TEAM FERRARI

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ARBITRATION (ADDITIONAL FACILITY) RULES

-between-

Vemma Holdings Inc.

CLAIMANT

-and-

The Federal Republic of Mekar

RESPONDENT

MEMORIAL FOR RESPONDENT

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

23/09/2021

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ARSIWA	Draft articles on Responsibility of States for Internationally Wrongful Acts
BA	British Airlines
CBFI	The Consortium of Bonoori Foreign Investors
CBFI submission	Amicus submission by the Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
CRPU	External advisors to the Committee on Reform of Public Utilities
CRPU submission	Amicus submission by External Advisors to the Committee on Reform of Public Utilities
Emirates	Emirates Airline
EO 9-2018	Executive Order 9-2018
Facts	Statement of Uncontested Facts
First Investigation	CCM's First *suo moto* Investigation against Caeli Airways
FMV	Fair Market Value
History	History of the ICSID Convention, ICSID, 2006, Vol. II
ICSID	International Centre for Settlement of Investment Disputes
ICSID AFR	International Centre for Settlement of Investment Disputes Additional Facility Rules
km	kilometer
Mekar's application	Mekar's application to bar the amicus submission by the Consortium of Bonoori Foreign Investors.

MFN	Most Favoured Nation clause
Notice	Notice of Arbitration
Response	Response to the Notice of Arbitration
Rwanda – U.S. BIT	Rwanda - United States of America BIT, 2008
Second Investigation	CCM's Second Investigation launched in December 2016
SOE	State owned enterprise
VCLT	Vienna Convention on the Law of Treaties
Vemma	Vemma Holdings Inc.

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Gardiner	Richard Gardiner Applying the Vienna Convention on the Law of Treaties, A The General Rule, The General Rule: The Treaty, its Terms, and their Ordinary Meaning Treaty interpretation Oxford 2015
ILC Commentary	ILC Commentary on draft articles Yearbook of the ILC, vol II 1966
International Glossary of Business Valuation Terms	American Institute for Certified Public Accountants APPENDIX B International Glossary of Business Valuation Terms https://www.aicpa.org/InterestAreas/ForensicAndValuation/Membership/DownloadableDocuments/Intl%20Glossary%20of%20BV%20Terms.pdf [accessed: 14/09/2021]
Schreuer I	Christoph Schreuer, At What Time Must Jurisdiction Exist? In Practising Virtue: Inside International Arbitration, Oxford University Press 2015
Schreuer II	Schreuer, C., Shareholder Protection in International Investment Law, in Dupuy, P.-M. and Tomuschat, Dupuy, P. M., Fassbender, B., Shaw, M. N. and Sommermann, K.-P. (eds.), Common Values in International Law – Essays in Honour of Christian Tomuschat 2006
UNCTAD	United Nations Conference on Trade and Development Most-favoured Nation treatment Series on Issues in International Investment Agreements II 2010

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Auditing of Accounts	Case Concerning the Auditing of Accounts (Netherlands v France), PCA, 144 ILR 259, at 305 Award 12/03/2004
Azurix	Azurix v Argentine ICSID Case No. ARB/01/12 Award 14/06/2006
Biwater vs. Tanzania	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania ICSID Case No. ARB/05/22 Petition for amicus status 27/11/2006
Chevron	Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I) PCA Case No. 2007-02/AA277 Final Award 31/08/2011
CME Separate Opinion	CME Czech Republic B.V. v Czech Republic UNCITRAL Separate Opinion on the Issues at the Quantum Phases of CME v. Czech Republic by Ian Brownlie 14/03/2003
CMS	CMS Gas Transmission Company v. The Republic of Argentina ICSID Case No. ARB/01/8 Final Award 12/05/2005
Cour d'appel de Paris	Cour d'appel de Paris, n° 14/17964 29/11/2016,
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela* ICSID Case No. ARB(AF)/11/2 Award 4/04/2016
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic Decision on Jurisdiction ICSID Case No. ARB/97/4 24/05/1999
EDF	*EDF (Services) Limited v. Republic of Romania* ICSID Case No. ARB/05/13 Award 8/10/2009

Eili Lilly	Eli Lilly and Company v. The Government of Canada, ICSID Case No. UNCT/14/2 Application for leave to file an Amicus Curiae Submission Submitted by Seven Intellectual Property Law Professors 12/02/2016
Enron	Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic ICSID Case No. ARB/01/3 Decision on the Application for Annulment of the Argentine Republic 30/07/2010
Eritrea-Ethiopia	Ethiopia's Damages Claims Eritrea-Ethiopia Claims Commission Final Award 17/08/2009
Greentech	*Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic* SCC Case No. V 2015/095 Award 23/12/2018
Hydro	*Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania* ICSID Case No. ARB/15/28 Award 24/04/2019
Infracapital	*Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain* ICSID Case no. ARB/16/18 Decision on Jurisdiction, Liability and Directions on Quantum 13/09/2021
Krederi	Krederi Ltd. v. Ukraine ICSID Case No. ARB/14/17 Award 02/07/2018
LG&E	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic ICSID Case No. ARB/02/1 Award 25/07/2007
Luminati	Luminati Networks Ltd. v. B.I. Science (2009) Ltd. Judgment of the Supreme Court of Israel 21/04/2021
Mafezzini	Emilio Agustín Maffezini v. The Kingdom of Spain ICSID Case No. ARB/97/7 Award 13/11/2000

Mafezzini Jurisdiction	Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 Decisions of Tribunal on Objections to Jurisdiction 25/01/2000
Methanex	Methanex Corporation vs. USA Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici curiae" 15/01/2001
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile ICSID Case No. ARB/01/7 Award 25/05/2004
Philip Morris	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay ICSID Case No. ARB/10/7 Award 08/07/2016
Şirketi	İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24 Award 08/03/2016
Tecmed	Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 Award 29/05/2003
Unglaube	Marion Unglaube v. Republic of Costa Rica ICSID Case No. ARB/08/1 Award 16/05/2012
Vivendi	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic) ICSID Case No. ARB/97/3 Decision on Jurisdiction 14/09/2005
Watkins	*Watkins Holdings S.à r.l. and others v. Kingdom of Spain* ICSID Case No. ARB/15/44 Award 21/01/2020
White Industries	White Industries Australia Limited v. The Republic of India Final Award 30/11/2011

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Cited as:	Citation:
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts Adopted on 9/06/2001
ICSID Additional Facility Rules	ICSID Additional Facility Rules Adopted on 27/09/1978
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency Adopted on 1/04/2014
VCLT	Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331 23/05/1969

STATEMENT OF FACTS

1. CLAIMANT in these proceedings, Vemma Holdings Inc., is an airline holding company incorporated pursuant to the laws of Bonooru.[1] CLAIMANT is a party to Moon Alliance.[2]
2. RESPONDENT, Mekar, sits approximately 1,600 km to Bonooru's south.[3] Mekar's currency is the Mekari MON.[4] Mekar's population grew by 4.8 million in the last 35 years, however its judicial system failed to expand proportionally.[5] Corruption on high scale is part of Mekar's economy.[6]
3. Competition Comission of Mekar ("CCM") is a regulatory body created upon the Mekar's Monopoly and Restrictive Trade Practice Act of 2009.[7]
4. Vemma bought 85% of Caeli Ariways, in the process of privatisation of the state-owned airline, in 2011.[8] The purchase of Caeli and its participation the Moon Alliance were approved by the CCM.[9]
5. In cooperation with Moon Alliance Members Caeli benefited from lounge access, terminals, IT platforms, check-in operations and code-sharing.[10]
6. In October 28th, 2011 Vemma received subsidies under "Horizon 2020" Scheme.[11]
7. In 2012 Mekar has become popular destination among tourists because of the Eldin volcanic eruption, what boosted Caeli's income.[12]
8. In 2012 at the first shareholders meeting Mekar Airservices representatives warned Vemma about possible negative outcomes of Vemma's "extravagant approach".[13]
9. Representatives of Mekar Airservices cautioned Vemma again that Caeli's expansion should be controlled to avoid exorbitant costs. Vemma disregarded those warnings.[14]

[1] Notice, p. 2, ¶1, l. 11-16.
[2] Facts, p. 29, ¶11, l. 938-941.
[3] Facts, p. 29, ¶12, l. 942-948.
[4] *Ibid*.
[5] Facts, pp. 29-30, ¶13, l. 949-953.
[6] Facts, p. 29, ¶12, l. 942-948; Procedural order No. 3, p. 87, ¶13, l. 3212-3217.
[7] Fatcs, pp. 30-31, ¶19, l. 993-998.
[8] Facts, p. 32, ¶26, l. 1050-1058.
[9] Facts, p. 32, ¶25, 1042-1049.
[10] Facts, p. 32, ¶27, l. 1069-1072.
[11] Facts, p. 32, ¶28, l. 1079-1081.
[12] Facts, p. 33, ¶29, l. 1089-1095.
[13] Facts, p. 33, ¶29, l. 1095-1099.
[14] Facts, p. 33, ¶31, l. 1108-1116.

10. In 2014, as the oil prices around the globe crashed, Caeli had biggest losses on the high-traffic routes between Bonooru and Mekar.[15] It has been suggested that Vemma is making business decisions based on political reasons and its connections to Bonooru.[16]
11. Caeli offered such low prices that in 2014 it has carried around 35% of all Mekari citizens, as opposed to its predecessor which carried about 15-20%.[17]
12. Oil prices were still declining, allowing Caeli to shore up greater profits.[18]
13. By June 2016 Caeli became the only consistently profitable carrier.[19]
14. CCM launched its First investigation into Caeli's activities on 9 September 2016.[20] This investigation was based on suspicion of adopting predatory pricing strategies with the aim of hindering competition on the domestic market.[21] As a result of the investigation CMM put airfare caps on Caeli.[22]
15. In December 2016, CMM launched Second investigation into Caeli based on a complaint brought by Caeli's competitors, concerning price undercutting on certain routes to and from Phenac International Airport.[23]
16. MON crisis began in late 2016.[24] On October 2017, at the request of Caeli and several other airlines Mekar approved the denomination of airfare in US dollars.[25] The possibility of denomination in US dollars was nullified on 30 January 2018[26] as part of fighting the crisis.[27]
17. In 2018 Caeli request to remove the interim airfare caps imposed on in in 2016 was denied by the CCM.[28] When Caeli requested a judicial review of the CCM decision 27 March 2018, the Court Registrar has registered the hearing in its case to the first possible date.[29]

[15] Facts, p. 33, ¶33, l. 1120-1124.
[16] ANNEX VII, p. 55, l. 1890-1895.
[17] Facts, p. 34, ¶34, l. 1133-1136.
[18] Facts, p. 34, ¶34, l. 1134-1135.
[19] Facts, p. 34, ¶35, l. 1144-1146.
[20] Facts, p. 34, ¶36, l. 1147-1159.
[21] Facts, p. 34, ¶36, l. 1149-1150.
[22] Facts, pp. 34-35, ¶37, l. 1160-1169.
[23] Facts, p. 35, ¶38, l. 1170-1182.
[24] Facts, p. 35, ¶39, l. 1183-1190.
[25] Facts, p. 35, ¶40, l. 1191-1199.
[26] Facts, pp. 35-36, ¶42, l. 1208-1213.
[27] Facts, p. 35, ¶41, l. 1200-1207.
[28] Facts, p. 36, ¶43, l. 1221-1232.
[29] Facts, p. 36, ¶44, l. 1233-1241.

18. By the end of August 2018 CCM has concluded its First Investigation finding a breach in Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes.[30]

19. In 2018 oil prices rose, which left Caeli in financial destress.[31]

20. In November 2019 Vemma announced its intention to sell its stake in Caeli.[32] An arm's length offer from Hawthorne Group LLP was secured, what was communicated to the Mekar Airservices representatives on 9 December 2019.[33] Mekar Airservices rejected the offer as it was not on arm's length.[34] After the negotiations on the issue failed, Mekar Airservices filed a request for arbitration in Sinnoh Chamber of Commerce Arbitration Institute on 11 February 2020.[35]

21. The award by Mr. Cavanaugh, a sole arbitrator in the case, declared the Hawthorne Group's offer not an arm's length.[36] On 14 June 2020 the report by the Centre for Integrity in Legal Services alleged that the award was a result of bribery.[37] Subsequently, the award was set-aside, pursuant to the Vemma's request, by the Supreme Arbitrazh Court of Sinnograd.[38] After Mekar Airservices claim, the award was recognised by Mekar's courts, first by the High Commercial Court on 23 August 2020, and later pursuant to Vemma's appeal, by the Superior Court on 25 September 2020.[39]

22. On 8 October 2020 Vemma sold its shares in Caeli to Mekar Airservices for 400 million USD.[40]

[30] Facts, p. 36, ¶45, l. 1242-1245.
[31] Facts, p. 37, ¶48, l.1269-1271.
[32] Facts, pp. 38-39, ¶56, l. 1339-1344.
[33] *Ibid*.
[34] Facts, p. 39, ¶57, l. 1345-1354.
[35] *Ibid*.
[36] Facts, p. 39, ¶58, l. 1355-1361.
[37] Facts, p. 39, ¶60, l. 1366-1377.
[38] Facts, p. 39, ¶61, l. 1378-1383.
[39] Facts, pp. 39-40, ¶62, l. 1384-1389.
[40] Facts, p. 40, ¶63, l. 1390-1393.

SUMMARY OF ARGUMENTS

23. Issue 1

24. This dispute does not fall under the scope of CEPTA, as CLAIMANT is not an Investor in a meaning given to it by CEPTA and is not submitting the claim on its own behalf. CLAIMANT is acting on behalf of the State of Bonooru. Furthermore, CLAIMANT does not satisfy the requirements set forth by ICSID Additional Facility Rules. This dispute constitutes a State to State arbitration due to the fact that the government of Bonooru owns a majority stake in CLAIMANT's company. ARSIWA should not apply to this case. However, should the Tribunal apply The Broches Test, CLAIMANT was not acting in a commercial capacity, as CLAIMANT fulfills the requirements of both, structural and functional tests.

25. Issue 2

26. External Advisors to the Committee on Public Reforms meet all the requirements listed in article 43 (1) ICSID Additional Facility Rules and article 9.19 of CEPTA. The potential *Amici* acts impartially, in opposition to CBFI. CBFI is advised by Lapras Legal on financial strategies, the entity which is also in dispute with Mekar. CRPU has no affiliations with other organizations that could weigh on its reputation as an impartial and credible expert. The submission filed by *Amici* falls within the scope of the dispute, and the argument that new jurisdictional questions cannot be raised is misplaced because the ICSID Additional Facility Rules permit it. The CPRU's expertise will provide the Tribunal with a new perspective, moreover, the CRPU has a significant interest in the process and its participation in the proceedings will not contribute to the unduly burden. CBFI, on the other hand, does not have an significant interest in joining the proceeding and, moreover, its expertise is in no way new or innovative.

27. Issue 3

28. RESPONDENT'S courts and administrative bodies did not deny CLAIMANT justice in administrative proceedings, as the amount of time that CLAIMANT had to wait during administrative proceedings does not constitute undue delay, RESPONDENT administered justice in an appropriate way, and RESPONDENT has made its courts and other adjudicatory bodies accessible for everybody, including CLAIMANT. Furthermore, RESPONDENT'S enforcement of the arbitral award was made accordingly to the international and Mekari law. What is more, RESPONDENT'S actions were neither

arbitrary nor discriminatory. Finally, RESPONDENT did not frustrate CLAIMANT'S legitimate expectations.

29. Issue 4

30. CLAIMANT cannot apply different standard relying on principles of international law. Market value, and FMV are different standards, applicable in different circumstance. What is more, a treaty can derogate from the principles of international law. Valuation date shall be the day of purchase of Caeli Airways by Mekar Airservices. Furthermore, FMV standard cannot be imported through most favoured nation clause of Art. 9.7 CEPTA. Alternatively, any compensation shall be reduced due to the CLAIMANT'S contributory fault. The Tribunal should also take dire economic situation in Mekar into account.

ARGUMENT ON PROCEDURE

ISSUE I: THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE DISPUTE SUBMITTED BY CLAIMANT UNDER THE CEPTA.

31. In the cases concerning the investments between the State of Bonooru and the Republic of Mekar, the jurisdiction of the Tribunal is based on the arbitration agreement concluded on 9 December 2019. ICSID Additional Facility Rules, would be the suitable rules for arbitration proceedings between CLAIMANT and RESPONDENT, since Mekar is not a Party to ICSID Convention.[41] However, the requirements set forth by CEPTA make it impossible for the Tribunal to have jurisdiction over this case, as the bilateral investment treaty ratified by both Parties does not cover State to State arbitration. What is more, ICSID Additional Facility Rules stay silent about proceedings between States and cover only arbitration between State and the Party of another State. This case surely constitutes an arbitration between two States, as CLAIMANT without any doubt, is a State-owned enterprise. The whole dispute derives from the State of Bonooru seeking financial aid to provide for its company. Vemma Holdings led to the situation, where it had to terminate its investment in Mekar, by undertaking risky business decisions, uncommon for other companies in the aircraft industry, The company was often violating competition standards, even leading to CCM placing airfare caps on the enterprise.[42] Even after these decisions, the State of Bonooru decided to rescue Vemma by financing it.[43] Then the State obtained even a bigger stake in the company, showing that the Company has never been truly independent from the State. Now the State seeks more funds to finance its governmental functions in the company, by starting this arbitration. Therefore, there is no way in which the Tribunal can have jurisdiction over this case, as it constitutes a State to State arbitration.

I. THIS ARBITRATION DOES NOT FALL UNDER THE SCOPE OF CEPTA.

32. The proceedings between CLAIMANT and RESPONDENT do not fall under the scope of CEPTA. While drafting CEPTA, the Parties' intention was to provide investment protection for private investors coming from another Party's state. There was never a discussion that the scope of BIT should also extend to claims arising between states.

[41] Facts, p. 31 ¶20, l. 1000.
[42] Facts, p. 34, ¶37, l. 1160.
[43] Facts, p. 40, ¶65, l. 1405.

Article 32 ("Supplementary Means of Treaty Interpretation") of the Vienna Convention provides that it is necessary to look into the preparatory work of the treaty and the circumstances of the conclusion in order to reach its proper interpretation.[44] Also, in the case of *İçkale İnşaat Limited Şirketi v. Turkmenistan* the Tribunal ruled that when certain interpretation conflicts arise between Parties to the BIT, it is useful to perform a linguistic analysis and look into the preliminary thought behind the treaty.[45] In this case, there is little to no evidence of preparatory works to CEPTA. However, when viewed linguistically, it is clear that the parties did not include State to State proceedings in the BIT. Therefore, this arbitration does not fall under the scope of CEPTA, as (A.) CLAIMANT is not an enterprise of the Party in the meaning given to it by CEPTA, and (B.) CLAIMANT is submitting its claim on behalf of the State of Bonooru.

A. CLAIMANT IS NOT AN INVESTOR IN THE MEANING GIVEN TO IT BY CEPTA.

33. It is a general rule that the jurisdictional requirements need to be met at the moment of instituting judicial proceedings.[46] This statement is accompanied case law.[47] For example, in *Vivendi v Argentina* the ICSID Tribunal ruled that: *„It is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ICSID Tribunals have consistently applied this Rule."*[48] For this reason, it is necessary to look into CLAIMANT'S status as a state owned company at the moment of starting the present proceedings. Therefore, at the moment of filing the Notice of Arbitration, CLAIMANT was a governmentally owned company, with 55% shares of the company being owned by the State of Bonooru.[49]

34. According to Article 9.1 of CEPTA, Investor means a natural person with the nationality of a Party or an enterprise with the nationality of the Party or seated in the territory of the Party, that seeks to make, is making or has made an investment in the territory of

[44] VCLT, Article 32.
[45] *Şirketi*, ¶¶203, 204.
[46] Schreuer I.
[47] *Vivendi*.
[48] *Ibid*, ¶60.
[49] Facts, p. 40 ¶65, l. 1410.

the other Party. Clearly, there is no mention in this definition that the Party itself can be considered an investor. Going further, an enterprise of the Party was defined in CEPTA as an enterprise that is constituted or organized under the laws of that Party and has substantial business activities in the territory of that Party, or as an enterprise that is constituted or organized under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise from the first example.[50] This section of the definition also lacks explicit mention of the Party as being able to perform an investment on its own. On the contrary, Article 1 of the United States–Rwanda BIT (2008) defines a company as: "*any entity (...) whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise*".[51] This definition explicitly includes the possibility that a state-owned company could make an investment under the BIT. However, in this case it is clear that such a possibility was not envisaged by the Parties since they did not include it in the definition. Even if at the moment of the beginning of investment CLAIMANT could have been viewed as a privately held company, it is clear now that CLAIMANT is a State-owned enterprise and for this reason it cannot be an Investor under the definition provided in CEPTA.

B. CLAIMANT IS NOT SUBMITTING ITS CLAIM ON ITS OWN BEHALF.

35. Article 9.16 of CEPTA says that the claim may be submitted by an investor of a Party on its own behalf.[52] In this case, this requirement is not met as CLAIMANT is submitting its claim on behalf of the State it is controlled by. Therefore, these proceedings create a State to State arbitration which is outside the scope of both CEPTA and ICSID Additional Facility Rules. Since the beginning of CLAIMANT'S investment in Mekar, the connection between the enterprise and the state was very tight.

36. In Aviation Analytics from 7th June 2019 it was written that Bonoori officials were putting pressure on Mekar by threatening to hold back the funds which were meant to help rebuild Phenac's Airport as a part of the Caspian Project.[53] This situation shows

[50] CEPTA, Article 9.1, p. 73, l. 2595.
[51] Rwanda – U.S. BIT, Article 1.
[52] CEPTA, Article 9.16, p. 79, l. 2855.
[53] Annex IX, p. 57, l. 1950.

the tense relations visibile between the State of Bonooru and Mekar. After CLAIMANT terminated its investment in Mekar, due to its risky business model, the State of Bonooru increased its shares in the company. With 55% of shares, the government is now in possession of a controlling stake. Now, the government is undertaking a variety of actions in the company. Among other things, the government is changing Vemma's subject of business. This leads to the conclusion, that the controlling State is trying to gain funds to conduct changes in the entity through submitting baseless claims. It is also clearly a form of retaliation against RESPONDENT after its refusal to Bonooru's demands. All of the examples of CLAIMANT'S and the Bonoori government's actions indicate that in reality, it is not Vemma who is submitting the claim. In all likelihood, CLAIMANT is initiating the proceedings on behalf of its controlling state. Therefore, this claim stays outside the scope of CEPTA and should be dismissed by the Tribunal.

II. CLAIMANT DOES NOT SATISFY THE REQUIREMENTS SET FORTH BY ICSID ADDITIONAL FACILITY RULES.

37. CEPTA, in its article 9.16 point 2, contains the applicable Rules to the claims arising from the investment. In this case, the applicable rules would be ICSID Additional Facility Rules, as Bonooru is a Party to ICSID Convention, while Mekar is not. According to Article 2 of ICSID Additional Facility Rules proceedings must be conducted between a State and a national of another State. This provision sets a requirement that needs to be fulfilled in order for the Tribunal to have jurisdiction in this case.

38. CLAIMANT does not meet these requirements. CLAIMANT is not a national of another State under ICSID Additional Facility Rules. This dispute constitutes a State to State arbitration (**A.**), and ARSIWA should not apply in this dispute (**B.**). However, should the Tribunal apply *The Broches test*, CLAIMANT was not acting in a commercial capacity (**C.**), as CLAIMANT fulfills the requirements for the structural test (**i.**) and CLAIMANT fulfills the requirements for the functional test (**ii.**).

A. THIS DISPUTE CONSTITUTES A STATE TO STATE ARBITRATION.

39. ICSID Additional Facility Rules do not provide Tribunal's jurisdiction for disputes between two States. In order for the jurisdiction *ratione personae* to be present in the proceedings, one of the disputing parties needs to be a national of another State and the

other one, the State where the investment took place. However, in this case the situation is entirely different, as CLAIMANT is a publicly held company, that right now, cannot be distinguished from its controlling State.

40. As it was mentioned before, *ratione personae* requirements for jurisdiction need to be met at the moment of submission of the claim to the Tribunal. At the time, when CLAIMANT submitted its claim in March 2021, it was no longer a privately held company and for this reason, cannot be viewed as a private investor. It is clear that CLAIMANT had visible connections to the State of Bonooru since the moment of privatization of Bonooru Air. On 10 November 1980, Bonoori Prime Minister admitted that the government would always have a significant influence on the airline enterprise in the country, making sure that it would always make business decisions favourable to the State.[54] What is more, the government acquired the minority share in the company varying from 31-38%. The minority share does not mean that the government had no influence over CLAIMANT'S decisions over the years. In most companies, there are many mechanisms providing the protection for minority shareholders, as well as mechanisms of having an influence over the company's business. As Christoph Schreuer has said *"A shareholder may or may not control the company, which is not necessarily the same as majority ownership".*[55] In this case, it is clear that it has always been difficult to distinguish CLAIMANT'S actions from the government of Bonooru's actions. The situation is best illustrated by the fact that Bonooru's entitlement to hold a significant stake in the company was written into CLAIMANT'S memorandum of association.[56] This shows that the connections between the government and the company are inseparable. Right now, without any doubt, CLAIMANT is a state-owned enterprise. The government of Bonooru is undertaking various actions in the company, including paramilitary activities. The are no longer any differences between the company and the State. Therefore, this dispute constitutes a State to State arbitration and should be dismissed by the Tribunal.

[54] Facts, p. 29, ¶8, l. 920.
[55] Schreuer II.
[56] Annex IV, p. 45, l. 1540.

B. ARSIWA SHOULD NOT APPLY TO THIS DISPUTE.

41. Under Article 5 of ARSIWA it is considered an act of a State under international law if a person or entity which is not a State organ, but which is empowered by the law of that State to exercise elements of the governmental authority conducts an act in a governmental capacity. Moving on, Article 8 of ARSIWA it is also considered a conduct of a State if person or an entity is performing actions that are controlled or directed by that State. However, there is no reason that ARSIWA should apply to the proceedings in investment arbitration.

42. The Paris Court of Appeal in its ruling of 29 November 2016 stated that are certain doubts whether ARSIWA should be applicable in case of deciding whether SOEs should be able to bring its claims under arbitration proceedings, as the document is related to State responsibility under international law.[57] The judgement of the Court of Appeal is reasonable as applying multiple tests to identify actions of a governmentally owned enterprise with the controlling State under ARSIWA could be unfavorable in case of arbitration proceedings. The document's purpose is holding the State accountable for its actions rather than deciding whether the connection between the State and its entity is strong enough.

43. In this case, application of ARSIWA in order to assert the Tribunal's jurisdiction should not be allowed. The dispute is not related to any conducts of the State of Bonooru. Therefore, there is no point of examining elements of the governmental authority conducts as an act undertaken in the governmental capacity, as the State of Bonooru is not under trial for its actions and cannot be held accountable in this dispute. The subject of the government's responsibility for its entity's actions is beyond the scope of these proceedings. Therefore, it is clear that ARSIWA should not apply to this dispute.

C. SHOULD THE TRIBUNAL APPLY *THE BROCHES* TEST, CLAIMANT WAS NOT ACTING IN A COMMERCIAL CAPACITY.

44. In some cases, tribunals decided that there is a possibility that a State-owned enterprise can have a standing before ICSID tribunal under ICSID Convention or ICSID Additional Facility Rules. However, in order to ascertain the jurisdiction *ratione*

[57] Cour d'appel de Paris, ¶17.

personae, a State-owned enterprise needs to fulfill certain requirements. These requirements are often called *The Broches Test* and are loosely based on ARSIWA. This test consists of two parts that need to be fulfilled collectively. The first part is the structural test, which is aimed to find out if the company and the State can be separated from each other from a legal point of view. The second part, the functional test, is directed to determine whether a State-owned enterprise was acting in a governmental manner or exercising any governmental functions through its actions. In this case, it is clear, that CLAIMANT was not acting in a commercial manner.

i. CLAIMANT FULFILLS THE REQUIREMENTS FOR THE STRUCTURAL TEST.

46. In the structural test, tribunals would often examine if the company's structure is tightly connected to the State. In the case *Maffezini v. Spain*, the tribunal examined the structure of SODIGA, the company incorporated under the laws of Kingdom of Spain.[58] The government created SODIGA by a decree of the Ministry of Industry, which authorized the National Institute for Industry to create SODIGA.[59] The State provided that the National Institute for Industry would own no more than 51% of the shares in the company. The structural test there, has been successfully met. In the case of *CSOB v. Slovakia* the structural test has also been met, as the government owned 65% shares in the company in one or another way.[60]

47. In the present case, it also clear that the structural test has been met. Throughout its investment in Mekar, CLAIMANT has always been partially owned by the government, with the State's shareholding varying from 31 to 38%.[61] Another significant thing for the structure of the company would be the right to hold such stake that is written into CLAIMANT'S Memorandum of Association.[62] Since March 2021 as State of Bonooru owns 55% of the shares in the company.[63] This is the majority of the shares allowing the government to undertake most of the significant decisions in the enterprise. What is more, the composition of the board of directors has been changed from private investors into

[58] *Mafezzini Jurisdiction.*
[59] *Ibid*, ¶83.
[60] *CSOB.*
[61] Facts, p. 29, ¶10, l. 935.
[62] *Ibid.*
[63] *Facts*, p. 40, ¶65, l. 1410.

governmental functionaries.[64] Even CLAIMANT'S legal team consists of lawyers who work in Bonooru's Justice Department.[65] All of the above, show that it is difficult to distinguish the structure of the company form the State it is controlled by. Therefore, CLAIMANT undoubtedly fulfills the requirements of the structural test.

ii. CLAIMANT FULFILLS THE REQUIREMENTS FOR THE FUNCTIONAL TEST

48. When it comes to the functional test, it is necessary for the tribunal to try to capture the essence of the company and its background. For example, in the previously mentioned case of *Maffezini v. Spain*, the tribunal noted that SODIGA was created with the intent of the Kingdom of Spain, that the company would carry out governmental functions.[66] It is also worth noting, that this connection to the government was written into SODIGA's preamble and that the tribunal considered this factor significant when deciding on the functional test. An important thing was said by the tribunal when it considered whether a private non-governmental entity could have outsourced such development activities:

> *i. under the functional test this would not have necessarily delinked the Spanish State from the entity as its functions would have been delegated by the State and they could still be government functions in the light of international law*[67]

49. What should also be noted is that in other countries, many companies with the scope of activity similar to SODIGA were functioning as State entities. After considering all of these factors, the tribunal came to a conclusion that the functional test has been met in this case and that SODIGA in fact, was acting in a governmental manner.

50. In the present case, the situation is very similar to the one in the Maffezini Case. CLAIMANT'S connection to the State of Bonooru is clear and has even been written into CLAIMANT'S Memorandum of Association. CLAIMANT throughout its investment in Mekar was exercising various governmental functions and was constantly cooperating

[64] *Ibid.*
[65] *Ibid.*
[66] *Maffezini Jurisdiction*, ¶85.
[67] *Ibid*, ¶87.

with its State of origin. It can even be said that CLAIMANT was carrying out State's policy through undertaking its actions in Mekar. In 2011, Ms. Sabrina Blue confirmed that CLAIMANT desired to draw more travelers from Mekar to Bonooru and wanted to benefit the state through participating in the Caspian Project and the "Horizon 2020" Scheme.[68] Then again, in Phenac Business Today Podcast, Ms. Misty Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism, said that the routes from Mekar to Bonooru were not profitable for Caeli Airways and that there might have been some close-door arrangement between the State and CLAIMANT.[69] A company acting in a commercial capacity would not make decisions that could be adverse to the business of the company. CLAIMANT'S behavior indicates the hidden purpose of his actions. After gaining the controlling stake in the company, the State changed the nature of the company completely adding governmental functions, like paramilitary activities into the scope of CLAIMANT'S functions.[70] Right now, CLAIMANT is seeking additional funding to support himself and continue to implement the government's plans.

51. What is also worth noting, in many countries, aircraft is an industry in which many airlines are State-owned in countries all over the world. These airlines are often exercising several governmental functions. Acquiring tourists to visit the country and constantly supporting the State's economy can certainly be viewed as acting in a governmental manner, even if some profits go to the company itself. In the case at hand, CLAIMANT was undertaking these types of actions even at the expense of its own interests, as the routes would sometimes be unprofitable for CLAIMANT.

52. In the light of the above, CLAIMANT fulfills all of the requirements for the functional test. CLAIMANT'S actions in Mekar have not been fully commercial and it is clear that CLAIMANT was exercising governmental functions during its investment in Mekar and is still doing it to this day. Therefore, the Tribunal should dismiss this case on the basis of the lack of jurisdiction.

[68] Facts, p. 32, ¶28, l. 1085.
[69] Annex VII, p. 55, l. 1870, 1875.
[70] Facts, p.40 ¶65, l. 1410.

ISSUE II: EXTERNAL ADVISORS TO THE COMMITTEE ON PUBLIC UTILITY REFORMS SHOULD BE ACCEPTED AS THE AMICI ALL THE REQUIREMENTS LISTED IN ARTICLE 43 (1) OF ICSID AFR AND ARTICLE 9.19 OF CEPTA ARE SATISFIED

53. In the case Vemma Inc. vs Mekar, there are two submissions from potential *Amici*. One of them was submitted by the Consortium of Bonoori Foreign Investors (”CBFI”), the second one by External Advisors to the Committee on Public Utility Reforms (”CRPU”). The role of *Amici* is primarily to assist the Tribunal in balancing the arguments presented by the parties. Although the very nature of investment arbitration means that it is confidential and the public does not have access to it, the increased transparency of this institution affects trust and credibility of this form of resolving disputes.

54. *„The investment arbitration processes have a substantial influence on the population's ability to enjoy basic human rights, such as a healthy environment or access to water. As a result, these societies are demanding that their opinions be taken into account(…). Furthermore, condemnatory awards have a tremendous impact on the state's public purse and, therefore, on the taxpayer's interests”*[71].

55. Taking into account the above arguments and the nature of the dispute, the CRPU, being an entity that has professional knowledge in the field of economics, audit, mergers and acquisitions and, moreover, being an independent and objective entity is a good candidate for *Amici*. The CRPU also requests that the UNCITRAL Rules on Transparency be implemented in the dispute, which will further enhance the credibility and transparency of the proceeding.

I. EXTERNAL ADVISORS TO THE COMMITTEE ON PUBLIC UTILITY REFORMS MEET ALL THE CONDITIONS OF THE LEGAL STANDARD PROVIDED IN ARTICLE 43 (1) OF ICSID AFR AND ARTICLE 9.19 OF CEPTA

56. CLAIMANT alleges that External Advisors to CPUR raised a new jurisdictional issue which has not yet been raised by either party. It also claims that by this action it usurps the right to act as a party in the dispute External Advisors to CPUR act within the scope of the dispute because the provisions included in ICSID Additional Facility Rules provide an opportunity to raise jurisdictional issues.[72] Importantly, the Tribunal can

[71] Role of Amicus Curiae, p. 528.
[72] ICSID AFR, Article 45.

address the issue ex officio. This leads to the obvious conclusion that the CRPU's action in no way resembles, let alone usurps, the rights of a party to the arbitration. It also demonstrates that the scope of the allegation raised by the potential *A*is within the scope of the dispute. **(A)**.

57. Mekar stands for questioning Tribunal competence-competence due to the evidence against Mr. Dorian Umbridge, head of the Committee on Public Reforms, who allegedly lobbied for the acceptance of Vemma's proposal in exchange for a financial benefit **(B)**. The transaction concerned the sale of an 85% stake in Caeli Airways (Mekar's national carrier) and took place in 2011.

58. The new arguments would significantly facilitate the Tribunal to properly assess and balance the arguments of the parties **(C)**. It is because the applicant has the unique knowledge and experience gained while they participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Vemma. This is unique and useful knowledge.

59. CPUR possesses a general public interest in the proceeding to support and oversee the removal of this scourge of corruption **(D)**. The role of *Amici* is to support the Tribunal while balancing the arguments. As an additional advantage might be considered the fact that the arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In these circumstances it is particularly significant given the allegations against Mr. Dorian Umbridge, who is accused of taking bribes to lobby for Vemma's proposal to buy an 85% stake in Caeli Airways. Moreover, RESPONDENT demanded implementation of the UNCITRAL Rules on Transparency, which are an effective tool in the fight against fraud and promote transparency. This is one of the key issues in this dispute.

60. Submission prepared by them would not disrupt or unduly burden or unfairly prejudice in the proceeding because it complies with all the provisions set in article 43 (1) of ICSID Additional Facility Rules and article 9.19 of CEPTA **(E)**.

A. EXTERNAL ADVISORS TO CRPU ARE NOT PARTY TO THE DISPUTE. THEY ACT AS AN IMPARTIAL ENTITY

61. External Advisors to CRPU played a role as independent advisors in the process of acquisition of 85% of shares in Caeli Airways.[73]

[73] CRPU Submission, p. 19, l. 625.

62. As the Methanex Tribunal correctly noted, *Amici* is not an independent in that they advance a particular case to a tribunal. An *Amici* cannot be expected to be independent in the same way as an expert or a witness because (...). An Amicus should nevertheless be expected to put forward his point of view in a way which is independent from the parties' procedural strategies. (...) Such a requirement is needed to avoid manipulations that could be detrimental to the fairness and transparency of the process. The friend of the court should not be the friend of one of the parties.[74]

63. Lapras Legal advises Vemma on funding strategies related to the conflict with Mekar. At the same time, Lapras Legal is the member of the Consortium of Bonoori Investors which applied to be the *Amici* in the proceeding. It raises concerns towards impartiality of the potential *Amici*. In the case of CRPU, it is a wholly non-partisan organization; *Amici* are members of civil society and provide investment banking advice. They were involved in advising on the purchase of 85% of Caeli Airways, so they are well versed in the substance of the arbitration and able to assist the Tribunal with their professional expertise.

B. EXTERNAL ADVISORS TO CPUR HAVE SUBMITTED THE APPLICATION WHICH IS WITHIN THE SCOPE OF THE DISPUTE

64. The competence-competence principle is the power that belongs to the Tribunal to determine its jurisdiction in the dispute. According to article 45 (1) ICSID Additional Facility Rules the Tribunal shall have the power to rule on its competence.[75] Therefore, the allegations raised by the Rother party are Simple misplaced and as a result the submission is within the scope of the dispute.

65. Moreover, Mekar stands for questioning Tribunal competence-competence due to the evidence against Mr. Dorian Umbridge, head of the Committee on Public Reforms, who allegedly lobbied for the acceptance of Vemma's proposal in exchange for a financial benefit. As the country which suffered due to corruption for a long period of time, this is such an important factor for Mekari society to conduct a transparent process. Therefore, additionally to this doubt Mekar strongly demands applying UNCITRAL Transparency Rules to the proceeding. UNCITRAL Transparency Rules are intended to create access to arbitration for the public. This is because arbitration not only affects

[74] *Methanex*. ¶52
[75] ICSID AFR, Article 45.

key elements important to society such as natural resources, energy, the environment and communications (as in this case), but also because the potential financial handling of the arbitration affects the cost to taxpayers.[76]

66. To conclude, CRPU acts within the scope of the proceeding and the jurisdictional question is could be admitted.

C. EXTERNAL ADVISORS TO CPUR HELP IN EVALUATING SUBMISSIONS AND ARGUMENTS

67. External Advisors to CPUR possess specific knowledge, which is very valuable in order to the subject matter of the proceeding. They are professionals in investment banking. In 2010 Advisors were engaged to provide assistance in the process of restructuration, privatization of Caeli Airways, a national carrier in Mekar. Potential *Amici* were directly involved in Vemma's acquisition of an 85% stake in Caeli Airways. *Amici* therefore have the best possible knowledge, as they were directly involved in the transaction and are familiar with its entire course and long-term effects. Additionally, Advisors worked by performing an audit, an analysis of the economic, technical and financial performance of Caeli Airways.

68. Being a professional in a particular field allows you to better assess the legal and economic perspective of a dispute. As it was stated in the problem, CRPU were: „ *bringing indicators in the financial statements in line with accounting standards, the preparation of a financing model (…) setting of the initial price and the preparation of an information package on the airlines”*.[77]

69. Therefore, the knowledge that Amici have will allow them to assess the business case for the investment, the financial prospects that were given by Vemma and the arguments put forward by the experts coming from Mekar.

D. THEY HAVE THE SIGNIFICANT INTEREST TO ACT AS THE AMICUS CURIAE IN THE PROCEEDING

70. In the legal basis article 43 (1) of ICSID Additional Facility Rules and article 9.19 of CEPTA there is a condition that potential amicus curiae should possess a ”significant interest”.

[76] UNCITRAL Rules on Transparency.
[77] CRPU Submission, p. 19, l. 625.

71. The general interest is about supporting transparency and openness, which are crucial values for Mekar society. RESPONDENT is especially concerned about allegations addressed to Mr. Umbridge, who was the Chairperson to the Committee on Public Utilities at the time when Vemma bought 85% of shares of Caeli Airways. However, the offer proposed by this company was one of the most favorable. Nevertheless, experts agree that the assumptions were based on an over-optimistic profit forecast. During this period Mr. Umbridge lobbied for the acceptance of Vemma's proposal. So, in this case, the public interest is about supporting transparency of the proceeding. Additionally, the dispute concerns mobility rights of Mekari society, so in a broader context means the protection of mobility rights for the population.

72. To compare, a public interest can be defined as the exercise of access rights and environmental democracy. Without these spaces of peaceful dialogue, the concept of public interest loses its substantive content and becomes a risky legal and political category that has been abused to legitimise projects or actions that threaten human rights and the environment. For instance, in the case Eli Lilly and Company v. The Government of Canada, the public interest reffered to „*the functioning of the global patent system, particularly with respect to innovation in the biopharmaceutical sector"*[78] and the Tribunal stated that therefore accepting the submission from the Professors specialized in patent law involved having public interest.

E. THE SUBMISSION DOES NOT DISRUPT UNDULY BURDEN OR UNFAIRLY PREJUDICE THE PROCEEDINGS

73. The goal of the submission is to provide the Tribunal with the specified knowledge that will significantly help to make a fair judgment. Specifically, there are limits such as the time it takes to send a submission, its length, the content it should have, so that the submission does not adversely affect the efficiency of the Tribunal's work (having to deal with a lot of new information that is not relevant). When the specialization is closely related to the subject matter of the litigation, the submission is very unlikely to obstruct or interfere with the Tribunal's work in any unreasonable way. The applicant filled the submission within designated period of time, adjusted the volume of the submission to meet the necessary requirements, specified the interest that has in the pending arbitration. Additionally, it developed and analyzed in detail the prerequisites

[78] *Eili Lilly ¶18*

contained in the CEPTA and ICSID Additional Facility Rules, indicating that it meets each of them.

74. In the case *Biwater vs. Tanzania*[79] the Tribunal determined that the scope of the dispute would be narrowly construed, in that submission had to directly address environmental and human rights. Central to these proceedings is the issue of economic financial assumptions about the investments Vemma made in Caeli Airways. The potential amicus curiae has this knowledge, so its position in this regard may prove extremely useful and, above all, relevant.

II. CBFI DOES NOT MEET THE NECESSARY CONDITIONS PROVIDED IN ARTICLE 43 (1) OF ICSID ADDITIONAL FACILITY RULES AND ARTICLE 9.19 OF CEPTA

75. CBFI contrary to the External Advisors to CPUR brings together entrepreneurs and investors in the Greater Narnia region. It is a consultancy business and one can assume that it has some knowledge of the market in question, but this is not enough to be considered particularly useful. The parties in this dispute, which are Vemma and Mekar, are also familiar with the relevant market realities. Therefore, the knowledge possessed by the CBFI is neither revealing, innovative nor creative, and thus cannot assist the Tribunal in any way in balancing the arguments of either side. The external advisors have expertise in auditing, economic analysis. It is worth emphasizing that this is specialized knowledge, focused on details, and thanks to it the Tribunal, when weighing arguments, will be able to better assess the dispute from this multilateral perspective.

[79] *Biwater, ¶43.*

ISSUE III: RESPONDENT ACTED WITHIN ITS REGULATORY AUTHORITY AND DID NOT VIOLATE ARTICLE 9.9 OF THE CEPTA

76. Article 9.8 of the CEPTA limits the scope of the Article 9.9 of the CEPTA which contains the fair and equitable treatment clause.[80] The right to regulate included in the Article 9.8 allows the State regulations leading to legitimate policy objectives.[81] The objectives mentioned as examples are "*national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity".*[82] What is more, Article 9.8 allows a Party regulation withing its laws even if it negatively affects the investment or investor's expectations.

77. In RESPONDENT'S view, actions taken by the RESPONDENT either fall into the scope of the right to regulate under Article 9.8 of the CEPTA, or do not amount to breach of the Article 9.9 of the CEPTA. First, RESPONDENT'S courts and administrative bodies did not deny CLAIMANT justice in administrative proceedings (**1.**). Second, RESPONDENT'S courts did not deny CLAIMANT justice in civil proceedings (**2.**). Third, RESPONDENT did not act arbitrary or discriminatory towards CLAIMANT (**3.**). Fourth, RESPONDENT did not frustrate CLAIMANT's legitimate expectations (**4.**).

I. RESPONDENT'S COURTS AND ADMINISTRATIVE BODIES DID NOT DENY CLAIMANT JUSTICE IN ADMINISTRATIVE PROCEEDINGS.

78. CLAIMANT alleges that the fair and equitable treatment clause was breached by RESPONDENT by denial of justice. CLAIMANT specifies that RESPONDENT denied CLAIMANT justice by undue delay, inadequate administration of justice, clear and malicious misapplication of law and by denial of access to courts and other adjudicatory bodies. The facts recalled by CLAIMANT do not satisfy the requirements to breach the fair and equitable treatment clause in the CEPTA. First of all, the amount of time, which CLAIMANT had to wait for conclusion of administrative and court proceedings, does not constitute an undue delay (**A.**). Second of all, RESPONDENT neither administer justice inadequately, nor did clearly and maliciously misapply the Mekari law (**B.**). Third, RESPONDENT has made its courts and other adjudicatory bodies accessible for everybody, including CLAIMANT (**C.**).

[80] CEPTA, p. 76, l. 2724-2732.
[81] *Ibid.*
[82] CEPTA, p. 76, l. 2726-2728.

A. THE AMOUNT OF TIME THAT CLAIMANT HAD TO WAIT DURING ADMINISTRATIVE PROCEEDINGS DOES NOT CONSTITUTE UNDUE DELAY.

79. CLAIMANT bases its analysis of the premises of undue delay on several cases, one of which is case *Toto.*[83] In *Toto* Claimant's lawsuits were not proceeded for over 6 years.[84] However, the Tribunal in *Toto* did not decide in favor of Claimant in that case. Moreover, in *Toto* the Tribunal set forth a criterium, which states that "*two-and-a-half-year delay in the proceedings to annul an administrative order was acceptable. Likewise, a two-year period to obtain a judgment from an administrative tribunal against a dismissal was equally acceptable*."[85] In White Industries Australia Limited v. The Republic of India[86] the Tribunal did not consider over 9-year delay as undue. Case were the Tribunal agreed with Claimant and held that this delay was undue was *Chevron,*[87] where the delay was over 14 years. The above-mentioned cases show how strict is the undue delay standard and that not every delay should be deemed as breach of fair and equitable treatment clause.

80. The explanation as to what elements should be taken under consideration by the Tribunal was correct. However, as those cases show, there was certainly no undue delay in proceedings led by RESPONDENT'S courts and other adjudicatory bodies. In most cases the Tribunal did not consider delays in proceedings as undue. Even in *Toto* the 9-year delay was not decided to be undue, when the Tribunal considered other factors. The First investigation of CCM took two years to complete and a hearing for the removal of the airfare caps was scheduled for one year later. Considering how strict the undue delay standard is, those fact should not be decided as sufficient to constitute undue delay.

B. RESPONDENT ADMINISTERED JUSTICE IN AN APPROPRIATE WAY.

81. To breach the fair and equitable treatment clause by denial of justice "*it is not enough to have an erroneous decision or an incompetent judicial procedure*".[88] According to the Tribunal in *Philip Morris* case, the injustice must be clear and outrageous.[89] What is more, the decision or decisions in question must be "*clearly improper and discreditable*".[90]

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[83] *Toto*.
[84] *Toto*, ¶140.
[85] *Toto*, ¶160.
[86] White Industries, ¶¶11.4.5-11.4.15.
[87] *Chevron*, ¶ 37.
[88] *Philip Morris*, ¶500.
[89] *Ibid.*
[90] *Ibid.*

82. CLAIMANT suggests that the inadequate administration of justice was not removing the airfare caps and declining Caeli subsidies under the Executive Order 9-2018. CLAIMANT alleges that the airfare caps were no longer serving their purpose as Caeli struggled to secure a steady stream of revenue. The purpose of the airfare caps was not only to counteract earning supra-competitive profit by Caeli, but it was also to protect Mekari citizens as the consumers of Caeli's services. RESPONDENT made use of its right to regulate. Therefore, in contrary to what CLAIMANT suggests, the airfare caps were serving their purpose as the risk of anti-competitive behaviors from CLAIMANT was still existing. The decision to keep the airfare caps could be by some considered as rather strict, however it certainly is not "*clearly improper and discreditable"*.[91] CCM was acting within Mekari law by imposing the interim measure to counter the "*risk of serious and irreparable damage to competition"*.[92] CLAIMANT'S behavior did indicate some anti-competitive behaviors such as predatory pricing strategies.[93]

83. Second allegation that CLAIMANT makes as an inadequate administration of justice is rejection of Caeli's application for subsidies under EO 9-2018. State has a right to regulate and decide where its taxpayers' money goes. According to Article 9.8 (2) of the CEPTA the fact that a regulation interferes with or negatively affects an investment does not mean it breaches Article 9.9 of the CEPTA.[94] RESPONDENT did not even interfere or negatively affect CLAIMANT'S investment by denial of subsidies. The decision was in Secretary of Aviation discretion and did not constitute inadequate administration of justice towards CLAIMANT.

84. Another allegation is that RESPONDENT clearly and maliciously misapplied the law. Similarly, to the inadequate administration of law accusation, it has no merit. RESPONDENT did not intend to harm CLAIMANT'S investment in Mekar. Caeli was still partially owned by Mekar Airservices, so hurting this investment would also partially hurt RESPONDENT.[95] CLAIMANT'S case was properly heard, and a lawful judgement was given. The burden of proof that an act was malicious and therefore CLAIMANT was denied justice is on CLAIMANT. The mere fact that CLAIMANT did not like the holding of Justice VanDuzer does not prove clear and malicious misapplication of law.

[91] *Philip Morris*, ¶500.
[92] ANNEX V, p. 47, l. 1623.
[93] Facts, p. 34, ¶34, l. 1127-1129.
[94] CEPTA, p. 76, l. 2729-2732.
[95] Facts, p. 32, ¶26, l. 1050-1053.

C. RESPONDENT HAS MADE ITS COURTS AND OTHER ADJUDICATORY BODIES ACCESSIBLE FOR EVERYBODY, INCLUDING CLAIMANT.

85. Denial of access to adjudicatory bodies is defined as "*unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice*".[96]

86. In the present case RESPONDENT'S courts never refused to hear CLAIMANT'S claims. First, CCM did consider Caeli's request to remove airfare caps. Even though the request itself was denied, CLAIMANT was not denied consideration of the request.[97] Second, CLAIMANT'S claim against CCM was properly registered and heard in front of the proper court.[98] Further allegations that the impossibility of securing a meeting with Secretary of Aviation should not be considered as denial of access to adjudicatory bodies. Secretaries are not adjudicatory bodies and there is no procedure which would allow parties to be heard by the secretary. RESPONDENT'S courts and administrative organs did not at any point prevent CLAIMANT'S access to adjudicatory bodies.

II. RESPONDENT'S ENFORCEMENT OF THE ARBITRAL AWARD WAS MADE ACCORDINGLY TO THE INTERNATIONAL AND MEKARI LAW.

87. CLAIMANT alleges that RESPONDENT'S courts denied CLAIMANT justice by recognizing arbitral award rendered in favor of Mekar on May 9th, 2020.[99] Even though the award has been later set-aside by the Supreme Arbitrazh Court of Sinnongrad, Mekari courts still had full discretion to decide either to recognize, or not recognize the award.

88. There are two approaches supporting recognition of a set-aside arbitral award. First is the "universalistic approach", also called the Most Favorable Right principle. It says that in case that there are no grounds for setting aside an award, a court of a country in which the recognition is requested is entitled to do that.[100] Second view is based on the actual meaning of the word "may", which is used in Article 5 of the New York Convention. According to this approach "*setting aside does not prevent the possibility of recognition and enforcement of the arbitral award*".[101] Those two approaches show that court has a discretion to recognize a set-aside award.

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[96] *Krederi*, ¶452.
[97] Facts, p. 36, ¶43, l. 1221-1229.
[98] Facts, p. 36, ¶44, l. 1233-1235.
[99] Facts, p. 39, ¶58, l.1357-1358.
[100] *Luminati*, ¶18.
[101] *Ibid.*

89. The High Commercial Court of Mekar has simply used its discretion to recognize the arbitral award. What is more, it was fully justified. The Supreme Arbitrazh Court of Sinnongrad has itself admitted that it "*does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place*".[102] The evidence was not sufficient to decide whether the bribery took place. It is not confirmed to be real, and all allegations are based on a hearsay. The evidence submitted in proceedings in front of that court were by the court itself called circumstantial.[103] Therefore, as in Mekar the standard to refuse recognition of an arbitral award is high,[104] the High Commercial Court has made a correct ruling. In RESPONDENT'S view there was no actual ground to set-aside the award and the Supreme Arbitrazh Court of Sinnongrad has erred in its holding. Furthermore, applying the second view regarding the meaning of the word "may" in Article 5 of the New York Convention, the conclusion is that there was no restriction against recognizing the arbitral award. RESPONDENT'S courts did not denied CLAIMANT justice in civil proceedings.

III. RESPONDENT'S ACTIONS WERE NEITHER ARBITRARY NOR DISCRIMINATORY.

90. In CLAIMANT'S view RESPONDENT'S launch of the First Investigation and denial of subsidies under EO 9-2018 were respectively arbitrary and discriminatory conducts. CLAIMANT' allegations are incorrect. Both situations were resolved accordingly to Mekari and international law. Launching the First Investigation by CCM was not arbitrary (A.) and denial of subsidies under EO 9-2018 was not discriminatory (B.).

A. RESPONDENT'S ACTIONS WERE NOT ARBITRARY.

91. A conduct is arbitrary when actions of a state are insufficient in a way "*that would be recognized 'by any reasonable and impartial men"*.[105] To be even more specific, Professor Schreuer's opinion, as cited in the *EDF* case, describes arbitrary as:

92. "a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

93. b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

[102] ANNEX XIII, p. 64, ¶11, l. 2184-2186.
[103] ANNEX XIII, p. 64, ¶13, l. 2201.
[104] ANNEX XIV, p. 65, ¶8, l. 2254-2256.
[105] *Tecmed*, ¶154.

94. *c. a measure taken for reasons that are different from those put forward by the decision maker;*

95. *d. a measure taken in wilful disregard of due process and proper procedure"*.[106]

96. CLAIMANT classifies the launch of CCM's First Investigation as supposably arbitrary conduct. This position is incorrect. CCM's only objective is to prevent anti-competitive behaviors and to protect Mekari citizens. What is more, CCM was created in 2009 by revision of the Monopoly and Restrictive Trade Act.[107] It already existed in 2011 when CLAIMANT made the investment in Caeli Airways.[108] CLAIMANT new that such commission existed at the time of the investment. What is more, CLAIMANT duly submitted an undertaking that "*it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members"*.[109] Shortly after entering into a Share Purchase Agreement, Caeli has contracted with the Moon Alliance members and cooperated by sharing lounge access, terminals, and other facilities.[110] Then in 2014, Caeli offered way lower prices for their flights that other airlines.[111] Finally, in 2016 Caeli was the only profitable carrier on the routes from and to Phenac International.[112]

97. This rapid expansion would draw attention of any anti-competitive commission in the world. In a fairly short time and in period in which other airlines were facing financial problems, Caeli was thriving and taking costumers from other companies. The purpose of the investigation was to make sure, if Caeli does not use any anti-competitive practices. It was necessary and reasonable.

98. Despite what CLAIMANT alleges, the launch of the First Investigation was made according to Mekari law. The reasoning of CCM's Vice-President Iroh Iwamatsu when it comes to market share of investigated airlines was correct.[113] Caeli's rapid growth was connected to the Moon Alliance and contracts with Royal Narnian. What is more, Caeli broke its undertaking and engaged in high-level cooperation with Moon Alliance partner. They were in fact acting as one and profiting from that engagement. That is why their market share was considered as one.

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[106] *EDF*, ¶303.
[107] ANNEX V, p. 47.
[108] Facts, p. 31, ¶24, l. 1032-1034.
[109] Facts, p.32, ¶25, l.1046-1049.
[110] Facts, p. 32, ¶27, l. 1068-1072.
[111] Facts, p. 34, ¶34, l.1132-1135.
[112] Facts, p. 34, ¶35, l. 1144-1146.
[113] Facts, p. 34, ¶36, l. 1151-1153.

99. All procedures were pursued accordingly to the Mekari and international law. The launch of the First Investigation would be considered justified and right by any objective observer. For all the above-mentioned reasons, there was nothing arbitrary in CCM's actions.

B. RESPONDENT'S DENIAL OF CLAIMANT'S REQUEST FOR SUBSIDIES WAS NOT DISCRIMINATORY.

100. A discriminatory conduct occurs when there is an "*unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation*".[114] CLAIMANT has to demonstrate that was in the same position as others but was treated differently without any reason.

101. It is in Secretaries of Civil Aviation discretion to decide where Mekari taxpayers' money goes. What is more, most of the recipients of subsidies under the EO 9-2018 were airlines operating important domestic routes in Mekar.[115] They had less that 5% market share on these routes.[116] It was important to secure range of possibilities to travel around Mekar for Mekari citizens and the decisions were made in accordance with public interest. Caeli has pushed out its competitors with its predatory pricing strategies and was thriving among other airlines operating in Mekar. Since 2014 approximately 35% of Mekari citizens flew Caeli Airways.[117] By 2016 it was "*the only consistently profitable carrier on over half the routes*"[118] on Phenac. Caeli was way ahead of its competitors when the economic crisis began. CLAIMANT did not need the subsidies as much as other airlines, especially when the Mekar's finances were also limited. The economic crisis affected everybody.

102. Caeli Airways were on a better financial position and had a bigger chance to bounce back the losses, because of their large costumer's base. It was significantly different from other airlines which got the subsidies. Therefore, denial of subsidies was not discriminatory.

[114] *Unglaube,* ¶262.
[115] Procedural Order no. 4, p. 89, ¶7, l. 3299-3301.
[116] *Ibid.*
[117] Facts, p. 34, ¶34, l. 1133-1134.
[118] Facts, p. 34, ¶35, l. 1144-1146.

IV. RESPONDENT DID NOT FRUSTRATE CLAIMANT'S LEGITIMATE EXPECTATIONS.

103. It is no secret that when somebody decides to invest, they expect earning profits. It is the purpose of making an investment. RESPONDENT understands that CLAIMANT'S expectations to earn profit were legitimate. However, RESPONDENT is not responsible for the frustration of those expectations.

104. From the beginning, Vemma's actions were risky. It is true that CLAIMANT very quickly turned a net profit and became a frequently chosen airline by passengers.[119] However, CLAIMANT'S approach to the investment was "extravagant"[120] and "risky"[121]. The initial success was an effect of simple luck. The formations from the Eldin volcanic eruption draw more tourists to Mekar and gave CLAIMANT a possibility to offer more flights and collect more profit.[122] CLAIMANT immediately, against RESPONDENT'S advisors, decided to expand its fleet.[123] Then RESPONDENT'S representatives cautioned CLAIMANT again to avoid huge costs.[124] What is more, even the former high-ranking employee from Bonooru's Ministry of Tourism has made some criticism about CLAIMANT'S way of handling the investment. She made it clear that addition of routes between Bonooru and Mekar was more profitable to Bonooru than CLAIMANT.[125] She also made a point that CLAIMANT'S business model was not good for a long-term.[126] She even predicted that in case of a drop of the consumers base or rise of costs Caeli "*would suffer a great deal"*.[127] Even before the beginning of economic crisis it was already clear that CLAIMANT'S business model was risky and not forward-looking. It was only a matter of time for Caeli to stop making profits and start making losses.

105. CLAIMANT also alleges that conducting the First and Second investigation frustrated CLAIMANT'S expectations to be able to use the assets offered at the time of the investment without negative consequences. Neither the First, nor the Second investigations were launched because of CLAIMANT'S benefiting from Caeli's core assets which were part of the investment proposal.[128] The First investigation was

[119] Facts, p. 33, ¶33, l. 1121-1122.
[120] Facts, p. 33, ¶29, l. 1097.
[121] Facts, p. 34, ¶34, l. 1132.
[122] Facts, p. 33, ¶29, l.1089-1090.
[123] Facts, p. 33, ¶29, l. 1094-1098.
[124] Facts, p. 33, ¶31, l. 1109-1110.
[125] ANNEX VII, p. 55, l. 1868-1871.
[126] ANNEX VII, p. 55, l. 1890-1892.
[127] *Ibid*, l. 1892-1893.
[128] Facts, p. 31, ¶21, l. 1013-1016.

launched because of CLAIMANT'S anti-competitive behaviors, as described in part III.A. The Second Investigation was launched based on the complaint filed by a consortium of small regional airlines.[129] According to Chapter II (3)(a) of the Monopoly and Restrictive Trade Practice Act, CCM was obliged to open an investigation in a matter brought by a complaint of a direct competitor.[130] Nobody has never assured CLAIMANT at the time of the investment that it will not be investigated.

106. To sum up, any expectations created by the time of the investment were not frustrated by the RESPONDENT. The bad outcome of the investment was caused by CLAIMANT'S risky business model and a bit of misfortune which cause the economic crisis.

[129] Facts, p. 35, ¶38, l. 1170-1174.
[130] ANNEX V, p. 47, l. 1607-1609.

ISSUE IV:

107. CLAIMANT submits that „fair market value" (FMV) is the standard of compensation applicable in this case.[131] CLAIMANT argues that both principles of international law, and most favoured nation clause contained in CEPTA, permit for derogation from specific standard of compensation prescribed in Art. 9. 21 of CEPTA.[132] However, these arguments, aimed at overriding investment treaty between Bonooru and Mekar, are flawed. Firstly, principles of international law do not allow for an omission of provisions of a specific treaty (I). Secondly, most favoured nation clause of CEPTA does not apply to the issue of compensation (II). Finally, any compensation that would be awarded shall be reduced due to the CLAIMANT's contributory fault, and Mekar's dire economic situation (III).

I. CLAIMANT CANNOT APPLY DIFFERENT STANDARD RELYING ON PRINCIPLES OF INTERNATIONAL LAW.

108. CLAIMANT cannot departure from the market value standard provided for in CEPTA. The interpretation of CEPTA following the rules of Vienna Convention on The Law of Treaties (VCLT)[133] leads to the conclusion that the market value, and FMV are substantially different standards that apply in different circumstances (A). Moreover, a treaty can derogate from the principles of international law (B). Finally, the day of valuation under market value standard shall be the day of purchase of Caeli Airways by Mekar Airservices (C). As a result, the RESPONDENT submits that it has already paid the compensation by purchasing the stake in Caeli Airways for 400 million USD.

A. MARKET VALUE, AND FMV ARE DIFFERENT STANDARDS, APPLICABLE IN DIFFERENT CIRCUMSTANCES.

109. The terms of CEPTA shall be interpreted in accordance with the rules of interpretation contained in VCLT. According to Art. 31 VCLT, the ordinary meaning shall be given to the terms of the treaty in their context, and in the light of their object and purpose. Moreover, ordinary meaning shall not be determined in abstract, as separate from the context, object, and purpose of the treaty.[134]

[131] Notice, p. 5, ¶30, l. 154-156.
[132] *Ibid*.
[133] VCLT.
[134] ILC Commentary, ¶12.

110. CEPTA provides for the FMV standard in Art. 9.12 in the context of direct expropriation of an investment. In such context FMV has been interpreted, and applied by multiple tribunals.[135] FMV is defined as the amount, expressed in cash equivalents:

*111. "at which property would change hands between a **hypothetical** willing and able buyer and a **hypothetical** willing and able seller, acting at arms-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."*[136]

112. On the other hand, market value standard prescribed in Art. 9.21 CEPTA, is not a hypothetical valuation of an asset in the ideal market conditions. It is the value that is possible to be obtained for particular property/investment in particular circumstances. Hence, it is not "fair" value of an investment, but the one that is to be, or was, paid for an asset.

113. As Vemma was unable to attract any legitimate buyer for its share in Caeli[137], market value of its investment is the amount that was agreed between Vemma and Mekar Airservices on 8 October 2020.[138] Therefore, the market value of Caeli was 400 million USD.[139] As Mekar paid Vemma the market value of Caeli, it shall be considered that no further compensation is owned under market value standard provided in CEPTA.[140]

114. Moreover, the context referred to in Art. 31 VCLT includes the whole treaty in which a term is used.[141] Thus, while interpreting both standards of compensation contained in CEPTA, an emphasis shall be put on the mere fact that there are two different terms used to describe a compensation. It is only rational to expect that different terms used in a well-drafted treaty, such as CEPTA, have different meanings, and that a treaty is consistent with its wording.[142]

115. Thus, the fact that the negotiating parties of CEPTA decided to use FMV standard with respect to expropriation, and to omit the prefix "fair" in the context of monetary

[135] E.g. *CMS*, ¶402; *Azurix*, ¶424.
[136] International Glossary of Business Valuation Terms, "fair market value" entry.
[137] Facts, p. 40, ¶63, l.1390-1391.
[138] *Ibid*, l. 1391-1392.
[139] *Ibid*, l. 1391-1393.
[140] CEPTA, Article 9.21 ¶1a, p. 82, l. 3017-3021.
[141] Gardiner, p. 209.
[142] *Auditing of Accounts*, ¶91.

damages for treaty violations, implies that they intended to give those terms different meanings.

116. Although, this presumption is not an absolute one[143], the burden of proving otherwise lies on the CLAIMANT. Thus, the CLAIMANT would have to argue that the parties of CEPTA were irrational and decided to use different words to convey the same standards.

B. A TREATY CAN DEROGATE FROM THE PRINCIPLES OF INTERNATIONAL LAW.

117. A treaty can derogate from the principles of international law, and customary international law concerning State responsibility, on the basis of the *lex specialis derogate legi generali* rule.[144] Thus, the principles of international law do not apply to the extent that the state responsibility is governed by a specific treaty provisions.[145]

118. The CLAIMANT aims to apply the standard of FMV in light of principles of international law.[146] Hence, CLAIMANT's presumption is that market value standard contained in Art. 9.21 CEPTA is inconsistent with those principles, and should be replaced.

119. As the treaty takes precedence over principles of international law[147], in the case of inconsistency between the sources, the applicable standard of compensation is the one provided by the treaty. Thus, market value standard applies, as it is specifically prescribed by CEPTA. Moreover, if there is no inconsistency between the market value standard, and principles of international law, then there is no reason why it should not be applied in the present case.

C. VALUATION DATE SHALL BE THE DAY OF PURCHASE OF CAELI AIRWAYS BY MEKAR AIRSERVICES.

120. With respect to the valuation date tribunals have applied different approaches. In the context od FET violations tribunals considered that a date of valuation shall be either the date of first violation[148], or the one of culmination of the events constituting FET violation.[149] In other cases tribunals also chose the date of award as an appropriate one.[150]

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[143] *Ibid*.
[144] ARSIWA, Article 55.
[145] *Ibid*.
[146] Notice, p. 5, ¶30, l. 154-156.
[147] ARSIWA, Article 55.
[148] E.g. *Infracapital*, ¶819; *Greentech*, ¶565.
[149] E.g. *Watkins*, ¶¶679, 680; *Crystallex*, ¶855.
[150] E.g. *Hydro*, ¶831.

121. However, the present case is of precedent character, as no other investment treaty provides for a precise standard of compensation for violations, other than expropriation. Thus, the methods of establishing valuation date used in cases where there was no standard prescribed in a treaty, does not apply.

122. As it was elaborated above, under the market value standard the value of an investment is not a hypothetical. Therefore, it can only be established on a date when a price for an asset was to be obtained, and in particular circumstances. As a price for Vemma's share in Caeli was agreed on 8 October 2020 it shall be considered the valuation date under market value standard.

II. FMV STANDARD CANNOT BE IMPORTED THROUGH MOST FAVOURED NATION CLAUSE OF ART. 9.7 CEPTA.

123. Paragraph 1 of the Art. 9.7 CEPTA provides that Parties shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments. Thus, in principle, CEPTA contains typical MFN clause.[151]

124. However, paragraph 2 of the Art. 9.7 CEPTA stipulates clarification of the understanding of "treatment" from paragraph 1. According to this provision such treatment "does not include **procedures for the resolution of investment disputes,** between investors and states provided for in other international investment treaties". Therefore, CEPTA clearly excludes the possibility of importation of procedural provisions.

125. Furthermore, paragraph 2 follows that substantive provisions are also excluded from the understanding of "treatment", absent measures adopted or maintained pursuant to them. As a result, both categories of provisions contained in a investment treaties, are not subject to the use of MFN clause, on their own.

126. CLAIMANT argues that it can rely on the MFN clause of CEPTA in order to import FMV standard from the ARRAKIS – MEKAT BIT of 2006.[152] The latter treaty provides in Art. 13 for the FMV standard in case of treaty violation by a State.

127. Standard of compensation is a provision on procedure for the resolution of investment disputes. Firstly, Art. 9.21 is located in Section E of CEPTA entitled "Settlement of

[151] UNCTAD, p. 13.
[152] Notice, p. 5, ¶30, l. 154-156.

Disputes". Secondly, the article itself is entitled "Final Award" it sets up, and in the same time, limits the powers of the tribunal while making an award. As the CEPTA stipulates that the tribunal may award monetary damages at a market value, it means that a tribunal cannot anything more than is appropriate under this specific standard. Hence, to change the standard of compensation, for presumably more favourable to the CLAIMANT, is to extend the power of tribunal.

128. Moreover, not only is Art. 9.21 a procedural provision in this particular treaty, but the issue of compensation, and generally reparation, is essentially procedural. The rules on State responsibility are applicable only in situation where there was a violation of specific international obligation, i.e. substantive rule.[153]

129. Therefore, the MFN clause of Art. 9.7 does not apply to the provisions concerning standard of compensation, as it is a part of the procedure for the resolution of investment disputes, and on the ground of paragraph 2 of the Art. 9.7 does not constitute a "treatment".

III. ALTERNATIVELY, ANY COMPENSATION SHALL BE REDUCED.

130. If the Tribunal does not agree with the RESPONENT issue of applicable standard of compensation, and in turn decide that any compensation is owned to the CLAIMANT, its amount shall be reduced. Firstly, CLAIMANT risky and ill-advised business strategy contributed to the losses it suffered (A). Secondly, while awarding a compensation the Tribunal shall take into account the dire economic situation in Mekar, and reduce the amount appropriately (B).

A. COMPENSATION SHALL BE REDUCED DUE TO THE CLAIMANT'S CONTRIBUTORY FAULT.

131. In determination of compensation, an account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured party.[154] An action or omission is negligent or wilful if it manifests a lack of due care on the part of the victim of the breach for his or her own property or rights.[155] Investment treaties are not "insurance policies against bad business judgements"[156], and investors "should bear the consequences of their own actions as experienced businessmen"[157].

[153] ARSIWA Commentaries, ¶1.
[154] ARSIWA, Article 39.
[155] ARSIWA Commentaries, Article 39 ¶5.
[156] *Mafezzini*, ¶64.
[157] *MTD*, ¶178.

132. Vemma business strategy was ill-advised, and resulted in financial losses due to several reasons. Firstly, Vemma decided to offer, and maintain against the advice from Mekar Airservices, low-fare, long-distance routes to Mekar aimed to capitalize from the temporary circumstances, namely the eruption of volcano and inexpensive currency MON.[158] Such approach did not take into account the volatility of tourist demand in Mekar, especially in the fall/winter season.[159]

133. Secondly, while Vemma's short-sighted business model allow them to profit[160] instead of injecting the profits into outstanding debt and improving Caeli's financial health, as Mekar Airservices advised[161], they chose to expand, and lower the prices even further.[162] Such strategy made Caeli especially vulnerable during the upcoming crisis.

134. Finally, Caeli's initial profitability was largely a result of the exceptionally low oil prices.[163] In June 2014 crashed to a five-year low, however, the CEPO Secretary General warned, that there is no possibility of further diminishing, and stated that a strong increase is to be expected.[164] Vemma as an experienced company from a country that has an experience of oil crises[165] should have been more cautious, and not base their business strategy on the temporary price of highly volatile commodity.[166] As a result, when oil prices rose rapidly, as predicted, Caeli was left in deep financial distress.[167]

135. To summarise, Vemma's extravagant approach left Caeli vulnerable to risks that it had to face.[168] The experts in the field of tourist, and avian industries agree that Vemma's strategy was "not a good long-term model"[169], and that Caeli's financial troibles could have been avoided, had Vemma adopt the approach advised by Mekar Airservices.[170]

136. Vemma acted negligently and should face the consequences of its actions, as Mekar cannot be responsible for the ill-advised strategy Vemma adopted. Therefore, the amount of any compensation should be reduced proportionally to the contribution to the injury by CLAIMANT.

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[158] Facts, p. 33, ¶29, l. 1089-1099.
[159] Facts, p. 33, ¶¶29, 30, l. 1089-1107.
[160] Facts, p. 34, ¶34, l. 1127-1135.
[161] Facts, p. 34, ¶35, l. 1136-1146.
[162] *Ibid*.
[163] Facts, p. 33, ¶29, l. 1089-1099.
[164] *Ibid*.
[165] Facts, p. 29, ¶7, l. 911-913.
[166] E.g. Baumeister and Lutz, pp. 139-160.
[167] Facts, p. 37, ¶48, l. 1269-1276.
[168] Facts, p. 35, ¶40, l. 1191-1199.
[169] Annex VII, p. 55, l. 1890-1895.
[170] Annex IX, p. 57, l. 1956-1960.

B. THE TRIBUNAL SHOULD TAKE DIRE ECONOMIC SITUATION IN MEKAR INTO ACCOUNT.

137. Difficult economic conditions must be taken into account in assessing the compensation.[171] The compensation should not take form that would be likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the responsible State.[172] Therefore, when an amount of compensation would have crippling effect on the State, a Tribunal should asses its amount equitably in light of the economic situation of RESPONDENT.[173]

138. The CLAIMANT asks for 700 million USD in compensation.[174] Since 2016 Mekar is in a state of financial crisis of great proportions.[175] The sum for which the CLAIMANT is asking would be 200 % of Mekar's consolidated annual public spending.[176] The payment of such huge amount would inevitably put the wellbeing of Mekarians at risk, and prevent Mekar from economic recovery. Therefore, the Tribunal should reduce the quantum of compensation in order to avoid its crippling effect on Mekar, and protect its citizens from misery.

139. To summarise, the RESPONDENT primarily submits that CLAIMANT cannot avail to the FMV standard. Neither principles of international law, nor the MFN clause contained in CEPTA allow for such departure from a standard of compensation expressly prescribed in an investment treaty. In turn, RESPONDENT asks the Tribunal to find that under the applicable market value standard of Art. 9.21 CEPTA, it has already paid the compensation owned to the CLAIMANT, when it purchased Caeli for 400 million USD. Therefore, the principal submission of the RESPONDENT is that is does not owe any further compensation to the CLAIMANT. However, if the tribunal was to disagree with these arguments, the RESPONDENT submits that any compensation for the CLAIMANT shall be reduced. It is because first, the CLAIMANT contributed to its own injury, and should bear the consequences of its actions, and second, the dire economic situation, and ongoing crisis in Mekar shall be factors taken into account while evaluating the amount of compensation owned.

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[171] *Eritrea-Ethiopia*, ¶26.
[172] *CME Separate Opinion*, ¶78.
[173] *LG&E*, ¶33 et seq.; *Enron*, ¶407.
[174] Notice, p. 5, ¶ 30, l. 154-156.
[175] Facts, p. 35, ¶¶39-41, l. 1183-1207.
[176] Procedural Order No.3, p. 86, ¶4, l. 3161-3168.

REQUEST FOR RELIEF

In light of the foregoing reasons, RESPONDENT respectfully request this Tribunal to:

a. Declare that it does not have jurisdiction over the claim.

b. Dismiss CBFI's amicus curiae submission.

c. Admit CRPU's amicus curiae submission.

d. Declare that RESPONDENT did not breach Art. 9.9 CEPTA.

e. Declare that RESPONDENT already paid compensation to CLAIMANT under market value standard.

f. In alternative, reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

g. Order CLAIMANT to pay all costs and fees related to these proceedings.