TEAM 1658 ELIAS G

FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

2021

IN THE MATTER OF AN ARBITRATION UNDER THE ADDITIONAL FACILITY RULES OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

- between –

Vemma Holdings Inc.

(Claimant)

- and –

The Federal Republic of

Mekar

(Respondent)

MEMORIAL FOR Respondent

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LIST OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CBFI	Consortium of Bonoori Foreign investors
CCM	Competition Commission of Mekar
CEPTA	The Mekar-Bonooru Comprehensive Economic Partnership and Trade Agreement
CILS	Center for Integrity of the Legal Services
Claimant	Vemma Holdings Inc.
CRPU	Committee on Reform of Public utilities
ECJ	European Court of Justice

FET	Fair and Equitable Treatment
FMV	Fair Market Value
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF	ICSID additional facility rules
ILC	International Law Commission
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
Mekar	The Federal Republic of Mekar
NDP	Non-disputing party
POE	Privately Owned Enterprises

Respondent	The Federal Republic of Mekar
SOE	State Owned Enterprises
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Vemma	Vemma Holdings Inc.

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Copper Mesa v. Ecuador	Copper Mesa Mining Corporation v. Republic of Ecuador, Case No. 2012-2, Award, (Perm. Ct. Arb. 2016).

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STATEMENT OF FACTS

1. This case concerns the Federal Republic of Mekar ("**Respondent**") who is still going through economic recovery since the mid-1920s, its colonial occupation, and the great migration movement it faced after that.
2. With a cautious approach, Mekar opened its economy to foreign investment since 1994, all the while trying to preserve its sovereignty in the regulation of its affairs which is provided under the Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**") concluded between Mekar and Bonooru in 2014.
3. ("**Vemma**" or "**Claimant**"), is a Bonoori airline holding company with a 100% ownership in Royal Narnia. In which Bonooru, its national state and Respondent's neighboring country, retained a minority shareholding that ranged between 31% to 38% until March 2020.
4. On 29 March 2011, Vemma entered into a Share Purchase Agreement with Mekar
5. Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were owned by the Mekari State. And although the investment was indebted and associated with liabilities, Claimant took a risky, miscalculated approach to its investment activities. Which was evident by its expansive strategy and its negligence towards the investment's health in the long haul given the risky economic climate in Mekar.
6. Before making the investment, Claimant was informed about the Competition commission of Mekar ("**CCM**")'s review procedures against anti-competitor behavior.
7. Therefore, the two investigations by the CCM into Caeli, after its unexpected expansion and the air-cap fairs imposed in 2016 were beyond justified.
8. When oil prices around the globe crashed to a five-year low, Vemma continued to operate in its normal routes highlighting that, the losses it incurred were particularly concentrated in the high-traffic routes between Bonooru and Mekar. And on 30 January 2018, Mekar set out a requirement for all companies operating in the country to offer goods and services denominated exclusively in MON.
9. As a result of its dangerous strategies, Vemma suffered great financial losses that translated to scaling back and minimizing the services offered by Royal Narnian to compensate, which caused protests by the Bonoori citizens.

10. In March 2021, the Bonoori government, in order to secure the citizens' rights under Article 70, it increased its shareholding in Vemma to 55%, replaced its' board of directors with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar.
11. Ultimately, Claimant had every opportunity to pursue Justice in Mekari courts and in front of judicial authority, it even got the chance to do so in a shorter delay than the usual for Mekari courts.
12. After having suffered a great loss, Vemma acquired an offer from the Hawthorne Group LLP, to buy its stake in Caeli. In response, Mekar Airservices disputed the offer in arbitration under SCC rules. On 9 May 2020, the released award ruled in favor of Mekar Airservices, because the Hawthorne Group was "affiliated with Vemma" by its membership in the Moon Alliance. Accordingly, Mekar Airservices sought to enforce the released award. And on the 17th of November 2020., Claimant submitted its request for arbitration to the Secretariat.
13. On June 15th, 2021, the Committee on Reform of Public Utilities ("**CRPU**") submitted its application for leave to file a non-disputing party amicus curiae submission believing that it can help the tribunal reach its decision because it possess a general interest in promoting fair business practices in Mekar, since the assessment of the legality of Vemma's investment is crucial to the determination of the Tribunal's competence. Further, the Consortium of Bonoori Foreign Investors ("**CBFI**") a Bonoori non-profit industry association that represents investors investing in the region and internationally, submitted its application for an amicus curiae on the 19th of April 2021 claiming that it could provide context regarding the business climate of Bonooru, the existing corporate framework in which enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia.

ARGUMENTS

14. It is submitted that the tribunal lacks jurisdiction to hear the dispute. The claimant lacks standing in the present proceeding for being an agent of its' national state Bonooru. It is also submitted that the amicus submission presented by the external advisors to the Committee on Reform of Public Utilities ("**CRPU**"), should be rendered admissible as opposed to the amicus submission presented by the Consortium of Bonoori Foreign Investors ("**CBFI**"), which should be dismissed for failure to fulfil the required conditions under the applicable arbitration rules as well as the bilateral investment treaty ("**BIT**") signed between the disputed parties.

I. THE TRIBUNAL LACKS JURISDICTION TO HEAR THE DISPUTE

A. <u>The claimant lacks protection for being a State-owned enterprise acting as an agent of its national State</u>

15. Respondent submits that Claimant lacks standing, as Vemma is acting as an agent of Bonooru, rendering it a State-to-State arbitration (1), falling outside the jurisdiction of the tribunal (2).

1. Vemma Holdings is a State-owned enterprise acting as an agent of Bonooru

16. A state-owned enterprise is a legal entity which is wholly or partially owned by the government, and that partakes in commercial activities on the government's behalf.[1] Which in this case directly applies to Vemma Holdings, as since the date of its' incorporation, its

[1] Investopedia, "State owned enterprises' legal definition", Available at: State-Owned Enterprise (SOE) Definition (investopedia.com)

national State Bonooru, has maintained a certain percent of ownership, specifically ranging between 31% and 38%[2], and that was further expanded in March 2020 to 55%[3]. Therefore, Vemma Holdings, is recognized as a state-owned enterprise, which conducts commercial activities to the benefit of its home State Bonooru.

17. According to article 25(1) of Chapter II of the ICSID Convention[4], and Article 2 of the ICSID Additional Facility Rules ("**ICSID AF**")[5], consented to by both parties, the jurisdiction of the center extends only to "any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State". Nonetheless, article 9.1 of the 2014 Bonooru - Mekar CEPTA, defines an investor as "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"[6]. Meaning that, in both applicable texts, an investor has to be a national of another contracting state, but can never be the state itself, and the rules do not offer, at any point, protection for a state's claim disguised as an investor state dispute settlement ("**ISDS**"), which is the motive behind Bonooru's actions, and will be further demonstrated by the respondent throughout its submission.

18. State-owned enterprises, as a "judicial entity", play a huge role in international investments, and do qualify as a "national of another Contracting State" within the meaning of Article 2 of the ICSID AF, which is entitled to standing before the Centre[7]. However,

[2] Case Record, Statement of Uncontested Facts, Page 29, Paragraph 10

[3] Case Record, Statement of Uncontested Facts, Page 40, Paragraph 65

[4] International Centre for Settlement of Investment Disputes. Article 25, "Chapter II: The Jurisdiction of the Centre". ICSID Convention, Regulations and Rules. Washington, USA. (2006). Available at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf . page 18

[5] ICSID Additional Facility Rules. Washington, USA. (2006). "Arbitration (Additional Facility) Rules". Available at: https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf Article 2. P. 48.

[6] Case Record, 2014 Bonooru – Mekar CEPTA, Article 9.1, page 73

[7] Farouk El-Hosseny, "State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?". (2016), BCDR International Arbitration Review 3, Issue 2, pp. 371-387. Available at: https://kluwerlawonline.com/journalarticle/BCDR+International+Arbitration+Review/3.2/BCDR2016034

state-owned enterprises must remain distinct from their contracting states, therefore Aaron Broches, the first secretary-general of ICSID and one of the principal drafters of the Convention, created what is called the "Broches Test" in order to address the distinction between state-owned enterprises as investors from Contracting states. The test was primarily inspired and is considered by many reputed scholars as mirror image of articles 5 and 8 of the International Law Commission's ("**ILC**") Draft Articles on Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**") [8], that addresses the states' attribution of conduct, which is why Professor Schruer[9] even described this test as 'probably the best guideline' for deciding whether a state enterprise is qualified to bring a claim against another state under the ICSID Convention [10].

19. In distinguishing between investors and contracting states, tribunals have relied on this test, also referred to as the "Broches Test", to determine whether the investor is working as an agent for the government or is discharging an essentially governmental function. In light of the emergence of mixed economy companies and government owned corporations, in which there are combinations of capital from private and governmental sources, even government owned corporations should not be "disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.[11]".

20. And while the respondent does not contest the standing of the Claimant based on the fact that Vemma Holdings is a state-owned enterprise, but however cannot disregard the fact

[8] Paul Blyschak, "State Owned Enterprises and International Investment Treaties", 6 Journal of International Law and International Relations, (2011), 1, 35.

[9] Christoph Schreuer is an expert in investment protection and public international law. He has written expert opinions in many investments cases & has served as arbitrator in ICSID and UNCITRAL cases.

[10] Schreuer, C. H., Malintoppi, L., Reinisch, Sinclair, A. (2009). The ICSID Convention: A Commentary. Cambridge University Press.

[11] Broches, A. (1995). Selected essays: World Bank, ICSID, and other subjects of public and private international law. Martinus Nijhoff.

that, its functions increasingly expanded overtime, rending it an agent of Bonooru, that is mostly controlled by the latter (i), that pursues political objectives (ii), and that exercises governmental functions (iii).

i. *The Claimant is under the control of its' national state Bonooru*

21. The first factor to be considered is the extent of control Bonooru has over Vemma Holdings. In order to qualify as an investor, the Claimant has to demonstrate that it is an independent entity, distinct from its' national State Bonooru.[12] Which is not the case in the present dispute. Not only does Bonooru own the majority of Vemma's shares constituting 55%[13], which is sufficient to direct all of Vemma's actions, [14]but the owner of these shares is the government itself, specifically Ms. Sabrina Blue, the Secretary of Transportation and Tourism, and equally the Head of Board of directors in Vemma.[15] Meaning that the Bonoori government is directly tied to Vemma, and the activities that it conducts. Furthermore, Bonooru proceeded later by, replacing Vemma's board of directors with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar. Thus, it is obvious that the extent of control that the Bonoori government has over the Claimant is far more than regular state-owned enterprises, which evidences that the party present before the tribunal is not Vemma Holdings, but rather the Commonwealth of Bonooru using it as a mean to bring claims before the tribunal through one of its' agents. And, with this extent of control, definitely follows ulterior motives, being political rather than commercial, behind such huge investment in the Claimant,

[12] Giulio Alvaro Cortesi, "ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law". The Law and Practice of International Courts and Tribunals 16 (2017). Brill Nijhof. page 112

[13] Case Record, Statement of Uncontested facts, Page 40, Para. 65

[14] Case Record, Procedural order No.3, Page 86, Para 3.

[15] Case Record, Statement of Uncontested facts, Page 31, Para. 22

ii. *The purpose and objectives of Vemma Holdings are not purely commercial*

22. The purpose behind the establishment of an investment is important to determine whether the state had the intent to carry out governmental functions, or solely participate in commercial activities. In fact, the tribunal in Maffezini v. Spain gave great importance to the purpose of the state, and the background leading to the institution of an investment, which showed the intent of the government of Spain to carry out governmental functions through the investment. It found that the participation of governmental bodies in the investment "points to the fact that it was established to carry out governmental functions in the field of regional development." [16]

23. In analyzing the purpose and objectives of the present investment, it is important to note that Bonooru is a group of islands[17], making their main mean of transportation airplanes, and therefore a main source of income to the state, and an important sector to be developed and preserved by the Bonoori government in order to protect the citizens' civil rights.

24. In fact, the same interpretation of the *Maffezzini* tribunal[18] could be applied to Bonooru regarding its' investment in Vemma Holdings. When the "Privatization of Enterprises" movement took place, Vemma Holdings was to replace its' predecessor BA Holdings, to which the Bonoori citizens protested in order to demand that the only airline would be *"kept for the people"* and not privatized. To ensure the citizens mobility rights, the Bonoori Prime Minister, ensured that the "government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure

[16] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction. Para. 85

[17] Case Record, Statement of Uncontested Facts, Page 28, Para. 5

[18] Ibid page 19 footnote 15

that it operates routes to our most remote islands, regardless of profitability."[19], showing the government's intentions in maintaining control over Vemma Holdings, and further guaranteeing that its priorities were to preserve the citizens mobility rights, regardless of profits, while gaining profits should be the core priority of a state-owned enterprise. The Claimant, therefore, cannot allege that its goals are purely commercial, but rather political in nature.

25. The Prime Minister's words were in fact later confirmed, by the multiple expansions Vemma undertook, when it increased its' ownership in Vemma to 55%, specifically at the time of the arbitration against Mekar, making sure it would ensure the legal safety of its agents. Nonetheless, but replaced Vemma's lawyers with lawyers from the Bonoori Justice Department, meaning that Vemma, is actually represented by state lawyers.

26. These actions, are all in fact, enforced by Article 70 of the Constitution Act of Bonooru, in which 70.2 cites "Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands;", meaning that ensuring and facilitating travel of the Bonoori citizens is an essential goal of the Bonoori government, and is translated in article 70. This obligation has shown to be transposed, by the Bonoori government, through the investment that it made in Vemma, which equally made sure to invest in Caeli Airways in order to maintain certain control over travel to, and from Bonooru and Mekar.

27. In addition, in order to ensure these rights to the citizens, the Claimant had, even after enduring losses concentrated in the high-traffic routes between Bonooru and Mekar, continued to operate in these routes[20], "regardless of profitability", life the Prime Minister of Bonooru previously assured. Bonooru continues, through the actions Vemma, to demonstrate that they are not separate legal entities but in fact, directly linked, in all

[19] Case Record, Statement of Uncontested Facts, Page 29, Para. 8

[20] Case Record, Statement of Uncontested Facts, Page 33, Para. 33

factors. Having in its agenda not only commercial goals, but equally political, which leads to the fact that Vemma had undertaken governmental functions in the benefit of its' national state, working as an agent of the Bonoori government.

iii. The Claimant exercises governmental functions and paramilitary activities

28. Governmental functions refer to duties or activities that are closely attached to the public interest and are usually performed by government employees.[21] Essentially discharging a governmental function is what makes a state-owned enterprise an agent of the State, and which will be proven to be the case with the Claimant.
29. It was held in *CSOB v. Slovakia* that "the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were "essentially commercial rather than governmental in nature"."[22] In applying the same interpretation, a private entity that exercises governmental functions delegated by its' national state, is under the Broches test applied, considered as an organ of this state, and would be considered as its' agent, which was the interpretation of the *Maffezzini* tribunal[23]. This leads us to analyze the functions that were exercised by the Claimant.
30. In fact, in order to ensure the fulfillment of the aforementioned political purposes, the Claimant had undertaken governmental functions that are essentially reserved to its' national state Bonooru. The provision of the mobility right of the Bonoori citizens in Article 70 of the Bonoori constitution, was predominantly performed by the state of Bonooru up until the point where it decided to privatize BA holdings. It was reserved to

[21] Lexis Nexis, "Governmental functions' legal definition", (2010), Available at: Governmental Function Law and Legal Definition | USLegal, Inc.

[22] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4. Decision of the Tribunal on Objections to Jurisdiction May 24, (1999). Para. 17

[23] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction. Para. 80

the state of Bonooru. Therefore, the Claimant's participation to assure this mobility right; is a discharge of an essential governmental function. Consequently, Claimant cannot contend otherwise when it is holding out a constitutional right of its national state, nor can it allege that these activities are within the duties of a State-owned enterprise.

31. Furthermore, it was found in the *Maffezzini* case, that "regional development" is a sector in which governments aim to ensure stability and growth, this being the case with the investment in question, which was used by the government of Spain in order in order to reach its' goal through the participation of government bodies in the project. The facts of the aforesaid case highly resemble the present case; the stakes owned by Bonooru are specifically owned by the Ministry of Transport and Tourism[24], which directly ties in with the fact that Vemma has participated in developing tourism in Bonooru, through the "Horizon 2020" Scheme, outlining that "its investment in Caeli Airways would draw more travelers from Mekar and the Greater Narnian region to Bonooru's emerging tourism markets."[25] This therefore showing that the Bonoori Ministry of Transport and Tourism, is participating through Vemma and its investment in Caeli, in order to promote tourism in Bonooru.

32. Nonetheless, in 2020, and in light of huge financial losses by Vemma, in order to protect the citizens' rights under Article 70, Bonooru proceeded by expanding its ownership in Vemma to 55%, it replaced board members by government functionaries, the Claimant's functions were expanded to include paramilitary activities, in addition to Vemma's legal team being equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar[26].

[24] Case Record, Annex IV, "Memorandum of Association of Vemma Holdings Inc.", page 45

[25] Case Record, Statement of Uncontested Facts, Page 32, Para. 28

[26] Case Record, Statement of Uncontested Facts, Page 40, Para. 65

33. In light of the previous cumulative evidence, taking into consideration the timing of all these factors; Right after the Bonoori Prime Minister ensured control over the future owner of Bonooru Air following the privatization, Vemma holdings acquired 100% of the Royal Narnian, the flag carrier of Bonooru, by Vemma Holdings, and simultaneously, Bonooru became owner of 31% to 38% in Vemma. While Vemma acquired its bid for the Caeli Airways investment in Mekar, its' head of board of directors, had been appointed as the Secretary of Transport and Tourism in Bonooru. The same secretary that later confirmed that Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal."[27] Furthermore, after facing multiple difficulties and financial losses, following its' notice of arbitration against Mekar, Vemma started scaling back and minimizing the services offered by Royal Narnian to compensate, which caused protests by the Bonoori citizens. Not long afterwards, the Bonoori government, in order to secure the citizens' rights under Article 70, it increased its shareholding in Vemma to 55%, replaced its' board of directors with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar **(Exhibit I)**. Now this brings us to question, whether this is the regular course of action regarding any Bonoori State-owned enterprise or does Bonooru give great importance to its' investment in Vemma, being one of its agents, acting on its behalf to fulfill the State's political goals, through discharging essentially governmental functions. Thus, by constituting an agent of the state, representing it in these proceedings, Vemma Holdings, is not protected under any applicable text.

[27] Ibid page23 footnote 25

B. <u>The Claimant is not protected under any applicable legal instrument</u>

34. For the Claimant to have standing in these proceedings, the Claimant must fulfill all required criteria under both applicable texts being firstly the 2014 Bonooru Mekar CEPTA (1), and secondly, the ICSID Additional Facility rules (2).

1. Claimant's status as an agent is not protected under the 2014 Bonooru – Mekar CEPTA

35. In April 2014, Bonooru and Mekar signed the Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**"). The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.[28] Consequently, and as provided by article 1.6 of the new BIT, all investment even those made prior to its entry into force shall be government by the 2014 CEPTA.[29] Therefore, for Claimant to have standing before the tribunal, the Claimant should fulfill the investment requirements set out in the CEPTA.

36. While Vemma's investment in Caeli could qualify as an investment under the CEPTA, Respondent submits that the Claimant as an investor is not offered protection under the applicable BIT. As previously elaborated; the respondent does not contest the claimant's status as a state-owned enterprise, but contests that it represents a state in these proceedings, acting as an agent of Bonooru.

37. Article 9.1 of the CEPTA[30], elaborates on the necessary investment terms definitions, and it defines investor as "a natural person with the nationality of a Party or an enterprise with

[28] Case Record, Statement of Uncontested Facts, Page 33, Para. 32

[29] Case Record, 2014 Bonooru-Mekar CEPTA, page 72

[30] Ibid footnote 28

the nationality of a Party or seated in the territory of a Party", meaning that the investor must be a national of a contracting state rather than a contracting state itself pursuing an arbitration proceeding disguised by its agent, who is claimed to be a mere investor having the form of an SOE, in the host state.

38. Thus, by representing a state in these proceedings the investor does not qualify for protection under the CEPTA, signed and ratified by both parties. In addition, by not fulfilling this criterion, the Claimant also cannot claim protection under the applicable arbitration rules.

2. Claimant's status as an agent is not protected under the ICSID Additional facility rules

39. Following the same logic of the CEPTA, article 25, under Chapter 2 of the ICSID Convention, as well as article 2 of the ICSID AF, define the tribunal's jurisdiction to "extend to any legal dispute arising directly out of an investment, between a Contracting, and a national of another Contracting State". However, does not refer to the national state of the investor being a possible party to the dispute. And as previously demonstrated, the Claimant and Bonooru, cannot be regarded as two separate entities, but one that acts on behalf of another, the latter being the Bonoori government. Hence, the applicable arbitration rules, being the ICSID AF, and chapter 2 of the ICSID Convention, exclude state-to-state arbitrations from their jurisdiction.[31]

40. The Respondent submits that Vemma should be denied standing, for being a state-owned enterprise that is fully controlled by the Bonoori government, that pursues political goals in developing the tourism in Bonooru through the investment in Mekar, that actively

[31] Aron Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", Columbia Journal of International Law, Vol. 5, 1966, 263, at 265.

exercises governmental functions to reach these goals, and nevertheless, engages in paramilitary activities, making it an agent of the Bonoori government, representing the state in these proceedings. This status is neither protected under the CEPTA, nor under the ICSID AF, therefore rendering the dispute outside the jurisdiction of the tribunal. Therefore, this party requests that the Claimant be denied standing before the Tribunal.

II. THE ADMISSABILITY OF FILING NON-DISPUTING PARTY SUBMISSIONS IN THESE PROCEEDINGS

41. *Amici Curiae* or "Non-disputing party submissions" are considered as submissions by "friends of the court", that are not parties to the dispute, but that would aid the tribunal in reaching a decision by bringing a new perspective of information to the dispute. In addition, *amicus* submissions often aim to promote transparency of the proceedings by assisting on matters of public interest.[32] Which is the present case, by applying the UNCITRAL Rules on Transparency, by the agreement of both parties.[33]

42. The ("ICSID AF") permits the admissibility of non-disputing party submissions, but only with the existence of certain prescribed conditions. To demonstrate, Article 41.3 of the aforementioned rules, similarly to article 9.19 of the CEPTA[34], elaborate on three main criteria that should be considered by a tribunal "among other things"[35] in order to allow submissions by non-disputing parties; Firstly, the party should assist the tribunal in resolving the dispute by bringing a new perspective or knowledge that is different from

[32] Stephanie Forest & Gary Born. "Amicus Curiae Participation in Investment Arbitration". ICSID Review - Foreign Investment Law Journal. (2019). Page 2

[33] Case Record, 2014 Bonooru – Mekar CEPTA, Article 9.20, Page 82

[34] Case Record, 2014 Bonooru – Mekar CEPTA, Article 9.19(2) and 9.19(2) (3), P. 80

[35] ICSID Additional Facility Rules. Washington, USA. (2006). "Arbitration (Additional Facility) Rules". Article 41. Page 62

that of the parties. Secondly, the knowledge or perspective brought forward must remain within the scope of the dispute. Lastly, the non-disputing party must maintain a significant interest in the dispute.[36] By fulfilling these criteria, the tribunal reserves the discretion to allow non-disputing party submissions.

43. While tribunals retain the discretion to interpret the criteria of article 41(3), however, such requirements should be regarded as presumptive, since the absence of one or more criteria, would render the *amicus* participation inadmissible. Therefore, if a non-disputing party cannot demonstrate through its knowledge and experience, a new and useful perspective, its' submission should be denied. Similarly, if the submission would widen the scope of the dispute, which defies the purpose of amicus submissions, or the non-disputing party would not maintain a significant interest in the outcome of the dispute, the *amicus* participation should be rendered inadmissible.[37]

44. Thus, it is essential to evaluate how through fulfilling all the above-mentioned criteria, the external advisors to the Committee on Reform of Public utilities, ("**CRPU**"')'s submission should be accepted (I), as opposed to the submission by the Consortium of Bonoori Foreign investors, ("**CBFI**"), which should be rendered inadmissible (II).

A. <u>The admissibility of the amicus submission presented by the CRPU</u>

45. The Respondent submits that the CRPU has presented a submission that provides the tribunal with a new perspective to a material issue in the dispute (1), that this information falls within the scope of the dispute (2), and finally that it reserves a significant interest in the outcome of the dispute (3).

[36] ICSID Additional Facility Rules. Washington, USA. (2006). "Arbitration (Additional Facility) Rules". Article 41. Page 62

[37] Ibid page 27 footnote 32 (page31)

1. The submission provides the tribunal with a new perspective to the case

46. The first provision in article 41(3) of the ICSID AF, specifies that "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".[38] Meaning that in order to consider an amicus submission in the first place, is the existence of information that is not available to both parties, this being the main purpose of *amicus* submissions, which was the reasoning of the *Bear Creek Mining* Tribunal.[39]
47. This factor focuses on the utility of the non-disputing party's participation in the proceedings, hence any submission that would be considered "duplicative" regarding the disputing parties' submissions, would be dismissed, which was confirmed by the tribunal's findings in the *Apotex* case.[40] Without fulfilling the first criterion, the submission would defy the main purpose of amicus submissions, which is generally assisting the tribunal in resolving the dispute.

48. In fact, the CRPU's submission has disclosed a new information regarding the means by which the investment was acquired by Vemma, an information that was not available to both parties. According to the non-disputing party submission, Vemma has acquired its' investment rights through means of bribe bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee. [41] Furthermore, it was found in the *Krederi Ltd. v. Ukraine* case, under the ICSID rules, that; "Violating core values protected by international law would clearly be not in good faith and lead to the loss of investment protection under the

[38] Ibid page 25 footnote 28

[39] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21. Procedural Order No. 6. (2016). Para. 36

[40] Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1. Procedural Order on the participation of the Applicant Mr. Barry Appleton, as a non-disputing party. (2013). Para. 34.

[41] Case Record, "Amicus Submission by the external advisors to the Committee on Reform of Public Utilities", Page 19.

Treaty." They additionally, relied on the International public policy to state that acts of illegality are prohibited under international public policy, would lead to loss of treaty protection even in the absence of an express legality requirement. [42] Thus, corruption committed by Vemma to acquire the investment rights, will affect its' status as an investor protected under the CEPTA.

49. This disclosure in the CRPU's submission evidently qualifies as materially new information that would not be presented by both parties, as well as would aid the tribunal in reaching a decision, specifically in the jurisdictional issue. Which is why, it is important to further address how this information falls within the scope of the dispute.

2. The information provided remains within the scope of the dispute

50. The second provision in article 41(3) of the ICSID AF, specifies that the non-disputing party submission should address a matter within the scope of the dispute.[43] According to the tribunal's findings in *UPS v. Canada*; this criterion specifically prevents broadening the dispute, or addressing issues that weren't raised by the parties, as *amicus* should not change the subject of the arbitration into a different dispute.[44]

51. In addition, it was found by multiple tribunals[45] that issues of jurisdiction could possibly raise matters of public interest, on which the non-disputing parties could aid the tribunal through *amicus* participations. Similarly, in the case at hand, the information concerning

[42] Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/1. Final Award. (2018). Para. 385

[43] Ibid page 25 footnote 28

[44] United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/. Decision of the Tribunal on petitions for intervention and participation as Amicus Curiae. (2001). Para. 60

[45] Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1. Procedural Order No 2, para 32. & Electrabel SA v Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 5.32.

the means by which the investment rights were procured, directly affects the claimant's status in these proceeding, and the findings of the tribunal regarding the bribe allegations would in fact affect the status of the Claimant as a legitimate investor able to bring claims, or not, before the tribunal.

52. Nevertheless, Vemma cannot claim that the non-disputing submission raises a new issue, since it was found in *Infinito gold v. Costa Rica*, that the tribunal has a duty to assess, and engage in its own inquiry, regarding all allegations of corruption, the latter being a matter of international public policy[46]. In addition, in the context of applying the UNCITRAL Rules on Transparency, the parties have agreed to more transparency in these proceedings[47], which is exactly what the CRPU is trying to achieve, the Claimant should not protest such submission. Therefore, the tribunal cannot in all cases dismiss any bribe allegations and must assess the information brought forward by the CRPU's submission. Consequently, by addressing a matter of international public policy that is within Mekar, the CRPU reserves a certain degree of interest in the proceedings.

3. The "CRPU" reserves a significant interest in the dispute

53. The last criterion elaborated by article 41(3) of the ICSID AF, specifies that the non-disputing party must have a significant interest in the proceedings. Furthermore, pursuant to article 9.20(6) of the CEPTA, the parties have agreed to apply the UNCITRAL rules on transparency in treaty-based investor-state arbitration[48], which was requested by the Respondent's application to bar the amicus submission by the Consortium of Bonoori Foreign Investors.[49] In light of this request, Article 4 of the UNCITRAL rules on

[46] Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5. Decision on Jurisdiction. 4 December 2017. Para. 137

[47] Ibid page 27 footnote 32

[48] Ibid page 27 footnote 32

[49] Case Record, Mekar's Application to bar the Amicus submission by the Consortium of Bonoori Foreign Investors. Page 24

transparency[50], requires that, when exercising discretionary duties, which is the case regarding the assessment of *amicus* submissions, the tribunal must take into consideration the public interest.

54. In fact, the issue raised by the CRPU, is an issue of public policy, and considering the fact that the CRPU is incorporated in Mekar, such issue would constitute an issue of public interest. The tribunal in the Vivendi case gave importance to distinguishing between public interest matters that are present in all investment proceedings, such as State's liability, and public interest matters presented in that case, which was the distribution of water, which will affect people other than the two parties[51]. In fact, in the case at hand, the Claimant has acquired the rights to the largest airline in Mekar through means of bribe, but nonetheless continued to pursue political goals to improve the tourism in its national state Bonooru, and finally led to Caeli's downfall, as previously demonstrated, thus, all actions following the illegitimate acquisition of rights and claims, affected multiple parties other than the disputing parties, making this an issue of public interest that should not be disregarded by the tribunal.

55. To sum up, in light of the aforementioned analysis, the respondent respectfully requests the arbitral tribunal to pronounce the admissibility of the CPRU'S submissions as it fulfills all the conditions provided by article 41.3 of the ICSID AF as well as article 9.19 of the CEPTA[52], as opposed to the CBFI's submission which should be dismissed.

[50] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. "Discretion and authority of the arbitral tribunal". United Nations. New York. (2014). Article 4. P. 6. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf

[51] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II), ICSID Case No. ARB/03/19. Order in response to a Petition for Participation as Amicus Curiae. Para. 19

[52] Ibid page27 footnote 33

B. <u>The inadmissibility of the amicus submission presented by the CBFI</u>

56. In application of article 41(3) of the ICSID AF, the Respondent respectfully requests the inadmissibility of the amicus submission presented by the CBFI, for failure of providing any perspective or material knowledge that would assist the tribunal in reaching a decision (1), in addition to presenting a conflict of interest by its' participation (2).

1. The CBFI's submission does not provide the tribunal with a new perspective to the case

57. As previously demonstrated, contributing by perspective or knowledge that would assist the tribunal in reaching a decision, is the main purpose of non-disputing party submissions. The amicus submission has to assist the tribunal with sufficient information that would help it in reaching a decision. The CBFI has mentioned that it intends to provide two things; "context regarding the business climate of Bonooru, the existing corporate framework in which enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia."[53]

58. Firstly, providing context exclusively, being a represented of Bonoori investors in the region, is not enough to suffice for admitting an amicus submission. In the *Resolute forest* case, the tribunal rejected a non-disputing submission by two academics, because they would not be able to sufficiently assist the tribunal, regardless of their knowledge or expertise on the matter, since they would not be able to provide perspective different than of the parties and experienced councils representing them.[54] This decision upheld the interpretations of the *Apotex* tribunal previously mentioned[55]. Therefore, being

[53] Case Record, CBFI's submission. Page 15, para. 2

[54] Resolute Forest Products Inc. v Government of Canada, PCA Case No. 2016-13. Procedural Order No. 6. Para. 4.4

[55] Ibid page30 footnote 42

experienced and knowledgeable as to the subject matter of the dispute is not enough, and by providing context, the non-disputing party would not provide the tribunal with information that would not be available to the disputing parties, rendering this submission irrelevant.

59. Secondly, as previously mentioned CBFI wants to apply test on nature of activities of the aviation industry in Bonooru. It has been held in the *Bear Creek Mining v. Peru* case, that if the matter could be sufficiently discussed by both parties, this is grounds for dismissal of the non-disputing party submission[56]. In fact, this is the case with the CBFI's submission since the nature of the activities in the aviation industry is actually discussed by both parties while assessing the claimant's, as well as the Bonoori government's activities in the first issue. Hence, the non-disputing party would not address the issue in a matter that would exceed the capabilities of the parties.

60. Consequently, by exclusively providing context available to both parties, and discussing matters previously addressed by the parties, the CBFI's submission would not be able to assist the tribunal with any new perspective or knowledge that would aid the tribunal in reaching a decision. Furthermore, aside from not assisting the tribunal, in analyzing the interest that it holds in the dispute, the CBFI's participation would create a conflict of interest in these proceedings.

2. The CBFI's participation in the present proceeding presents a conflict of interest that negatively influences its submission in a bias manner

61. In analyzing the CBFI's interest in the proceedings, we'd find that it exceeds the reasonable standard, by being in direct contradiction to the Respondent's interest. In fact, amicus

[56] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21. Procedural Order No. 6. (2016). Para. 38

submissions have been often justified on the basis that they're presented by "friends of the court"[57], now how can we apply this interpretation on CBFI, while it actually should be considered as a "friend of the Bonoori investors"[58], or in other words, the claimant.

62. A conflict of interest occurs when an entity or individual becomes unreliable, because of a clash between personal interests and professional duties or responsibilities[59]. The tribunal in the Suez case, specified, that it would only accept submissions from applicants that would have "expertise, experience, and independence" to assist in this case, and without these conditions, the submission would not be granted leave.[60] In this case, the non-disputing party is lacking one important criterion; being the independence of the amicus submitter. Additionally, it was found in the Von Pezold case, that "The apparent lack of independence or neutrality of the Petitioners is a sufficient ground to deny the NDP Application". The tribunal has also found that, where the non-disputing party's interests are aligned with one of the parties, this would be considered as a lack of Independence in the case of *Amicus Curiae.*[61]

63. In fact, the case at hand, not only, the CBFI is a non-profit organization that represents Bonoori Investors in the greater Narnian region, but one of the Bonoori Investors represented by the CBFI is Lapras Legal which advises Vemma Holdings on strategies regarding this case.[62] Thus, it is clear that two conclusions arise. Firstly, that the CBFI's interests are directly aligned with those of the claimant, creating clear bias. Secondly, that it is clear that Lapras Capital participates to this case through the CBFI. and seeing as their

[57] Ibid page23 footnote 25

[58] Case Record, CBFI's submission. Page 16, para. 2

[59] Investopedia, "Conflict of interest legal definition", Available at: Conflict of Interest Definition (investopedia.com)

[60] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19. Order in Response to a Petition for Transparency and Participation as Amicus Curiae. Para. 24.

[61] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15. Procedural Order No. 2. Para 51 and 56

[62] Case Record, Procedural Order No. 3, P. 87, Para. 12

interests contradicts the Respondent's, their submission raises a great conflict of interest that shouldn't be disregarded, rendering its' submission inadmissible.

64. The Respondent further submits that in the present case, 38 members of the CBFI are currently investors in Mekar. Two of whom are currently pursing claims against the respondent in regard to the same violations that the claimant presents to this tribunal.[63] Hence, it is clear that the latter's objective is to benefit and aid its own arbitration proceedings by the findings of this one. It is further emphasized through their own submission in which they clearly expressed that this arbitration will be taken as a precedent for all investors of the CBFI.[64] Consequently, seeing as the CBFI, has ulterior motives behind its' participation as a non-disputing party, the tribunal should render its submission inadmissible, for presenting a conflict of interest and being, and equally for presenting the tribunal with not only an irrelevant, but a biased *amicus* submission.

65. In order to conclude on the jurisdictional issues, the Respondent requests on firsthand that Vemma Holdings should be denied standing, as it acts as an agent of its' national State Bonooru, by being mostly owned by the government, and exercising governmental and paramilitary functions, rendering this a State-to-State arbitration falling outside the jurisdiction of the Tribunal. Nevertheless, the claimant's status remains in all cases unprotected under the CEPTA and the ICSID AF, for acquiring its' investment rights through means of bribe. Furthermore, the Respondent requests on second hand, the admissibility of the CRPU's submission for providing the tribunal with novel and valuable information that will aid in the decision making on the case, as opposed to the CBFI's submission which should be rendered inadmissible, for lacking any useful information to the tribunal, and presenting an issue conflict by its close ties to the Claimant.

[63] Case Record, CBFI's submission. Page 16, para. 6

[64] Case Record, CBFI's submission. Page 16, para 9

III. Respondent did not violate article 9.9 of the CEPTA Agreement

66. In the absence of any specific commitment made by the Republic of Mekar with regards to the investment's framework stability, Claimant could not have legitimately expected it to remain untouchable (A). Rather, it was Claimant, a sophisticated investor, who failed to perform its due diligence duty (B). In any event, Respondent's actions only targeted the protection of the public interest which precludes any violation of the FET (**C**).

A. <u>The absence of any specific commitments made by Respondent towards Claimant</u>

1. Respondent's actions were a mere demonstration of their irrevocable right to regulate

67. It is crucial to examine whether, at the time of the investment, Claimant has received any promises. In other words, arbitral tribunals are always interested in seeing whether the host state has made any specific commitments that regulations would not occur or that they would not affect the investor. Such a stance was also adopted in the case of Parkerings-Compagniet v. Lithuania, where the arbitral tribunal stated:

> "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time".[65]

68. Respondent didn't take any specific undertakings that regulations would not be introduced. Both parties even agreed that both countries have the absolute right to regulate. This is provided under article 9.8 paragraph 1 of the CEPTA which defines an exhaustive list of "legitimate public policy objectives", one of which being "national security."[66] In the case of Continental v. Argentina, the arbitral tribunal emphasized that an economic crisis, just

[65] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, (Sept. 11, 2007), §332

[66] Case Record, CEPTA, Article 9.8, page 76

like the one Mekar was facing, may qualify as "essential security interest."[67] This said, Respondent lawfully exercised its right granted to it under the CEPTA.

69. As if this was not enough, both parties also decided in the CEPTA to give the right to regulate a significantly wide scope of application and that is clear in the second paragraph of the aforementioned article reading the following:

> "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".

70. In light of the above, Respondent hereby submits that it never gave any specific commitments to Claimant and that it only exercised its right to regulate strictly conforming to the CEPTA.

2. Respondent's legal framework could easily change due to the political and economic climate

71. It is certainly illogical to estimate that a government would not change its priorities and policies throughout time, and that laws would be tailored just to match the needs of an investor. In the case of Parkerings v. Lithuania, it was mentioned that:

> "The political environment was changing at the time of the negotiation of the Agreement and the Claimant should have known that the legal framework was unpredictable and could evolve."[68]

[67] Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, § 174 (Sept. 5, 2008)

[68] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, §342 (Sept. 11, 2007)

72. This same decision is of particular importance, as it offered Claimant an alternative to cover the risk of political modifications which is "introducing into the investment agreement a stabilization clause or some other provision protecting it against unexpected and unwelcome changes."[69] Finally, in the case of Maffezini v. Spain, a commentary interpreted the rendered award as follows: "Unrealistic expectations of economic success in transitional economies, economies in crisis, highly undeveloped countries or failing States do not deserve protection."[70]

73. Respondent was suffering from a severe economic crisis and as stated above, regulatory principles to protect public policy cannot be interpreted as FET breaches. Furthermore, Respondent had just seen a largely conservative party, the LPM, regain political power again. It was therefore clear that changes would be introduced. It is also definitely illogical to believe that a political party would remain in power forever, and therefore, Claimant should have sought any sort of a protective clause, such as the alternative proclaimed in the case of Parkerings-Compagniet.

74. Hence, Respondent could not be declared liable for FET breaches, as Mekar was in political transition and economic turmoil during the alleged breaches, and all of its changes were made with the specific goal of preserving public policy. Even further, it never made any specific commitments to Claimant.

3. Claimant did not examine the historic, economic, or political background of Respondent

75. It is only appropriate that when an investor decides to invest, this investor should examine the legal and economic framework of the host country. This was even considered as a

[69] Ibid, §332

[70] P. Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', ICLQ 55 (2006): 527, 546.

presumption by many arbitral tribunals. In the case of Duke Energy v. Ecuador, the arbitral tribunal stated that for legitimate expectations to be reasonable, they:

> "Must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State".[71]

76. Investors are generally attracted to developing countries due to greater opportunities than those in developed countries. However, greater opportunities and profits are accompanied with greater risks, including regulatory ones.

77. Mekar is a country with high regulatory intervention that has been holding it back on investment and late economic reforms.[72] It only opened to privatizations in 2009, when a new government was elected. With such a historic background of regulatory interventionism and an attempt to make the leap into privatization, it was only appropriate to expect obstacles and any prudent investor would have known so and sought assurances from the host state's part.

78. However, Claimant seemed to neglect such an obligation of due diligence when it was making its investment in Respondent, to be demonstrated further in Respondent's second submissions.

B. Claimant's individual claims are demonstrative of its lack of due diligence, rather than any wrongdoing by Respondent

79. Respondent had every reason to impose and maintain airfare caps (1). It was also in right not to grant Claimant subsidies (2) Further, Mekar lawfully enforced the award annulled

[71] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, §340 (Aug. 18, 2008)

[72] Case Record, Statement of Uncontested Facts, §12, page 29

in Sinnoh (3). If anything, these measures seem to indicate Claimant's lack of due diligence, as demonstrated by their ignorance of the duration of the judicial proceedings in Mekar (4).

1. Respondent had the right to impose and maintain airfare caps due to the ongoing investigations

80. Claimant argues that when Respondent opened an investigation against it for violation of the Mekari Competition Law, it was illegal as Caeli Airways did not have a 50% share of the relevant market. Hence, it did not have jurisdiction to open such an investigation.

81. While it is true that the market share was only 43% during the opening of the first investigation, it is also relevant to remember that there was a certain relationship between Caeli Airways and the Royal Narnian, which is why their cumulative shares resulted in 54% share of the relevant market. They were both owned by the same company, they were both members of the Moon Alliance and finally, they cooperated on various aspects such as "lounge access, terminals, IT platforms, check-in operations and code- sharing."[73] These aspects all fall within the category of facilities, a category that Claimant agreed to an undertaking made to the CCM that they would not engage in high level co-operation with Moon Alliance members on.[74]

82. First things first, collective dominance is a widely established concept when it comes to characterizing an abuse of dominant position. To put it mildly, the General Court of the EU agreed that

> "There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic

[73] Case Record, Statement of uncontested facts, §27, page32

[74] Case Record, Statement of Uncontested facts, §25, page32

> links that [] together they hold a dominant position vis-à-vis the other operators on the same market".[75]

83. The ECJ also confirmed that:

> "a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity".[76]

84. Even if we're to agree that the Royal Narnian and Caeli Airways were somehow not related, the Mekari Competition Law in the Monopoly and Restrictive Trade Practice Act [77]expressly stipulates that: "The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share." It is hereby normal that competition in the aviation sector, one of importance to Mekar, should be protected against the anti-competitive practices exercised by Claimant.

85. Finally, the use of airfare caps as interim measures is consistent with the legal framework of Mekar. When comparing it to the facts, Claimant's actions could have easily driven out other competitors out of the market, as their strategy was based on lower prices to attract clients. They were making use of their infrastructure, relationships, and consistent backing from Bonooru. Given that Claimant, as already demonstrated, was in a dominant position, it bears special responsibility, which necessarily means that same actions taken by smaller competitors could amount to a violation if exercised by a company in a dominant position.

86. Respondent also had the obligation of maintaining these airfare caps, as without them, Caeli Airways would have driven competitors, who were already suffering from the

[75] Joined cases T-68/89, T-77/89 and T-78/89, Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission [1992] ECR II-1403.

[76] Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge Transports and Others v Commission [2000] ECR I-1365.

[77] Case Record, Annex V (Monopoly and Restrictive Trade Practice Act, as Amended 2009), §2, page47

economic crisis, out of the market. Claimant's main method was to put lower prices than their competitors, and even than their cost, to drive these competitors out of the market. Claimant was making use of its infrastructure, relationships with members of the Moon Alliance and significant backing from Bonooru, to lose on the short term, but gain on the long term once their competitors were driven out of the market. This also could be factored with the fact that competitors did not have access to Phenac International, and Claimant's anti-competitive behavior was clear. These competitors were suffering from Claimant's anti-competitive behavior before the crisis, and, during the crisis, the crisis itself. If Mekar allowed both factors to be combined, the results would have been disastrous for the Mekari aviation market.

87. Therefore, CCM had the right to implement airfare caps to prevent the ousting of competitors and the cementing of a stronger dominant position by Claimant.

2. Respondent's duration of judicial proceedings was normal

88. Claimant's ignorance of the legal and economic environment also shows in their confusion at the duration of judicial proceedings in Mekar.

89. There is not a specific criterion for a delay in judicial proceedings to be considered reasonable or not. When assessing the reasonableness of the delay of judicial proceedings, it must be taken into consideration the parties involved, the evidence presented and the complexities surrounding their technicality. Hence, in the case of Jan de Nul v. Egypt[78], a delay of ten years did not amount to a denial of justice and therefore, not to a breach of the FET standard. The same logic goes in the case of Toto v. Lebanon[79], where the arbitral tribunal found that a delay of 3 years does not amount to a denial of justice.

[78] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, §204 (Nov. 6, 2008)

[79] Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, §160 (Sep. 11, 2009)

90. The approximate duration of proceedings in commercial matters in Mekar lasts for, approximately, 27 months[80]. Claimant submitted its claim in March 2018, only to receive a final decision 13 months later in June 2019. This date is very reasonable, in a country already suffering from understaffing in the judicial system. The tribunal in Frontier v. Czech Republic precises that:

> "The Czech courts were experiencing at once a high volume of cases and a shortage of judges. This helps to explain the delay, and although not an optimal situation for the efficient resolution of claims, this Tribunal does not find that such a delay rises to the level of a breach of the BIT".[81]

91. Also, Mekar is suffering from an economic crisis and therefore, their courts are overwhelmed with cases.

92. Respondent therefore submits that there was not any delay of judicial proceedings in Mekar and that even if there was, it happened because of circumstances out of Mekar's hand. It is illustrative rather of Claimant's ignorance of the duration of the judicial proceedings in Mekar.

3. Respondent's decision not to grant Claimant subsidies was not discriminatory

93. Discrimination, as per the definition of arbitral practice, means unequal treatment of equal or like circumstances without any justified motive.

94. Privately-owned enterprises and State-owned enterprises are not in a similar situation are thus, are not necessarily entitled to the same treatment. They are not bound by the same obligations, and they may not receive the same privileges. In the case of United Parcel Services v. Canada, Canada refused to allow a competitor the same privileges that it would

[80] Case Record, Statement of Uncontested Facts, §13, page 30

[81] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Award, §336 (Nov. 12, 2010)

accord to its state-owned enterprise.[82] This case serves therefore as a basis, that POEs and SOEs are not "in like circumstances" and therefore, there cannot be any discrimination occurring between the two different categories.

95. Bonooru consistently provided Claimant with financial backing and help. Experts believed that Claimant has a near guarantee that Bonooru interfere if "anything bad were to happen to its prized national carrier's owner."[83] and those enterprises tend "not to be fully independent or independent at all"[84]. Bonooru's behavior, when Vemma faced economic difficulties following pulling out from Mekar, must also be examined. They bought shares up to 55%, brought members of the Justice Department to assist in their lawsuit against Mekar.[85] In other words, Bonooru did everything in its power to save Vemma from going bankrupt. It is not logical to suggest that POEs would have been provided the same amount of protection from their host states if they were to go bankrupt. Mekar therefore decided to help the companies who are truly in need of these subsidies, who would not receive the same backing and protection from their owning State.

96. Hereby, there was not any sort of discrimination if Mekar did not grant Claimant subsidies and decided to do otherwise for POEs, because they were not in like circumstances.

[82] United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award, § (May 24, 2007)

[83] Case Record, Annex IX, page57

[84] Case Record, Annex VII, page55

[85] Case Record, Statement of uncontested facts, §65, page 40

4. Respondent's decision to enforce the arbitral award rendered in Sinnoh was consistent with arbitral practice

i. *The New York Convention provides an option to set aside the annulled award*

97. The New York Convention, in its Article V paragraph 1.e, states that "Recognition and enforcement of the award "may" be refused"[86] if it was set aside or annulled in the country in which the arbitral award was made. The language of the New York Convention is very permissive, as it grants the country the option, rather than the obligation, to set aside an award annulled in the seat of arbitration.

98. It remains within every state's prerogative, or "reading glasses"[87], to interpret the Convention according to their culture, history, and legal jurisprudence. Many countries apply the literal interpretation of its words. France decided to apply the literal interpretation of the New York Convention, interpreting article V paragraph 1.e considering article VII, to understand the permissive language.[88]

99. Mekar never had the obligation to set aside the award set aside in Sinnoh. Rather, it interpreted the Convention according to their own culture and legal setup and decided to apply the New York Convention literally, which was their prerogative. Mekar was always

[86] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, Article V para. 1.e; see also Article V(1)(E) - Guide - NYCG 1958. 1958 New York Convention Guide. (n.d.). Retrieved September 11, 2021, from https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=625&opac_view=-1, §28

[87] Paulsson, M. R. P., Bella, D. R. D., & Dar, W. A. (2017, December 17). Enforcement of annulled awards: A restatement for the New York convention Kluwer Arbitration Blog. Retrieved September 11, 2021, from http://arbitrationblog.kluwerarbitration.com/2017/12/21/enforcement-annulled-awards-restatement-new-york-convention/.

[88] France / 23 March 1994 / France, Cour de Cassation / Société Hilmarton Ltd v. Société Omnium de Traitement et de Valorisation (OTV) / 92-15.137 (1994).

hostile to adopting such a liberal approach, which explains their decision not to join the ICSID Convention because it was "[sceptic] towards the foreclosed possibility of domestic review of awards conflicting with Mekar's public policy."[89]

ii. Mekar cannot set aside the award based only on circumstantial evidence

100. Mekar's jurisprudence suggests that the only motive to set aside an award would be the violation of Mekar's public policy. The award was set aside by the Sinnoh court because there were allegations of bribery against the arbitrator presiding in the arbitral proceedings. However, these allegations are based only on circumstantial evidence.

101. A report made by the CILS, an entity who Mekar froze its bank accounts because it was allegedly interfering with Mekar's domestic affairs, served as the main piece of evidence in favor of Claimant. However, it's worth mentioning that the CILS leaked this evidence into the press, which affects the impartiality of the trial and renders their course of action, if not illegal, immoral at best. These actions taint the only piece of evidence presented and therefore, it does not amount to the high standard of proof of "clear and convincing evidence" in the case of corruption, especially in cases involving the judiciary branch.[90]

C. Respondent's actions do not constitute in aggregate a cumulative FET breach

102. The notion of creeping FET violation is based mainly on the notion of composite acts in Article 15 of the ILC Articles. However, the measures taken against Claimant are not composite acts, because composite acts mean necessarily that they were different measures taken against different persons but in a systematic way, such as a genocide. The

[89] Case Record, Statement of uncontested facts, §20, page 31

[90] Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award, §402 (June 22, 2010)

case against Mekar is rather a case of *complex acts*, which means different measures taken against the same individual. However, this notion of complex acts has disappeared from the new draft of the ILC Articles, which means that they have been currently abolished. [91]

103. Alternatively, Claimant argues that if all the individual claims do not constitute FET breaches on their own, they constitute cumulatively a "creeping FET violation." However, the only relevant case law would be El Paso v. Argentina, where the arbitral tribunal found that Argentina's measures altered the legal framework and therefore, constituted cumulatively an FET breach. However, to do so, the arbitral tribunal specifically mentioned: "all the different elements and guarantees just mentioned can be analyzed as a special commitment of Argentina that such a total alteration would not take place."[92]

104. However, as demonstrated prior, there is not any evidence that Mekar provided any sort of commitment to Claimant. Therefore, the theory proposed by El Paso v. Argentina is not applicable in our case.

105. Finally, the causal link between Respondent's actions and Claimant's failure is not established in this case. As a matter of fact, Aviation Analytics pinned the blame of Caeli's downfall on "enthusiastic overexpansion and the unforeseen financial situation in Mekar."[93] It is hard to see how Respondent had anything to do with these two causes. Therefore, it was merely a case of risky investment choices and, to quote the words of the arbitral tribunal in the case of Maffezini v. Spain, "[BITs] are not insurance policies against bad business judgments."[94]

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[91] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html [accessed 13 September 2021]; See also ILC Articles 1976 Draft

[92] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, §517 (Oct. 31, 2011)

[93] Case Record, Statement of Uncontested Facts, §53, page 38

[94] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, § 64 (Nov. 13, 2000).

106. Therefore, the notion of creeping FET violations does not have a legal basis, and even if it did, it is not applicable in our case.

IV. Respondent SHOULD NOT PAY THE AMOUNT OF COMPENSATION DEMANDED BY Claimant IF A VIOLATION IS FOUND

107. Respondent is entitled to apply the market value standard as per the dispositions of the CEPTA (A), to reduce the amount of compensation due to the presence of a contributory fault by Claimant (B) and to be exempt of the amount of compensation to be paid because of the presence of an economic crisis (C).

A. The fair market value standard is not applicable in the present case

108. The application of the FMV standard would not only contribute to a direct violation of the principle of party autonomy and contractual freedom (1) but would still fall short of the valuation demanded by Claimant (2).

1. Applying the FMV standard in the case at hand means violating the principle of party autonomy

i. The parties never agreed to use the FMV standard

109. International arbitration is based on the very idea of party freedom and autonomy. Both Bonooru and Mekar's arbitration laws are based on the UNCITRAL Arbitration Rules, themselves having the principle of party autonomy in their very essence. Hereby, parties' agreement is of paramount importance in terms of determining the compensation standard, with the exact intention of parties only relevant when the exact wording is ambiguous.

110. Hence, when reading Article 9.21 of the CEPTA Agreement concluded between Mekar and Bonooru, both agreed to the market value standard to be the main compensation standard in the occasion of breach[95]. This market value standard is defined, according to the International Valuation Standards, as:

> the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.[96]

111. Hence, Claimant's allegation that the FMV should be applied is unfounded.

ii. <u>The Most Favored Nation Clause is not applicable in our case</u>

112. Claimant can argue that Respondent also agreed to the Most Favored Nation Clause, which requires Respondent to treat Claimant in a way not less favorable than it treats investors of other third-party countries. As Mekar and Arrakis both agreed to use the fair market value as their compensation standard, Claimant could seek triggering the MFN clause, to implement the FMV standard.

113. The UNCTAD established that:

> "If a host country grants special privileges or incentives to an individual investor through a contract, there would be no obligation under the MFN treatment clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract. In this case, "freedom of contract prevails over the MFN clause.*'"*"[97]

114. MFN clauses operate without prejudice to the freedom of contract. Put differently, it only operates in the silence of the contractual provisions. This is not the case whatsoever as Respondent and Bonooru already agreed to use the market value standard. It is established that Bonooru entered this contract with full authority and consent. Hence, it

[95] Case Record, CEPTA, Article 9.21, page 82

[96] IVS 1 - Market Value Basis of Valuation, Seventh Edition

[97] MOST-FAVOURED NATION TREATMENT. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. (2010). Retrieved September 22, 2021, from https://unctad.org/system/files/official-document/diaeia20101_en.pdf.

cannot claim ignorance of the contractual terms of CEPTA. Even further, CEPTA was signed after Arrakis-Mekar BIT, which means that if Bonooru wanted to implement the FMV, they would have demanded or negotiated such during the drafting of the CEPTA, not after its execution.

115. MFN clauses are either general or specific by including an exhaustive list where the MFN clause would apply. CEPTA includes the case of the latter, with the MFN clause only applying in the case of *the* "establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."[98] This list does not include compensation or any term close to it, such as the term of liability, which means that it was never the common intention of the parties to apply the MFN clause to the issue of compensation. This is solidified by the fact that parties already agreed between them to the MV standard between them in Article 9.21. In Salini v. Jordan, the tribunal refuted the argument of the investor because it failed to establish that it was the intention of the parties to have the MFN clause apply to the provision in question.[99] The cumulation of the two aforementioned factors means that the parties never intended to subject compensation to MFN clause treatment.

116. Finally, CEPTA in its Article 1.4§2, prescribes that:

> "[in] the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."[100]

117. As there is inconsistence between CEPTA and Arrakis-Mekar BIT, the terms of CEPTA should prevail, hence the implementation of the market value standard in breaches other than those of compensation.

[98] Case Record, CEPTA, Article 9.7, page76
[99] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13 2a, Decision on Jurisdiction, §118 (Nov. 29, 2004).
[100] Case Record, CEPTA, Article 1.4, p.72

2. Claimant seems to ignore the definition of the fair market value notion

118. If we are to allow the admission of the fair market value standard, it is only appropriate to remember what the definition of the fair market value is. The International Glossary of Business Valuation Terms defines the fair market value as:

> "The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[101]

119. Claimant may invoke the offer it had from Hawthorne LLP Group, who is allegedly a third party. However, nothing could be any further from the truth. The latter is a fellow member of the Moon Alliance, which necessarily means there is a relationship between Hawthorne and Claimant. Hereby, it cannot be seen as an "arms' length offer" made by a bona fide third party.

120. Even if we're to consider this offer to be independently made by a bona fide third party, Claimant then wanted to sell its stakes to a third party for the price of 600 million USD.[102] Hereby, it cannot simply allege right now that the losses incurred due to the conduct of Respondent was at 700 million USD, in addition to the 400 million USD it already received when Mekar Airservices purchased Caeli Airways.

121. Finally, the standard of fair market value is normally used by arbitral practice in the case of expropriation. Therefore, it cannot be applied in our case as this case is not an expropriation case[103], along with the fact that Claimant seems to ignore the definition of the notion of fair market value, looking to make use of this case to make up for its failed

[101] INTERNATIONAL GLOSSARY OF BUSINESS VALUATION TERMS (2001), available at httpl/www.aicpa.org

[102] Case Record, Annex X, page58

[103] Case Record, PO3, §2, page86

investment. Also, arbitral practice has also made it clear that the tribunal can determine the compensation due only "in the absence of agreement between the parties."[104]

122. Therefore, there is no legal basis upon which this arbitral tribunal can apply the Fair Market Value Standard, and that even if it did, it would still fall short of Claimant's 1.1 billion dollars valuation.

B. The compensation must be reduced due to the contributory fault of Claimant

123. Claimant contributed directly to the situation Caeli finds itself through its risky and extravagant approach (1). Even further, it failed to mitigate its risks, even when the alleged breaches began to appear (2).

1. Claimant's contributory negligence led to the deterioration of the financial situation of Caeli Airways

124. Article 39 of the ILC Articles on State Responsibility provides that:

> "[i]n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[105]

125. Even further, the doctrine of contributory negligence was admitted unanimously by international case law and historical jurisprudence. In Maffezini v. Spain, it was agreed that "Bilateral Investment Treaties are not insurance policies against bad business

[104] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, §394 (May 12, 2005).
[105] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html [accessed 13 September 2021], Article 39

judgments."[106] The arbitral tribunal retorted the exact wording in another decision of MTD Equity v. Chile, where it stated that "[t]he BITs were not an insurance against the business risk" and the claimants should "bear the consequences of their own actions as experienced businessmen."[107] Tribunals made use of this doctrine of contributory negligence in order to reduce compensation in cases where FET breaches were found. Tribunals estimated a reduction of 50% of MTD Equity v. Chile[108], 25% in Occidental v. Ecuador [109]and Yukos v. Russia[110] and 30% in Copper Mesa v. Ecuador[111].

126. To apply the doctrine of contributory negligence, it is mandatory to see whether its conditions are fulfilled or not. The arbitral tribunal in Burlington Resources v. Ecuador found that two conditions must be satisfied: the investor's act or omission should have been willful or negligent and it must have materially contributed to the damage.[112]

127. While Claimant's financial suffering was based on the economic and financial crisis hitting Mekar, Claimant went with a policy seeking rapid expansion, going against advice from experts in Mekari markets advising to invest on long-term economic health and stability instead.[113] Claimant however wanted to capitalize on the falling oil prices and ensure profits, although CEPO Secretary General suggested that oil prices will see "a

[106] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, § 64 (Nov. 13, 2000).

[107] MTD Equity Sdn. Bhd. and MTD Chile v. Republic of Chile, ICSID Case No. ARB/01/7, Award § 178 (May 25, 2004).

[108] Id. § 243.

[109]Occidental Petroleum Corp. and Occidental Exploration and Production v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, § 687 (Oct. 5, 2012)

[110] Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA, Case No. 2005-04/AA 227, Final Award, § 637

[111] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA, Case No. 2012-2, Award, § 6.102

[112] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, § 576 (Feb. 7, 2017).

[113] Case Record, Statement of Uncontested facts, §31, page33; See also §33, page 33; See also §35, page 34

strong uptick in the near future." [114]It is clear therefore that Claimant engaged in these actions willingly, and that risky approach contributed significantly to the material damage that Caeli Airways suffered and the deterioration of the value of the investment.

128. Hereby, Claimant satisfied the two necessary conditions to characterize a contributory fault to the damages they suffered. Even further, Claimant did not only run Caeli Airways into the ground, but also failed in its duty to mitigate the alleged damages.

2. Claimant also failed to mitigate its damages, long after the so-called breaches of FET standards occurred

129. The obligation to mitigate damages is a general principle of the law, which means that it is applied even if it was not expressly stated in the contract between the Investor and the State.[115] The ILC Draft Articles on State Responsibility state that "even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury."[116] In other words, the investor must take all possible steps a reasonable person would have taken in order to avoid losses that were foreseen in the light of the 'breaches' committed by the State. To summarize, an obligation to mitigate is:

"Any failure needs to consist of an: 'unreasonable failure by the claimant to act subsequent to the breach of the treaty, where it could have reduced the damages arising' or the 'unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim."[117]

[114] Case Record, Statement of Uncontested Facts, §33, page 33

[115] Middle East Cement Shipping and Handling Co v. Egypt, ICSID Case No. ARB/99/6, Award, page 40, §167 (April 12, 2002)

[116] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html [accessed 13 September 2021], Article 31, §11

[117] Clayton and Bilcon v. The Government of Canada, PCA Case No. 2009-04; Award on Damages 10 January 2019, §205

130. Hereby, when a failure to mitigate is found, it would very reasonably reduce the amount of compensation claimed. In other words, tribunals consider it to be a reasonable mitigation strategy to put the operation of the investment into "hibernation" to minimize the risk of further losses.[118]

131. With that in mind, the conduct of Claimant when the first alleged breach occurred, is baffling. Claimant make any effort to slow down on its rapid expansion policy nor search for alternatives with regards to the direction the enterprise was going into. Rather, it pursued with its extravagant and risky expansion policy, hoping that the government would allow them some leeway not afforded to other financial actors. Even when their newly purchased Boeing 737 MAX was grounded after a plane crash by Mekar, Claimant were surprised at the decision, only for another plane crash to occur with the same aircraft one year later. Claimant seems to refuse to seek alternatives to mitigate its losses, a confusing approach given its dominant position and that it was estimated to be one of the operators that would easily recover following the financial crisis. Rather, it kept waiting for solutions that Respondent was unable to provide.

132. Further, Claimant was following a certain economic strategy depending on lowering their fares to undercut its competition and build a good relationship with customers. However, it was advised before that this strategy is not a "good long-term model."[119] Not only did Claimant kept being stubborn about their failing strategy, but it also wanted to keep using it during extremely difficult economic times, where circumstances are not necessarily the same and everything is harder for all economic operators.

[118] Achmea v. Slovakia, UNCITRAL, Award, (7 Dec 2012), §320.

[119] Case Record, Annex VII, page 55

133. Hereby, Claimant did not only contribute through its risky and negligent approach to the downfall of Caeli Airways, but it also failed to mitigate its losses even after it was able to foresee the alleged 'breaches' of Respondent.

C. Respondent must see the compensation reduced, as it was acting out of necessity during the financial crisis

134. The necessity doctrine consists of "permit[ting] an otherwise illegal act in an emergency not of the perpetrators' making and with severe consequences if the act is not done."[120] It is justified by the idea that this allocation of costs by presuming that the state's actions intended to protect an "essential interest" of higher value than the interest protected in the breached obligation.[121] This necessity defense is also elaborated in the ILC Draft Articles, part of the international customary law on State Responsibility, where it is stated : "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole".[122]

135. Arbitral tribunals also accepted the necessity defense in the case of an economic and financial crisis, most notably in the case of Continental Casualty, where it reasoned that "[a] severe economic crisis may […] qualify under Article XI as affecting an essential

[120] JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 226 (3d ed. 2003).

[121] Jorge E. Vinuales, State of Necessity and Peremptory Norms in International Investment Law, 14 LAW & BUS. REV. AMS. 79, 82(2008)

[122] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html [accessed 13 September 2021], Article 25

security interest."[123] Also, an annulment committee partially annulled an arbitral award due to rejecting the necessity plea that was made by Argentina in the case of Enron.[124]

136. Many scholars referred to a proportionality test in that case to use the necessity defense. Alec Stone Sweet posits that the arbitral tribunal will engage in a test, which asks "whether a respondent state "[took] measures that infringed more on investors' rights than was necessary for the State to achieve its purpose[s]."[125]

137. In our case, Respondent was suffering from a deep economic and financial crisis that resulted in the devaluation of the Mekari MON. The IMF, a non-partisan organism, even emphasized the importance of establishing credibility in the local currency to avoid this crisis.[126] It was only appropriate then that Respondent had to re-establish this confidence in its currency again, by requiring all companies to denominate its services and products in the MON currency. Further, Respondent refused to grant subsidies because Vemma is SOE, which necessarily means they're having more advantages than privately-owned enterprises. Therefore, it was only appropriate to prioritize those POEs over SOEs such as Vemma.[127]

138. Hence, even if Respondent was to be found guilty of FET breaches, Respondent should not be entitled to pay compensation because of the economic crisis it has been suffering. Finally, Respondent is only entitled to pay compensation for breaches resulting of foreseeable faults, which is not the case in an economic crisis.

[123] Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, § 174 (Sept. 5, 2008)

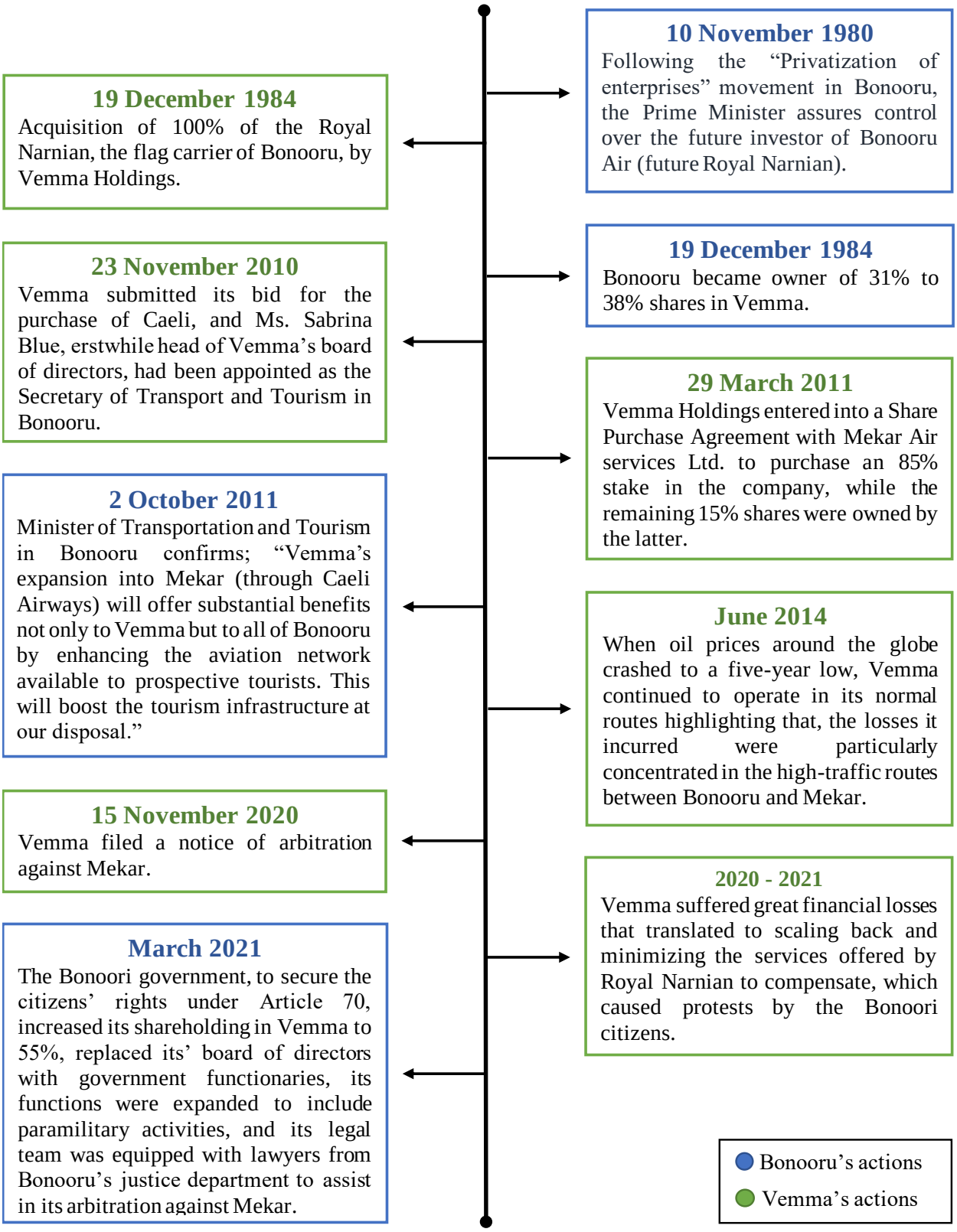
[124] Enron Corp. & Ponderosa Assets, L.P. v. Arg. Republic, ICSID Case No. ARB/01/3, Decision on Application for Annulment, §§ 406– 08, 414– 15 (July 30, 2010)

[125] lec Stone Sweet, Investor-State Arbitration: Proportionality's New Frontier, 4 LAW & ETHICS HUM. RTS. 47, 63(2010)

[126] Case Record, Statement of uncontested facts, §39, page 35

[127] Case Record, Statement of uncontested facts, §46, page 37

Exhibit 1 – Development of ties between Bonooru and Vemma Holdings



PRAYER FOR RELIEF

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

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

ii. To reject the CBFI's amicus curiae submission and admit that submitted by the CPRU.

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

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