.34; NOA, ¶14, p.3
[138] Annex V, p.47
[139] The Implementation of Secondary Slot Trading, p. 26
[140] *Id.*, p.25
[141] *Id*., p.26
[142] Manual on the Regulation of International Air Transport, p.4.10-2
[143] Facts, ¶25, p.32

international and regional routes[144] using the benefits from the competition factors to obtain more slots and dispatch more fleets.

89. Claimant recognized its optimum way of working to keep operational costs low through contracts with Moon Alliance members[145] in dispatching its eight purchased and fifteen leased Boeing 737 aircrafts.[146] Its equipment and fuel efficiency allowed it to avoid deep losses faced by its competitors.[147] Furthermore, the subsidies under the Horizon 2020 Scheme helped Caeli to drastically reduce its airfare tickets.[148]As such, Claimant skewed the market share in Mekar, which eventually pushed other competitors out of the industry.

90. Considering all the benefits outlined *supra*,[149] Claimant is not concerned about undercutting its ticket prices, resulting in predatory pricing. All this built-up Claimant's market share to more than 54%. As a result, other competitors are being pushed out of the market. Herewith, Respondent submits clear evidence that Claimant's pricing strategy would undoubtedly drive out other competitors from the market through the graph illustrated in Figure 1 and Figure 2:

Figure 1
Linear Cost Model

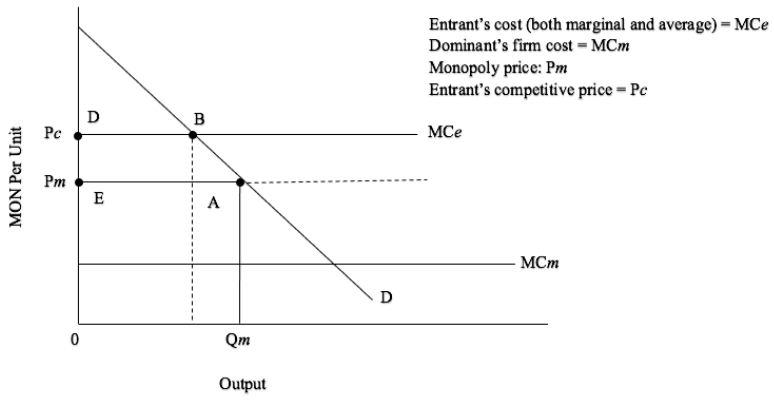


[144] Facts, ¶49, p.37
[145] Facts, ¶27, p.32
[146] Yu-Hern Chang/Pei-Chi Shao, pp.6, 13-16
[147] *Ibid.*
[148] Facts, ¶45, p.36
[149] *supra*, ¶¶88-89

91. This is contrary to Claimant's obligation to invest in a healthy competition of anti-competitive behavior, where MC*e* surpasses MC*m* but MC*e* remains below Pm. Due to its lower costs, the dominant firm may only be able to eliminate the entrant if it is permitted to reduce its price (P*m*) to a level below the entrant's costs but above its own costs.[150]

92. Contrary to the theory, Claimant's pricing strategy is shown in Figure 2, where P*e* > P*m* and P*m* > MC*m*. This is because Claimant possessed more than 54% market share[151] with excess monetary resources, making it an industry pioneer and leader.[152] Claimant, knowing its strengths in the industry and possessing a 54% market share was able to set its selling price lower than any other entrants,[153] hence monopolizing the market.

Figure 2
Caeli's Predatory Pricing



93. In comparison to Caeli's closest competitor, JetGreen most likely has a greater operational cost since it inherited just 21% of the market share.[154]

b. Respondent did not neglect proper procedures

[150] Brodley/Hay, p.744
[151] Facts, ¶36, p.34
[152] Annex VII, p.55
[153] Facts, ¶45, p.36
[154] PO3, ¶6, p.86

94. The *ADC* tribunal observed that due process necessitates the obligation for the investor to be notified through adequate advance notice that they were in alleged breach of their obligations.[155] Respondent had abided by proper procedure as it notified Claimant they were in a breach of the Monopoly and Restrictive Act. On September 9, 2016, the CCM issued an advance notice through a press statement announcing that Caeli had breached its domestic law.[156]

95. Even prior to the investment, the CCM cited that the amendment of the Act intends to maintain healthy competition in the market and that any monopolistic behaviour will be subject to CCM assessment.[157] On the day of acquisition, the CCM informed Claimant once again that Claimant should not participate in anti-competitive acts.[158]

96. Another fundamental threshold of due process, as required by the *ADC* tribunal is the obligation to hold a fair hearing[159] and that justice should not be rendered with unreasonable delay.[160]

97. In the case of *White Industries,* the tribunal was persuaded that given India's status as developing country status and its overburdened judiciary, a 42-month delay in proceeding was not undue.[161]

98. Similarly, Respondent's population increased from 6 million to 10.8 million. It is therefore difficult to commence an action because the system did not expand at the same rate. It should also be emphasized that because Mekari courts prioritize criminal cases, the average period it took to settle commercial matters ranged from 9-27 months.[162] Claimant was not only given a clear notice of hearing, but they were also served justice speedily in

[155] *ADC*, ¶276
[156] Facts, ¶36, p.34
[157] NOA, ¶12, p.7; Facts, ¶19, p.30
[158] Facts, ¶25, p.32
[159] *ADC*, ¶435
[160] *Al-Bahloul*, ¶221
[161] *White Industries*, ¶¶10.4.18-10.4.24
[162] Facts, ¶13, p.29

one year, with the decisions rendered in 2 days.[163] Claimant was also given every opportunity to voice its grievances. Hence, the case was not undue, as similarly the longer 42-month delay in the *White Industries* case was not.

99. Moreover, the court's dismissal of the decision did not amount to a denial of due process. Since under Executive Order 5-2014, courts were awarded the power to dismiss a matter without an appeal through summary judgement.[164] The court took into account all of Respondent's measures as they were reasonable and addressed public policy objectives.

100. All things considered, Respondent did not violate Claimant's rights to due process since all the measures were done in accordance with substantive and procedural due process.

2. The maintenance of caps and the MON denomination were not arbitrary

101. Moreover, the state must refrain from any arbitrary conduct. The *AES* tribunal held measures are reasonable when they are based on a rational purpose and must demonstrate a reasonable *nexus* with due regard to the pursuit of rational policy.[165] Hence, the maintenance of the airfare caps and the MON denomination were not arbitrary since they **|a|** articulated rational purpose and **|b|** demonstrated a reasonable *nexus* to the pursuit of a rational policy [166]

a. Respondent measures articulated rational policy

102. For a state's measure to be reasonable, the *AES* tribunal established that the existence of a rational policy must be present. It is defined as one *"taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter."*[167] The tribunal stated that Hungary had been driven to reintroduce price regulation in order to

[163] Facts, ¶52, p.38
[164] PO3, ¶8, p.86
[165] *AES*, ¶10.3.8
[166] *Id.* ¶460; *AES* ¶10.3.7
[167] *AES*, ¶10.3.8

address the EC's concerns about state aid, which constituted a rational public policy measure.[168]

103. Presently, the maintenance of the caps and the imposition of fines articulated a rational policy. They were done to prevent Claimant from making supra-competitive profits as a result of Claimant's predatory pricing[169] and the Horizon 2020 subsidies that allowed Caeli to drastically reduce its fares below its average costs.[170]

104. Claimant's strategy weakened Respondent's domestic markets and rendered it vulnerable to monopoly. This eliminated friendly competition and eventually harmed public interest by resulting in increased prices for consumers and a decline in choice, which goes against the fundamental core of the Monopoly Restrictive act. Therefore, the maintenance of the caps was reasonable to prevent Claimant to act arbitrarily that might lead to an undesirable weakened aviation industry.

105. Moreover, regarding the MON Decree, it was enacted pursuant to public interest. Respondent is entitled to exercise its rights to protect its security[171] and public interest[172] to reduce Respondent's reliance on USD to mitigate against capital outflows and secure its macroeconomic situation.[173]

b. The measures demonstrated a reasonable *nexus* to the pursuit of a rational policy

106. Reasonableness also requires that the impact of the measure on the investor demonstrates a reasonable correlation to the pursuit of a rational policy. Hence, it is imperative for the

[168] *AES*, ¶10.3.16
[169] Facts, ¶37, p. 34
[170] Facts, ¶45, p.36
[171] *Continental*, ¶18; *CMS*, ¶364
[172] Titi, p.101
[173] RNOA, ¶14, p.8

said measure to demonstrate a reasonable *nexus* between the state's public policy objective and the measure adopted to achieve it.[174]

107. The maintenance of the caps was necessary to control Claimant's monopolistic pricing and significant amount of market dominance from engaging in anti-competitive behaviour. It met legitimate policy objectives to prevent practices having adverse effects on competition in Mekar.[175]

108. In the case of *AES*, Hungary's conduct was established after no agreement was reached between the claimant and the State. In the absence of a specific commitment to the investor that administrative pricing would never be reintroduced, the tribunal considered the state's regulatory power to enact the decree during the crisis to be non-arbitrary, since it was found to be the best option at the time.[176]

109. Similarly, under a state's right to regulate,[177] Respondent addressed a reasonable correlation between its policy objective and the measures adopted to achieve it.[178] This is because the enactment of the MON decree was deemed to be the best solution to stabilize its currency during the monetary crisis. A country in the grip of an economic crisis is under no duty to meet the desires of a foreign investor.[179]

B. THE REFUSAL TO GRANT CAELI SUBSIDY UNDER EXECUTIVE ORDER 9-2018 WAS NON-DISCRIMINATORY

110. Respondent contends that it had always treated Claimant in a non-discriminatory manner and adhered to Article 9.9 of the CEPTA which protects investors against discriminatory

[174] *AES*, ¶10.3.9
[175] Annex V, p.47
[176] *Ibid.*
[177] CEPTA, Article 9.8, p.72
[178] *AES*, ¶10.3.35
[179] RNOA, ¶17, p.8; *AES*, ¶9.2.10

measures by the host State. To claim otherwise, Claimant must demonstrate a *"different treatment in similar circumstances without reasonable justification."*[180]

111. The *Nykomb* tribunal found that in order for discrimination to exist,[181] there must be different treatment awarded to investors in like circumstances without objective justification.[182] While it is true that Respondent did not grant subsidies to Claimant, Respondent's action cannot be viewed as discriminatory because it did not treat Claimant less favourably compared to other airline companies in Mekar.

112. In the present case, Claimant was not discriminated since Larry Air, who was equally impacted by the 2017 economic crisis, and a foreign government-owned entity,[183] did not receive the subsidies as well.

113. In reference to the 'guidance on how to assess the competition effects on subsidies', HM Treasury highlights that a subsidy undermines the mechanisms for ensuring efficiency in the market to the extent that the recipient is under less financial pressure to be competitive.[184] Similarly, the law on EO 9-2018, Chapter 31, Article C (1)(B), states that the intended obligation of loans and loan guarantees *"would not skew market conditions in favour of one or more enterprises."*[185]

114. Furthermore, the *Micula* tribunal likewise held that incentives regarded as State aid should be revoked if it led to a distortion of competition.[186] In line with the EO 9-2018, the secretary shall not grant subsidies if doing so will skew market conditions in favour of one or more enterprises.[187]

[180] *Crystallex*, ¶715
[181] Nykomb, p.34; *OEPC*, ¶170
[182] *ADC* ¶442; *Saluka* ¶313
[183] Facts, ¶41, p.37
[184] HM Treasury, Guidance on how to assess the competition effects of subsidies, p.5
[185] Annex VIII, p.56
[186] *Micula* on the Judgment of the Court of Justice of the European Union (State Aid), ¶7
[187] *Ibid.*

115. Even if Respondent could adequately grant subsidies, Claimant had previously reaped many benefits that several of its competitors in Mekar did not receive.[188] As such, Respondent should not grant one company in favor of the other. Claimant had a 43% market share for all domestic and international flights,[189] an excessive 11% of market share with Moon Alliance and received benefits from Horizon 2020 and Phenac international airport.[190]

116. In contrast, JetGreen had a market share of only 21%.[191] Moreover, the two airlines were operating important domestic routes within Mekar with less than 5% market share on these routes.[192] Furthermore, in regard to the subsidies received by JetGreen and Star Wings, the two airlines only received a one-time lump sum payment from their home State, while Claimant was funded subsidies for a year straight from 2015 to 2016.[193] It would be unfair for other industries since Claimant would skew the market in their favor if they receive the subsidies.

117. Respondent thereby requests this Tribunal to find that Respondent adhered to the law and did not discriminate against Claimant.

C. THE PROCEEDINGS BEFORE MEKARI COURTS AND THE ENFORCEMENT OF THE ARBITRAL AWARD ALREADY SET ASIDE BY THE SINNOH COURT DID NOT CONSTITUTE DENIAL OF JUSTICE

118. It is imperative to note that tribunals set a high threshold for establishing a denial of justice.[194] In the case at hand, Respondent managed to adhere to the standard of international law, which condemns any "*fundamentally unfair proceedings and*

[188] RNOA, ¶15, p.8
[189] PO3, ¶6, p.86
[190] Facts, ¶46, p.37
[191] PO3, ¶6, p.86
[192] PO4, ¶7, pp.89-90
[193] *Ibid.*
[194] *Philip Morris,* ¶¶499-500

outrageously wrong, final and binding decisions".[195] Contrary to the accusation that Claimant was denied justice, Respondent submits that **|1|** the proceedings were fair. Additionally, **|2|** Claimant was not given an outrageously wrong, final and binding decision.

1. Respondent's behaviour did not cause fundamental unfair proceedings

119. The CEPTA itself provides a clause which promotes *"transparency, good governance, and the rule of law, and eliminates bribery and corruption in trade and investment."*[196] The World Justice Project's Rule of Law Index consistently ranked Sinnoh among the top-10 countries in terms of civil and criminal justice administration between 2010 and 2020. It emphasized that courts in Sinnoh are *"virtually free of discrimination, corruption, and improper influence by public officials."*[197]

120. As such, fairness and transparency have been accorded to Claimant. To claim otherwise, Claimant bears the burden to demonstrate that Respondent's behaviour meets the standard of proof of corruption. In *Lao Holdings*, the tribunal applied a high standard of proof for allegations of corruption,[198] requiring robust evidence[199] such as a clear and convincing one.[200] Fewer tribunals have also applied a criminal law standard of proof *"beyond reasonable doubt."*[201]

121. Claimant has failed to provide facts of the bribery that may justify the presumption of corruption for instance, an unexplained payment.[202] The allegation solely relied on circumstantial evidence of a conversation between the head of the Mekar Committee and Mr. Cavannaugh[203] that is unsubstantiated. Therefore, as stated by the *Thunderbird*

[195] *Arif*, ¶445
[196] CEPTA, Preamble. p.7
[197] PO4, ¶8, p.90
[198] *Lao Holdings*, ¶110
[199] *Union Fenosa*, ¶7.52
[200] Pietrowski, pp.379-380
[201] *AHCA*, ¶52
[202] *Ibid.*
[203] Facts, ¶60, p.39

tribunal[204] and others,[205] insufficient evidence with mere unsubstantiated insinuations of corruption should be disregarded.

122. The award was set aside[206] because the circumstantial evidence in question was said to be sufficient to shift the burden of proof on the Defendant's side.[207] Additionally, tribunals have often refused shifting the burden of proof and found it to be unacceptable and controversial.[208] This being said, the alleged bribery *per se* does not meet the burden of proof of corruption in the Sinnoh Arbitration. Hence it does not cause fundamental unfair proceedings.

2. Claimant was not given an outrageously wrong final and binding decision

123. Article III of the Convention states that: *"each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory"*[209]

124. Under the language of the foregoing clause, Respondent is obliged to recognize and enforce an award. If confirmed, Claimant's allegation of corruption[210] would be a serious infringement of the fair and equitable standard,[211] as the CEPTA prohibits such conduct.[212]

125. However, since Claimant's submission lacks the standard, Respondent may pursue an enforcement for the foregoing award under Article V of the New York Convention.[213]

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[204] *Thunderbird*, ¶20
[205] *Tanzania Electric Supply Company Limited*, ¶¶52-54
[206] Facts, ¶61, p.39
[207] Annex XIII, p.64
[208] *Union Fenosa*, ¶7.113; *Tethyan Copper*, ¶¶314-318; *Karkey Karadeniz*, ¶521; *Thunderbird*, ¶118
[209] Article III of the New York Convention
[210] Facts, ¶60, p.39
[211] *ECE*, ¶4.738; *EDF*, ¶221
[212] CEPTA, Preamble, p.71
[213] Article V of the New York Convention

126. For the enforcement of an arbitral award to be refused, the competent authority in Mekar should find that: *"the recognition or enforcement of the award would be contrary to the public policy of that country."*[214] However, the Mekari courts recognized its duty to fight anti-corruption and condemned any illegality within the judicial system.[215]

127. Pursuant to Claimant's failure to bring *"clear", "concrete"* evidence, Mekari courts were only exercising its legal obligation[216] and abided by Article V (1)(e) of the New York Convention in enforcement.[217] Should there be clear evidence showing the authenticity, the courts would nullify the award. Furthermore, the use of "may" in the New York Convention and Section 36 of the Act provides an enforcing court with discretion to recognize an award that has been set aside at its seat,[218] but is limited to one fundamental element of Article V, that is the burden of proof: the drafting history states that only if a court is satisfied that enough evidence is submitted to warrant refusal, may a court proceed to do so.[219] Hence, Claimant was not given an outrageously wrong, final and binding decision.

128. In any case, the Mekari Court decision merely affirmed Claimant's right to find another buyer for its stake in Caeli pursuant to Article 39 of the SPA between Claimant and Mekar Air Services.[220] As Claimant was unable to find an interested buyer, it voluntarily sold its shares back to Respondent. It should therefore be barred from raising that it was denied justice.

[214] Article V (2)(b) of the New York Convention
[215] CEPTA, Preamble, p.71
[216] CEPTA, Article 9.21(8), p.83
[217] Article V (1)(e) of the New York Convention
[218] Annex XV, p.68
[219] Marike Paulsson, *The 1958 New York Convention in Action, Kluwer Law International 2016*, p.160
[220] Annex VI, p.52

D. TAKEN COLLECTIVELY RESPONDENT'S MEASURES DO NOT CONSTITUTE A DENIAL OF JUSTICE

129. Even if this Tribunal finds that each of the measures violate Article 9.9 CEPTA, taken collectively, Respondent's measures do not constitute a denial of justice. The tribunal in *Chevron*[221] concluded that denial of justice includes an *'extremely gross'* misconduct by the state with absence of any appropriate relief within the Respondent's own legal system.[222] Respondent therefore contends that **|1|** the implementation of MON Decree is not an egregious misconduct, thus **|2|** Claimant is not entitled for remedies.

1. The implementation of MON Decree is not an egregious misconduct

130. Claimant cannot contend that the measures adopted during the crisis were arbitrary, because Respondent was merely exercising its legislative authority to stabilize the country's economic downturn.

131. As stated by *AIG*, States have inherent power to regulate in the public interest[223] through its different organs or entities exercising regulatory functions.[224] Respondent retains the *"undeniable right and privilege to exercise its sovereign legislative power*" and *"to enact, modify or cancel a law at its own discretion."*[225] in the public interest even if the changes negatively affect a foreign investor.[226]

132. In the same way, CEPTA Article 9.8 also recognizes the State's right to regulate, as stated:

> 1. *"The Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity.*

[221] *Chevron*, ¶142, ¶8.76
[222] *Id.*, ¶8.76
[223] *AIG*, ¶10.4.1
[224] *Al Tamimi*, ¶344; *UAB*, ¶804
[225] *Parkerings*, ¶332; *Cube Infrastructure*, ¶397
[226] *Saluka*, ¶307

2. 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."[227]

Therefore, Claimant cannot put emphasis on the decision taken by Respondent, because of the instability of MON.[228] Respondent did nothing except what was best for the country in order to stabilize the crisis and exercised its rights during the executions of measures.

133. Claimant should have been aware of and considered the country's degree of development as it was made aware prior to the investment that Mekar had a history of lengthy political instability and late economic reforms beginning in 1994.[229]

134. *Methanex*[230] and other tribunals[231] support the view that investors need to have a general awareness of the regulatory environment, country's development, and administrative practices in which it was operating. Knowing Respondent had a history of instability, Claimant should not merely rely on an overly optimistic forecast and blame Respondent for the Decree enactment. Claimant's confidence based on an unduly optimistic forecast should be accompanied by an assessment of the greater risk, including in the regulatory sphere, because the prospect of greater profits is followed by greater risks.[232]

135. All in all, the implementation of MON Decree is not an egregious misconduct.

2. Claimant is not entitled to remedies

136. It is generally accepted that a claim for denial of justice requires remedies.[233] However, this is not always the case when doing so would be evidently futile or unreasonable.[234]

[227] CEPTA, Article 9.8, p.76
[228] Facts, ¶¶39-42, p.45
[229] Facts, ¶12, p.29
[230] *Methanex*, ¶¶9-10
[231] *Generation Ukraine, In*c ¶20.37; *Parkerings*, ¶¶334-338
[232] *Ibid.*
[233] Philip Morris, ¶499
[234] Corona Materials, ¶261; Philip Morris, ¶503

137. As Claimant brought up the issue of SPA and insisted that Hawthorne was a *bona fide* party, Respondent never made any specific representation towards Claimant in regard to commitment. The *Eastern Sugar*[235] and several other tribunals[236] ruled that in any case, host states' unilateral statements only create legitimate expectations if the statement was meant to create these expectations, which the investor reasonably relied on at the time of investment. Presently, Claimant voluntarily wanted to invest in Mekar, evinced that Claimant participated in the tendering process being the highest bidder,[237] hence it is unreasonable for Claimant to raise a claim on denial of justice where its expectation had been infringed

138. Article 39 regulates Claimant's right to sell its stake to a *bona fide* party but is also subject to Respondent's consent.[238] The Hawthorne Group did not offer a *bona fide* third-party arm's length price, since they were affiliated with Claimant by virtue of their membership in the Moon Alliance.[239] Hence, the rejection was judicious.

139. Ultimately, Claimant should be deemed not entitled to remedies as it would be unreasonable to pass on to Respondent the cost of Claimant's own failure to find another third-party *bona fide* buyer. Claimant should thus be deemed to have sold its shares in Caeli back to Respondent voluntarily and without coercion.

IV. RESPONDENT'S ACTIONS DID NOT BREACH THEIR COMMITMENT TO FAIR AND EQUITABLE TREATMENT THUS DOES NOT ENTITLE CLAIMANT TO COMPENSATION

140. Even if the present Tribunal finds that there has been a violation of the FET standard by Respondent, |**A**| the Tribunal should apply the market value standard as |**B**| Claimant is

[235] *Eastern Sugar*, ¶¶243-244
[236] *Thunderbird* ¶147; *Parkerings* ¶¶329-331
[237] Facts, ¶¶23-24, p.31
[238] Annex VI, p.52
[239] Facts, ¶57, p.39

not entitled to rely on the FMV standard. |**C**| This Tribunal should also find that Mekar has already paid the market value for Claimant's investment through its reacquisition in Caeli for USD 400 million. Moreover, |**D**| compensation due to Claimant should be reduced primarily because of Claimant's contributory fault. Lastly, |**E**| the dire situation in Mekar should be taken into account in awarding compensation.

A. THIS TRIBUNAL SHOULD APPLY THE MARKET VALUE STANDARD

141. Respondent submits that when this Tribunal makes a final award, monetary damages awarded should be market value except as provided for in Article 9.12 of the CEPTA in which cumulative elements for expropriation are found.[240] Market value is the result of the application of the but-for premise considering the prevailing economic circumstances affecting the business in both the actual and but-for situations, including situations of distress and economic crises.

142. In this vein, Respondent contends that |**1**| Claimant cannot rely on the Most Favoured Nation clause in the CEPTA as |**2**| there is an express prohibition preventing Claimant from derogating from the standard prescribed therein.

1. Claimant cannot rely on the MFN clause

143. A Most Favoured Nation **["MFN"]** clause obligates a State to award another State Most-Favoured-Nation treatment in an agreed sphere of relations.[241] Recent investment treaties like CETA **["Comprehensive Economic and Trade Agreement"]**[242] clarify that the MFN clause cannot be used to import substantive obligations from other treaties. The CETA states "for greater certainty" the importation of substantive or procedural provisions is impermissible. CETA and CEPTA are both made with the specific aim of securing a market for their goods and services and promoting economic integration.

[240] CEPTA, Article 9.21, p.82
[241] Draft Articles on MFN clauses with commentaries, Article 4 (D)
[242] CETA, EU-Can., 2016, Article 8.7

Similarly, this Tribunal should also find that CEPTA, made with narrow language, cannot be utilized to import substantive obligations.

144. The *Ickale* tribunal refused to import a substantive standard of treatment based on an MFN clause. The claimant therein attempted to import a number of substantive protections into the Turkey-Turkmenistan BIT which offered only limited protection.[243] The tribunal disagreed with *Ickale's* expansive argument that any matters, including substantive protections, which are not expressly excluded from the scope of the MFN should be considered to be within its scope.

145. Similarly, this present Tribunal should also hold that Claimant is not entitled to a broad interpretation of the MFN clause as Article 9.7.2 CEPTA narrowly framed, providing that "substantive obligations in other international investment agreements and trade agreements do not constitute treatment". The presumption must therefore be that the MFN clause promises treatment of an investment requiring the existence of measures adopted or maintained by either party, and not merely the process of dispute settlement between Bonooru and Respondent. Moreover, broadly interpreting the CEPTA MFN clause would have the effect that "*the express choice of a compensation clause becomes nugatory*."[244]

146. Claimant cannot therefore rely on the MFN clause contained in the CEPTA to import the FMV standard in the 2006 Arrakis-Mekar BIT.

2. There is express prohibition preventing Claimant from derogating from the standard prescribed therein

147. Respondent highlights the significant difference between FMV and market value. Market value is the result of the application of the but-for premise considering the prevailing economic circumstances affecting the business in both the actual and but-for situations, including situations of distress and economic crises and acknowledges that the price

[243] *Ickale*, ¶328
[244] Separate Opinion of Ian Brownlie at the Quantum Phase: *CME*, ¶11

obtained in a public tender "is an efficient manner to determine the price of the assets sold."[245]

148. In case this Tribunal finds that Respondent effectively expropriated Claimant's investment, Respondent has adhered to the standard of the *Hull formula* in providing Claimant adequate compensation. Adequate compensation corresponds to the market value of the investment.[246]

149. Article 9.21 in the CEPTA explicitly provides
"*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, except as otherwise provided for in Article 9.12; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages at a market value and any applicable interest in lieu of restitution.*"

150. The FMV is the result of applying the but-for premise without considering distress, threat or economic crises for their duration. Therefore, the FMV is likely to be higher than the market value. Respondent stressed that the market value standard contained in Article 9.21 of the CEPTA, include full compensation or *"restitutio in integrum".* Moreover, even if Respondent's actions are deemed expropriatory, it is explicitly enshrined in Article 9.12 that an investor is not protected against measures that may be considered to indirectly expropriate an investment.[247]

151. Therefore, Claimant has no right to propose the use of FMV as there is an express prohibition preventing Claimant from derogating from the standard prescribed therein. Conclusively, Claimant cannot rely on both the MFN clause in the CEPTA and international law to ground the use of FMV compensation standard.

B. CLAIMANT IS NOT ENTITLED TO INVOKE THE FMV STANDARD

[245] *Tecmed*, ¶191
[246] *Ibid*; World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, 1992, p. 41, Guideline IV(3)
[247] CEPTA, Article 9.12 ¶1 b, p.78

152. CEPTA allows for FMV standard for compensation only when damages suffered amount to expropriation.[248] Moreover, FMV standard in the *LG&E* tribunal's view is appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment.[249] The interference must be "*sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner" so as "to render almost without value the rights remaining with the investor*."[250]

153. Be that as it may, in order to be considered an indirect expropriation, the implementation of Respondent's measures interference with the investor's rights must have a major adverse impact on the Claimant's investments.[251] The tribunal in *LG&E* rejected the claim for expropriation as claimant had not been deprived of the right to enjoy their investment, the effect of the State's actions had not been permanent on the value of the claimant's shares and the claimant's investment had not ceased to exist.[252] On this basis, this Tribunal must find that **|1|** Respondent's measures did not substantially deprive Claimant's investment nor **|2|** its value permanently.

1. Respondent's measures did not substantially deprive Claimant's investment

154. *First*, Claimant has not proven that it had been substantially deprived of the economic value of its investment due to Respondent's measures. The tribunals in *Sempra*[253], *LG&E*[254]and *Total*[255] emphasized the adverse impact of a measure must effectively deprive the investor's investment of substantially all its value. This threshold of deprivation is high and would need to be reached with respect to the investment as a

[248] CEPTA, Article 9.12 ¶2, p.78
[249] *LG&E*, ¶35
[250] *Philip Morris*, ¶189
[251] *Id*, ¶192
[252] *LG&E*, ¶¶35-36
[253] *Sempra*, ¶285
[254] *LG&E*, ¶191
[255] *Total*, ¶196

whole,[256] which includes the residual value of physical property[257] as upheld by the *Waste Management* tribunal where an expropriation claim was denied in view of the residual value of claimant's physical assets which were not affected.[258]

155. Although the enactment of Respondent's measures hurt Claimant's financial standing, a mere negative impact is not sufficient.[259] The perilous crises did not solely impact Claimant as it also affected other investors within the airline industry unfavourably. Claimant still had physical assets in the form of twelve relatively young A340 aircrafts[260] that were not grounded by Mekar[261] and still retained their economic value. The remaining aircrafts can still be used in ferrying cargo and air medical transportation. Thus, Respondent's measures have not been effectively proven to deprive Claimant's investment of its economic value.

2. Deprivation of value is not permanent and irreversible

156. *Second*, the deprivation of Claimant's investment is neither irreversible nor permanent.[262] The finding of the *RFCC* tribunal provides that the consequences of a measure must be equivalent to a permanent loss, where the recovery or access to it does not replace ownership in its initial situation.[263]

157. Claimant has not suffered a permanent loss as Respondent's measures, which included the MON decree[264] and the airfare caps[265], may be removed when Caeli's market share, with its fellow Moon Alliance member factored in, were to fall below 40%. Caeli never

[256] *Telenor*, ¶67
[257] *Pope & Talbot*, ¶¶98, 102
[258] *Waste Management*, ¶159
[259] *Philip Morris*, ¶189
[260] Facts ¶26, p.32
[261] Facts ¶48, p.37
[262] *BG Group*, ¶268
[263] *R.F.C.C*, ¶68
[264] Facts ¶42, p.35
[265] Facts ¶49, p.37

protested on the implementation of airfare caps and Claimant failed to provide evidence that the caps hurt its profitability in 2016.[266]

158. The airfare caps were only kept in place until 2019 due to clear evidence of anti-competitive behaviour by Caeli, including abuse of dominant position, predatory pricing, and unfair subsidization.[267] Claimant still enjoyed a considerable market share in Mekar, that would allow it to make quick recoveries when the crises abated.[268] Essentially, Claimant may re-establish its market share once the airfare caps have been lifted by Respondent as the caps are only placed to prevent Caeli's airfare from earning supra-competitive profits.[269] Thus, there is no permanent and irreversible harm that is caused by Respondent's measures.

159. This Tribunal should therefore reject the request for compensation due to Claimant as the alleged damages suffered is not sufficiently proven through reliable evidence that their rights under CEPTA has been breached. Moreover, Claimant has not suffered expropriation of any kind, thus, Claimant is not entitled to rely on the FMV standard.

C. THIS TRIBUNAL SHOULD FIND THAT MEKAR HAS ALREADY PAID THE MARKET VALUE FOR CLAIMANT'S INVESTMENT THROUGH ITS REACQUISITION OF CAELI FOR USD 400 MILLION

160. The market-based valuation is appropriate for this Tribunal to value Claimant's investment in Mekar. The actual purchase price of the investment provides a benchmark for calculating compensation according to the full reparation. However, absent the evidence of purchase price and the investment had not changed hands as it is still under Claimant's name. Respondent refers to the tribunal in *Crystallex* wherein shares in the claimant were widely traded on a public stock exchange.[270] The claimant company did

[266] Facts ¶37, p.35
[267] RNOA, ¶13, p.7
[268] RNOA, ¶18, p.8
[269] Facts ¶37, p.34
[270] *Crystallex*, ¶890

not own any significant assets aside from its investment in Venezuela. On this basis, the tribunal held that the price at which the shares were being traded reflected market participants' perceptions of the value of its investment in Venezuela.

161. Similarly, Vemma did not own any notable shares in Mekar. Corresponding with Article 39 of the Shareholders' Agreement, before Claimant can enter into the Proposed Agreement, Claimant had established a price in which they are willing to offer Hawthorne Group LLP for the sale of 170 000 (one hundred seventy thousand) Ordinary Shares in Caeli for a consideration of USD 600 million paid in cash.

162. Claimant was required to secure a *bona fide* third-party offer.[271] Mekar Airservices rejected the offer in its response dated 17 December 2019, since the price offered to be artificially inflated and not an arm's length commercial price. It noted that "the right to offer the shares at 'the price proposed by a *bona fide* third-party purchaser' does not extend to offering them at a price proposed by the Hawthorne Group or its affiliates, which are associated with Vemma Holdings through the Moon Alliance."[272]

163. Vemma's efforts between February and September 2020 failed to yield another buyer for its shares.[273] Thus, Respondent offered 400 million USD which is what the investment is worth due to political and economic uncertainty.

164. Additionally, Claimant may suggest the replacement cost method which involves arriving at an asset's value by reference to the present-day cost, in an arms-length transaction, of replacing that asset with a similar asset in a similar condition.[274] The method is based on the principle that a buyer will not pay more for an asset and a seller will not accept less than the price of a similar asset.[275]

[271] Annex VI, p.51
[272] Facts ¶57, p.39
[273] Facts ¶63, p.40
[274] Ripinsky/Williams, p. 219
[275] *Id.* p. 305

165. Claimant requests that Respondent pay 700 million USD,[276] a value close to what the investment was originally worth before the economic crisis. However, it is worth noting that the replacement cost method is often considered a deficient method of valuing a business, as it "assumes that it is possible to reconstruct the value of the entire investment simply by replacing its physical assets."[277] Hence, Respondent decided to offer the Claimant's investment what is worth in the market and purchased it at "market value" for 400 million USD due to the Claimant's inability to attract another suitable buyer for its shares in Caeli, and the currency crisis precipitating in Mekar.[278]

166. Furthermore, multiple valuation techniques should not be used cumulatively as this leads to double counting of the same loss.[279] Thus, this Tribunal should find that Respondent has compensated Claimant at market value and Claimant is owed no additional compensation.

D. COMPENSATION DUE TO CLAIMANT SHOULD BE REDUCED PRIMARILY BECAUSE OF CLAIMANT'S CONTRIBUTORY FAULT

167. Respondent points out that it is a well-established principle of international law that an investor cannot seek compensation from a State because of its own poor performance and weak business planning. Further, it submits that international courts and tribunals have repeatedly emphasized that international investment law is not intended to protect investors from the normal commercial risk inherent in their business ventures and in the host country's economic environment, including risk arising from an investor's own conduct.[280] Respondent hereby submits that **|1|** Claimant's own negligence contributed to its own demise and **|2|** Claimant failed to mitigate their losses.

[276] PO3, ¶4, p.86
[277] Williams, J., p.179
[278] RNOA, ¶21, p.9
[279] Marboe, *supra* note 40, 298
[280] *Biwater*, ¶440

1. Claimant's own negligence contributed to its own demise

168. The principle of contributory negligence (also known as contributory fault) has been applied by investment tribunals to reduce the amount of damages awarded to Claimant, where the Claimant's own conduct contributed to the loss suffered. In applying this principle, tribunals have typically been guided by the ILC Articles and have used a two-pronged test, requiring the conduct of Claimant to have been "willful or negligent,"[281] and to have caused a "material and significant"[282] contribution to their own loss. Tribunals have recognized that the application of this principle is highly discretionary.[283]

169. Claimant took unmanageable commercial risks from its own lack of due care. An action manifesting lack of due care amounts to contributory fault.[284] The term 'due care' is defined as the conduct a reasonable person would exercise in a particular situation,[285] while lack of due care is manifested when a person understands a dangerous situation, yet still voluntarily encounters such a situation.[286] In *MTD,* the tribunal made a 50% deduction to the compensation owed by Chile due to the investor's failure to investigate adequately pre-existing regulations in the country that prevented the investor from using its land the way it had hoped.[287] Consequently, Respondent submits that Claimant's action of brisk expansion in Mekar's market manifested lack of due care.

170. Claimant had experience with the airline industry in its home State and globally, whom should have been well aware about the volatility of the market,[288] yet Claimant failed to take any due diligence to avoid and plan for the possibility of economic fluctuations and crises. Claimant in fact took an informed risk when it decided to invest in Mekar, who has faced a tumultuous path to economic recovery.[289] The fact that such risk materialised, due

[281] ARSIWA, Art.39
[282] Art. 39 Commentaries; *Occidental*, ¶670
[283] *Ibid.*
[284] ARSIWA, Art.39, ¶5
[285] Black's Law (9th Ed.), p. 240
[286] Ripinsky/Williams, p. 315; Crawford (2002), p.240
[287] *MTD Equity Sdn. Bhd. and MTD Chile S.A.*, ¶¶243–246
[288] RNOA, ¶11, p.7
[289] RNOA, ¶8, p.7

in large part to its own incompetence and overcapitalisation of Caeli, does not entitle it to claim compensation from the Mekar.

171. More importantly, Mekar has repeatedly warned the Claimant against such an excessive approach and that Claimant's brisk expansion in Mekar's market was rash and thoughtless. Claimant should have listened to their warnings prior to taking risky business choices and putting the investment in jeopardy.[290] Claimant disregarding the facts and still choosing to invest is simply the opposite of what a reasonable investor would have done and for that, Claimant's own negligence contributed to its demise via lack of due care, resulting in material and significant losses to their own investment.

2. Claimant failed to mitigate their losses

172. Along with contributory negligence, a duty to mitigate damages is considered as a "*compensation-reducing*"[291] factor. However, in contrast to contributory negligence, the duty to mitigate damages arises only after the breach of an international obligation. It implies an obligation for an aggrieved party to "*take steps to minimize his loss, on the one hand, and abstain from doing anything to increase his loss on the other.*" The assessment of such steps is made on a case-by-case basis following the criterion of reasonableness.[292]

173. Claimant has failed in its duty to mitigate damages, which is recognized as a general principle of law.[293] As held by the *Middle-East Cement* tribunal,

> "*this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention*."[294]

174. However, it should also be noted that this duty does not consist of any legal obligation which could give rise to legal responsibility, rather it is a failure by the aggrieved party

[290] RNOA, ¶22, p.9
[291] S. Ripinsky, p. 19
[292] Marboe, pp. 125-126, ¶¶3.256
[293] Marboe, p.3.240; *CME*, ¶482; *AIG*, ¶10.6.4(1).
[294] *Middle East Cement Shipping and Handling Co*, ¶167

that may "*preclude recovery to that extent*."[295] Although Claimant needs to demonstrate that the loss incurred was caused by Respondent, the burden of proof that Claimant failed to mitigate the damages always rests on Respondent.[296]

175. Respondent asserts that Claimant also inherited debt liabilities linked with Caeli when it made its investment in the territory of Mekar in 2011. Potential investors cited legacy issues such as debt liabilities attached to the airlines as the sticking point.[297] While its revenues declined during the fall and winter quarters of these operating years, its summer and spring revenues cushioned its losses. The fall-winter decline was more than Vemma, which was accustomed to constant demand from business travelers in Bonooru, had expected.[298]

176. Citing these losses, representatives of Mekar Airservices cautioned that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and to hedge the liability of additional financing.[299] In September 2019, Fitch Ratings assigned a 'BB' Long-Term Issuer Default Rating to Vemma Holdings Inc., citing a looming liquidity crunch, risky investments, and exposure to external risks. Fitch further noted that "an internal review of Vemma's various airline businesses is critical. [300]

177. Despite Claimant's experience with the airline industry in its home State and globally, Claimant still took the risky approach to its investment activities, channeling funds towards rapid expansion and ill-strategize business plans instead of working toward long-term financial health. The representatives of Mekar present on Caeli's board have clearly and continuously warned Claimant.[301] Conversely, Vemma's representatives on Caeli's board continued to project optimism based on the airline's 2013 earnings.

[295] ARSIWA, Art. 31, ¶11
[296] A. S. Komarov (2009)
[297] Facts, ¶21, p.31
[298] Facts, ¶30, p.33
[299] Facts, ¶31, p.33
[300] PO4, ¶5, p.89
[301] RNOA, ¶11, p.7

178. Mitigation requires a party to which the non-performed obligation is owed to mitigate losses.[302] Here, Claimant was not only permitted but indeed was obligated to take reasonable steps to reduce the loss, damage, injury being caused by Respondent,[303] which in this case, to project the profits earned from decline in fuel prices into outstanding debt and improve financial health.

179. Additionally, Respondent's bank, First National Phenac considered Claimant's application for a 200 million USD loan. On 8 February 2019, the bank offered a credit line at an inflated interest rate. In a letter addressed to Caeli, the Chairman explained that this decision was premised on the CCC+ rating assigned to Caeli by the Investment Information and Credit Rating Agency ("IICRA"). In turn, the IICRA memorandum explaining its rating decision noted that it had taken into consideration "*risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM*". Caeli refused this loan. [304]

180. Not only did the Claimant run Caeli into the ground, but it also abandoned the enterprise at its own volition.[305] Clearly, Claimant had failed to mitigate its own losses. Along with negligence and Claimant's failure to mitigate losses, Respondent implores this Tribunal that compensation due should be reduced primarily because it is Claimant's contributory fault.

E. THE DIRE SITUATION IN MEKAR SHOULD BE TAKEN INTO ACCOUNT IN AWARDING COMPENSATION

181. International law provides that a tribunal is entitled to take into account the economic situation of the Respondent State.[306] It is not the host state's duty to make a good general

[302] Marboe, p.3.240
[303] *Alford*, ¶54
[304] Facts, ¶51, p.38
[305] RNOA, ¶18, p.8
[306] *CME*, ¶380

risk assessment of investing and working in a country facing difficult economic conditions, which may have reasons outside of the control of the investor and the host state.[307] Additionally, it is not the host state's duty to ameliorate the risk of operating in a developing country or region, because such risks might have reasons outside the control of the parties.

182. The *CME* tribunal views, in line with the jurisprudence of the *Iran-United States Claims* tribunal which has held that a general deterioration of the economic situation of the country where the investment was made, or the general circumstances of an on-going development must not be compensated to the investor.[308] Respondent requests the present Tribunal to do so when awarding compensation.

183. The economic crisis in Mekar was grave and serious. In fact, the 2019 IMF report predicted four consecutive quarters of negative growth for Mekar, an 8% fall in GDP, and a 2600% average inflation rate in 2020. The report also noted that Mekar was facing a potential third debt default in as many decades. According to a Mekari official, "to pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma." As of November 2020, Mekar has a CCC credit rating from Fitch. Moreover, a study released by Mekar's Ministry of Commerce acknowledged that bank loan defaults in Mekar had increased by 23% in the first three months of 2020 as opposed to the same period in 2019.[309]

184. Claimant emphasised on the decision taken by Mekar´s government on 30 January 2018, requiring all companies operating in the country to offer goods and services denominated exclusively in MON.[310] Mekar's currency, MON, has been fragile ever since the beginning of the economic crisis. History is witness to many such currencies hit by crises whose value ultimately goes into free fall, unleashing catastrophe for the nation.

[307] *Id*, ¶561
[308] *Id*, ¶562; Brownlie, ¶¶72-80
[309] PO3, ¶4, p.86
[310] Facts, ¶42, p.35

185. With the economy in freefall, the LPM was elected back to an overwhelming parliamentary majority in November 2017. In December 2017, the macroeconomic situation in Mekar continued to deteriorate.[311] Respondent further alleges that it is "*a well-established principle that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulation that are aimed at the general welfare*."[312]

186. The manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society.[313] A State's right to reduce reliance on foreign currencies, in order to mitigate against capital outflows and secure its macroeconomic situation, cannot be put on trial before this Tribunal. Neither can its framework for inflation targeting.[314] Respondent asserts that this Tribunal should take account of the dire situation in Mekar in awarding compensation.

[311] Facts, ¶41, p.35
[312] *RCM*, ¶8.19
[313] *Sempra*, ¶397
[314] RNOA, ¶14, p.8

PRAYER FOR RELIEF

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

a. Decline to exercise jurisdiction due to Claimant's status as a State-owned enterprise;
b. Find that *Amicus* Submission by the External Advisors to CRPU-EA must be granted leave;
c. Find that Respondent did not violate its obligation under Article 9.9 of the CEPTA;
d. Award no compensation to Claimant.

Submitted on 23 September 2021 by **TEAM ELDINE**

On behalf of Respondent

THE FEDERAL REPUBLIC OF MEKAR