TEAM FISCHER

The International Centre for Settlement of Investment Disputes

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

VEMMHA HOLDINGS INC.

(CLAIMANT)

V.

THE FEDERAL REPUBLIC OF

MEKAR (RESPONDENT)

MEMORIAL FOR RESPONDENT

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Aron Broches	Broches, A., *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331, 354/5 (1972-II).

TABLE OF ABBREVIATIONS

[ ]	paragraph
Art	Article
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	2014 Bonooru - Mekar Comprehension Economic Partnership and Trade Agreement
CRPU	Committee on Reforms of Public Utilities
ICSID	International Centre for Settlement of Investment Disputes
ILC	United Nations International Law Commission
MRTPA	Monopoly and Restrictive Trade Practice Act
p.	page
SOE	State-owned Enterprise
UF	Uncontested Facts

STATEMENTS OF FACTS

Dramatis Personae

1. Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") is an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru ("**Bonooru**"). Claimant acquired the investment in Caeli Airways JSC ("Caeli Airways" or "Caeli"), a privatized state-owned enterprise in Mekar.
2. The Federal Republic of Mekar ("**Mekar**" or "**Respondent**") lies approximately 1,600 km to Bonooru's south. Since the decline of the Pevensian empire, Mekar's economy has suffered as both people and resources have left the nation. High regulatory intervention and late economic reforms starting in 1994 affected Mekar's post-independence growth.

Vemma acquires Caeli

3. As part of a privatisation program, Mekar decided to sell a controlling stake in the State-owned Caeli Airways ("**Caeli**"). On 29 March 2011, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in Caeli Airways. Mekar maintained 15% ownership through Mekar Airservices Ltd.

Vemma fails to operate Caeli

4. When the Claimant made its investment in the territory of Mekar in 2011, it also inherited debt liabilities associated with Caeli Airways, yet decided to take an extravagant approach to its investment activities, funnelling funds towards rapid expansion and ill-strategised business plans instead of tending to long-term financial health.
5. The rapid expansion of Caeli Airways naturally drew the attention of the Competition Commission of Mekar ("**CCM**") and Caeli's competitors. As an interim measure, and in the rightful and legitimate use of its faculties, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits.
6. The airfare was only kept in place until 2019 due to clear evidence of anti-competitive behaviour by Caeli, including abuse of dominant position, predatory pricing, and unfair subsidization. Mekar lifted the airfare caps as soon as Caeli's market share fell below 40%.
7. In late 2016, the Mekari MON began to rapidly decline in value, forcing Mekar to make all companies operating in the country to offer goods and services denominated in MON in order to mitigate against capital outflows and secure its macroeconomic situation.

8. In 2018, Mekar's President granted subsidies for airlines operating in Mekar yet denied subsidies to Caeli Airways, as the Claimant enjoyed continuous influx of funds from its home State under the Horizon 2020 Scheme - a benefit that several of its competitors in Mekar did not.
9. Even when Caeli Airways fought these actions in courts, Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority, despite being overwhelmed by cases. The courts even managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters.
10. At the time the Claimant decided to sell off its stake in Caeli Airways, it still enjoyed a considerable market share in Mekar, that would have allowed it to make quick recoveries when the crisis abated.
11. Not only did the Claimant run Caeli Airways into the ground, but it also abandoned the enterprise at its own volition. During the course of the Claimant's investment, government officials from Bonooru have often exerted pressure on Mekar to treat the Claimant favourably. They have threatened to hold back funds promised to rebuild 280 Phenac's port as part of the Caspian Project.
12. Vemma later secured an offer from Hawthorne Group LLP ("**Hawthorne**") for its entire stake in Caeli Airways, whose price was artificially inflated and not an arm's length commercial price.
13. The dispute over the validity of the Hawthorne offer was submitted to arbitration under the rules of the Sinnoh Chamber of Commerce with the seat of the arbitration in Sinnoh. The arbitrator then ruled in favour of Mekar Airservices, following which Mekar's courts enforced the award.
14. Vemma failed to yield another buyer for its shares. As a result, Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD.

PLEADINGS

Part one: JURISDICTION

A. Applicable law

1. In international dispute arbitrations,

   "*The Bilateral Treaty on investment protection is not only the basis for the jurisdiction of the Centre and of the Tribunal; it also determines the applicable law.*"[1]

2. As such, in the present proceedings, the 2014 Bonooru – Mekar CEPTA assumes the role of the determinative instrument that lays out the basis for the applicable law regarding the matters of this case as well as provides the basis for the determination of the Tribunal.

3. Pursuant to the CEPTA:[2]

   "*A claim may be submitted under the following rules:*

   (a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;

   (b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; or

   (c) any other rules on agreement of the disputing parties."

4. Bonooru has signed and ratified the ICSID Convention, yet Mekar has not.[3] As a result, since there were no agreements on the application of any other rules, the ICSID Additional Facility Rules will be applied in the arbitration.

5. However, pursuant to the provisions of the CEPTA and the Additional Facility Rules, this Tribunal has no jurisdiction over the arbitration as it lacks jurisdiction *ratione personae.*

B. The Tribunal lacks jurisdiction *ratione personae*

6. In accordance with the provisions of the Additional Facility Rules, it is established that the jurisdiction of the Centre shall extend only to legal disputes between a State and a national of another State, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.[4]

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[1] *Antoine Goetz et al. v. Republic of Burundi*, [94].
[2] *CEPTA,* Art 9.16.2.
[3] *Notice of Arbitration*, [3], p.2.
[4] *ICSID Additional Facility Rules*, Art.2(a).

7. In this case, however, the present dispute constitutes a State-to-State arbitration and falls outside the scope of jurisdiction of the Tribunal, as the actions taken by Vemma were attributable to Bonooru.
8. In determining whether the conduct of an entity could be attributable to a state, the accepted test[5] has been formulated as:

   "*a mixed economy company or government-owned corporation 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*"[6] ("**the Broches test**").
9. It should be borne in mind that the two branches of the test are disjunctive, being separated by the word "*or*"; therefore, if either of these branches are satisfied, then the ICSID Additional Facility Rules will not apply to protect investment made by the alleged company. In this case, Vemma shall be disqualified as a 'national of a State' in the proceedings as both inquiries set out are met.
10. In applying the Broches test to the facts of the case, observations must be made on the fact that based on the wording of the text, the test shall extend only to "*a mixed economy company or government-owned corporation*". In this case, there are substantial grounds to believe that Vemma qualifies as a state-owned enterprise.

    a. Vemma is a state-owned enterprise, or, alternatively, a mixed economy company

15. Despite the lack of a universal definition of 'state-owned enterprise' ("**SOE**"), guidance to determine the 'state-owned' status of an enterprise may be found in the *Salini v. Morocco* case, where it is established that:

    "[…] *any commercial company dominated or predominantly controlled by the State or by State institutions, whether it has a legal personality or not, is considered to be a State-owned company*"[7]

[5] *CSOB v. Slovak,* [17]; *BUCG v. Yemen,* [33]
[6] Broches, A., *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331, 354/5 (1972-II).
[7] *Salini v. Morocco,* [31].

16. To that end, the assessment of the degree of State control and participation in a company should be made based on two criteria: (i) the structure of the company and (ii) the objectives of the company in question.[8]
17. From a structural point of view, the Bonoori government has consistently maintained a sizable stake in Vemma since its incorporation, ranging from 31-38%.[9] Despite the stake being a minority shareholding, it still overwhelmed that of any other stakeholders in Vemma, making the Bonoori government the dominant shareholder in the company.[10]
18. In fact, notwithstanding its minority share, Bonooru still exercised state control over the company in effectively deciding and implementing the key decisions throughout Vemma's operation.[11] It has been recognized that on multiple occasions, Bonooru took advantage of its dominance when representatives of other stakeholders were absent to form a majority of members present and voting.[12]
19. As of March 2021, Bonooru increased its shareholding in Vemma to a controlling 55% stake,[13] indicating total control of the state over the company. Following Vemma's restructuring, its board of directors was replaced with government functionaries and its legal team was equipped with lawyers from Bonooru's justice department.[14] Given the fact that Vemma's board of directors plays the role of its decision-making authority,[15] there is sufficient evidence to establish that Vemma was dominantly owned and governed by the State, with regards to both ownership and control.
20. From a functional point of view, which looks into the objectives of the company in question,[16] Vemma eventually carried out task of governmental nature. Pursuant to the Memorandum of Association of Vemma, one of the objectives for which the company is established is

[8] *Salini v. Morocco*, [31].
[9] *UF*, [10], p. 29;
[10] *Procedural Order No.4*, [2], p.89.
[11] *Thunderbird v. Mexico*, [108].
[12] Procedural Order No.3, [3], p.86.
[13] *UF*, [65].
[14] *UF*, [65].
[15] *Annex IV, Articles of Association of Vemma Holdings Inc.*, Article 152, p.46.
[16] *Salini v. Morocco*, [31]

"*to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, including servicing remote communities*."[17]

However, it has been recognized that Article 70 accord positive obligations to the State.[18] Therefore, it is clear that Vemma operates with the aim of accomplishing governmental duties.

21. Based on the aforementioned evidence, the Respondent submits that Vemma qualifies as a state-owned enterprise.

22. Alternatively, in the case that the Tribunal is not satisfied with the Respondent submission on the "state-owned" status of Vemma, the company would still qualify as a "mixed economy company" under the Broches test. Indeed, Vemma's founding documents signifies that even when Bonooru is not the majority shareholder of the company, it still has the right to retain continued minority shareholding in Vemma.[19] Thus, as part of Vemma's shares constantly belongs to Bonooru, it would still acquire the status of a "mixed economy company" under the Broches test even when the company fails to establish itself as a "state-owned enterprise."

b. Vemma acted as an agent for the Bonoori government

23. As the Broches factors are the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*,[20] guidance for understanding the concept of "*acting as an agent for the government*" can be found in the interpretation of such an instrument.

24. In particular, Article 8 of the ILC's Articles states that the conduct of a person or entity

"[…] *shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*."[21]

In that sense, "acting as an agent" refers to acting under a certain level of control, instruction or direction of an authority. The ILC Commentary also makes clear that, in

[17] *Annex IV, Memorandum of Association of Vemma Holdings Inc.,* Art 3(h), p.44.
[18] *UF*, [5].
[19] *UF*, [10], [65]; *Annex III, The People's Council of the Island of Kyoshi v. Bonooru*, [59], p.43.
[20] *BUCG v. Yemen*, [34].
[21] *ILC Draft Articles*, p. 47.

"[…] the text of Article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them."[22]

25. In this case, Vemma, as the successor of state-owned Bonooru Holdings, has historically been subject to state management and direction.[23] Ever since its incorporation, Bonooru has, at all times, exerted the right to maintain a sizable stake in the company,[24] as recognized by Bonooru's highest courts.[25] This is to guarantee continued state ownership and control over the company. Indeed, throughout the operation of Vemma, Bonooru has taken advantage of its ownership interest in the company to pass decisions on its own when representatives of other shareholders could not attend the meetings.[26]
26. Moreover, as has been confirmed by Bonooru's Prime Minister,[27] the Royal Narnian, owned and operated by Vemma, would operate under the direction of the government. To that end, Vemma was put under the entrustment of Bonooru through its representative in Vemma's board of directors, where a non-executive director position is almost perpetually reserved for the Ministry of Transport and Tourism, as recognized in the enterprise's Articles of Association.[28] Such an indication of continued governmental participation in the decision-making mechanism of Vemma proves that the company indeed operates under the direction of the State.[29]
27. In the context of the Caspian Project, Vemma continued to operate under the direction of the Bonoori government. Indeed, Vemma's investments in Caeli Airways, especially in flights between Mekar and Bonooru, were part of the Caspian Project.[30] Furthermore, as Vemma owned the majority of shareholding in Caeli,[31] Bonooru's participation in the company, which was already significant,[32] was able to expand into the board of Caeli Airways.

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[22] *ILC Draft Articles*, p. 48.
[23] *UF*, [8], [10]; *Annex III, The People's Council of the Island of Kyoshi v. Bonooru*, [59], p.43*; Annex IV, Memorandum of Association of Vemma Holdings Inc*., Art 3(h), Art 152.2, Art 152.4.
[24] *UF*, [10], [65].
[25] *Annex III, The People's Council of the Island of Kyoshi v. Bonooru*, [59], p.43.
[26] *Procedural Order No.3*, line 3160.
[27] *UF*, [8].
[28] *Annex IV, Articles of Association of Vemma Holdings Inc*., Art 152.2, Art 152.4, p.46.
[29] *Maffezini v. Spain*, [85].
[30] *Annex VII, Phenac Business Today Podcast Transcript, 17 November 2014*, line 1860-1870.
[31] *UF*, [25].
[32] *UF*, [10].

28. Under the "Horizon 2020" Scheme, Vemma was offered recurring subsidies from its home State in order to expand Caeli Airways' operation and benefit the tourism infrastructure of Bonooru at the government's disposal, as claimed by the Secretary of Transport and Tourism.[33] Pursuant to the Commentary to Article 8 of the ILC Draft Articles,

> "*[…] where there was evidence that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State*."[34]

In that sense, the conduct taken by Vemma through its investments in Caeli is attributable to Bonooru and proves that the company acted as an agent of the Bonoori government.

c. Vemma, throughout its operation, discharged essentially governmental functions

29. Turning to the second branch of the Broches test, which looks into nature of the particular entity's conduct,[35] the Respondent submits that Vemma, during its operation, discharged essentially governmental functions.
30. In addressing this matter,

> "*[…] reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account [...] if [...] that purpose is relevant to determining the non-commercial character of the contract or transaction.*"[36]

Therefore, the Tribunal should take a holistic approach to accurately determine the nature of Vemma's conduct by also paying attention to the purpose of its conduct.

31. The Articles of Association of Vemma, as the founding documents of the enterprise, indicate that one of Vemma's primary objectives is

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[33] *UF*, [28].
[34] ILC Draft Articles, p. 48.
[35] Broches, A., *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331, 354/5 (1972-II).
[36] *Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38, Art 2.2.

"[…] to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, including servicing remote communities."[37]

32. Since Bonooru is an archipelagic state with major public facilities located in major islands, the rights of the movement of Bonoori citizens have actually been constitutionalized in Article 70.[38] Eventually, it has been established by the Constitutional Court of Bonooru that Article 70 "*bestows positive obligations upon the State*" to assist and ensure provision of essential transportation to the population living in remote areas,[39] thereby proving that Vemma, during its operation, was under an obligation to perform essentially governmental duties under the direction of the State.[40]
33. It is crucial to note that the fulfillment of the mobility rights of the Bonoori people had been predominantly performed by the State only until it decided to privatize BA Holdings.[41] In the sense that "governmental functions" refer to those primarily and normally reserved to the State,[42] it is convincing that Vemma was discharging a governmental function.
34. The intention of the State in directing Vemma to discharge governmental functions was once again confirmed by Bonooru's Prime Minister in 1980,[43] where it is claimed that the Royal Narnian, though wholly owned and operated by Vemma, would be utilized for uniquely public services.
35. With regards to the nature of its conduct, the function accorded to Vemma in its Articles of Association of Vemma was not only the realization of the mobility rights under Article 70 of the Constitutional Act but also the promotion of tourist industries and the fulfilment of Bonooru's governmental initiative.[44]
36. It should be noted that Article 70 sets out the content of the mobility rights as "*Every citizen of Bonooru has the right to enter, remain in, and leave its territory.*"[45] The interpretation

[37] *Annex IV, Memorandum of Association of Vemma Holdings Inc.*, Art 3(h), p.44.
[38] *Annex I, Constitution Act of Bonooru, 1947*, Art 70, p.41.
[39] *UF*, [5].
[40] *ILC Draft Articles*, Art 5; *EDF v. Romania*, [194]; *Hamester v. Ghana*, [189-192].
[41] *UF*, [6-7].
[42] *Maffezini v. Spain*, [77].
[43] *UF*, [8]; *Annex III, The People's Council of the Island of Kyoshi v. Bonooru*, [59], p.43.
[44] *Maffezini v. Spain*, [86].
[45] *Annex I, Constitution Act of Bonooru, 1947*, Art 70, p.41.

of the ordinary meaning of text[46] would lead to a conclusion that the text of the provision itself does not impose a limit on the geographical application of the rights. Instead, it covers the obligation of the state to ensure that its citizens would have the necessary means to leave its country's territory. In that sense, the investment that Vemma made in Makar ultimately serves to fulfill the obligations set out by its host state, which is to ensure the enablement of the mobility rights of the Bonoori people.[47]

37. Shortly after Vemma's acquisition of an 85% stake in Caeli Airways was approved,[48] Bonooru's Secretary of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project,[49] which aims to promote the economic development of the state.[50] The close timing provided further evidence to prove that the investment that Vemma made in Caeli Airways was, to a certain extent, planned beforehand in pursuit of the fulfilment of public interest, especially when it is established that the company operated under state directives.

38. Under the Scheme, companies investing in tourism-related infrastructure in Bonooru, including Vemma, received a continuous influx of funds.[51] Thanks to the constant flow of subsidies from its home State, Vemma was able concentrate on catering to customers travelling from Mekar to Bonooru, which had been known to be one of the pillars of Caeli Airways' business model.[52] Through its seemingly commercial undertakings, Vemma was actually making efforts in promoting "the movement of people" as set out in the Caspian Project.[53]

39. In fact, in her statement on the rationale behind the subsidies under the "Horizon 2020" Scheme, Ms. Sabrina Blue, erstwhile Secretary of Transport and Tourism, admitted that Vemma's investment in Caeli Airways was beneficial in many ways to the Bonoori government. First, it "*would draw more travellers from Mekar and the Greater Narnian region to Bonooru's emerging tourism markets", which is the aim of the initiative*.[54]

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[46] *VCLT*, Art 31.1.
[47] *UF*, [5]; *Annex II, The National Ferry Workers Union v. Bonooru*, [25], p42.
[48] *UF*, [25].
[49] *UF*, [28].
[50] *UF*, [4], [28].
[51] *UF*, [28].
[52] *UF*, [28].
[53] *Salini v. Morocco*, [33]; *UF*, [4].
[54] *UF*, [28].

Second, Vemma's investments would bring about "substantial benefits" to Bonooru, especially in the development of tourism infrastrure.[55]

40. During the oil crisis in 2014, although Caeli Airways suffered from great losses, particularly in the high-traffic routes between Bonooru and Mekar, it showed no intention to stop nor cut back its operation on these routes.[56] This is due to the fact that, as disclosed by a former high-ranking employee within Bonooru's Ministry of Tourism, Vemma's investments in Caeli Airways, especially in flights between Mekar and Bonooru, were part of the Caspian Project and aimed to benefit Bonooru's tourism industry, rather than Vemma or the airways itself.[57]
41. Thus, in the context of the Horizon 2020 scheme, where Vemma was offered recurring state subsidies to maintain its business model, the objectives and functions of its conduct should be considered as serving the interest of the government and be attributable to the state of Bonooru.[58]
42. Based on the aforementioned grounds, there is sufficient evidence to prove that Vemma, during its operation, discharged essentially governmental functions.
43. In conclusion, Vemma qualifies as a state entity acting on behalf of Bonooru as it satisfies all the requirements set out in the Broches test. Consequently, the dispute would be a State-to-State arbitration between Bonooru and Mekar, which falls outside the scope of jurisdiction of this Tribunal.

[55] *UF*, [28].
[56] *UF*, [33].
[57] *Annex VII*, *Phenac Business Today Podcast Transcript, 17 November 2014*, line 1860-1870.
[58] *Maffezini v. Spain*, [86]; *Salini v. Morocco*, [33];

Part two: ADMISSIBILITY OF AMICI SUBMISSIONS

44. Pursuant to Procedural Order No.1 in the proceedings,

> "*[…] any non-disputing party that is a person of a CEPTA Party or that has a significant presence in the territory of a CEPTA Party and wishes to file a written submission with the Tribunal will apply for leave from the Tribunal to file such a submission*."[59]

45. In order for an *amicus curiae* submission to be accepted by the Tribunal, it must satisfy the requirements in the CEPTA and the ICSID Additional Facility Rules.[60] In particular, under Article 9.19 of the CEPTA and Article 41(3) of the ICSID Additional Facility Rules, in determining whether to accept an *amicus* submission, the Tribunal shall consider, among other things, the extent to which

    (i) 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;

    (ii) the non-disputing party submission would address a matter within the scope of the dispute;

    (iii) the non-disputing party has a significant interest in the proceeding.[61]

    Also, the tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.[62]

46. Furthermore, pursuant to CEPTA Article 9.20(6), the UNCITRAL Rules on Transparency in Investor-State Arbitration is applicable to the present proceedings. Under the Rules, beside the requirements laid down in the CEPTA and ICSID Additional Facility Rules for assessing the admissibility of an *amicus* submission, the tribunal in exercising discretion shall also take into account

[59] *Procedural Order No.1*, [20], p.13
[60] *Procedural Order No.1*, [21], p.13.
[61] *CEPTA*, Art.9.19(3), *Additional Facility Rules*, Art.41(3).
[62] *CEPTA*, Art.9.19(3), *Additional Facility Rules*, Art.41(3).

"*the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and […] the disputing parties' interest in a fair and efficient resolution of their dispute*."[63]

A. The amicus submission by external advisors to the CRPU shall be accepted

47. With regards to the submission made by external advisors to the CRPU, the Respondent submits that such an *amicus* submission shall be accepted by the Tribunal as it satisfies all the requirements set out in the CEPTA and ICSID Additional Facility Rules.

a. The external advisors comprise an independent non-disputing party

48. ICSID Tribunals, including that in the case of *Aguas Provinciales* have also considered independence to be a requirement of to admit *amicus* submissions:[64]

"*The purpose of amicus submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept amicus submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case.*".

49. External Advisors are members of Mekari civil society who focus on investment banking and were engaged as external advisors to the Committee on Reforms on Public Utilities in 2010 through a transparent and competitive process.[65] It does not receive any financial or other support from any of the disputing parties in the context of the proceedings.[66]

b. The external advisors are in a unique position to provide the Tribunal with novel perspectives on the matter

50. The mentioned *amici*, as independent advisors involved in the entirety of Caeli's privatization process, was able to present this Tribunal with novel factual perspectives on the disputed matters. Indeed, as the external advisors have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization projects, it has the requisite expertise to assist the Tribunal.[67]

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[63] *UNCITRAL Rules on Transparency*, Art 1(4).
[64] *Aguas Provinciales*, [23], *Methanex v. USA*, [30]; *Von Pezold v. Zimbabwe*, [49]; *Philip Morris v. Uruguay*, [55].
[65] *Amicus Submission by External Advisors to the Committee on Reform of Public Utilities*, line 616-623.
[66] *Amicus Submission by External Advisors to the Committee on Reform of Public Utilities*, line 660-661.
[67] *Aguas Provinciales*, [23].

51. Particularly, the *amicus* submission put forward the unique factual point that "*the rights received by Vemma Holdings were procured by means of bribes paid to Mr. Dorian Umbridge*",[68] the Chairperson of Mekari Committee on Reform on Public Utilities. In fact, the submission proves valuable to this Tribunal as it provides insights into the lack of transparency in Caeli's privatization process and moreover, the nature of Vemma's investments in Mekar.

c. The external advisors offered the Tribunal information that are within the scope of the dispute

52. The information provided by the amici was wholly covered by the scope of the dispute and raised no questions that had not been addressed by the disputing parties. However, even if the CBFI's amicus submission address a matter of jurisdiction before this Tribunal, it should still be admitted.

53. In Infinito Gold,[69] although neither party has made any allegations of corruption the tribunal determined that the petitioners' submissions would be admitted as they had a bearing on the tribunal's jurisdiction. In that context, the Tribunal cannot rule out at this early stage and without having heard the Parties that these matters may play some role in its assessment of this dispute

d. The external advisors possess significant interest and public interest in the proceedings

54. In submitting their *amicus* brief, the external advisors to the CRPU showed their significant interest in the proceedings. On the one hand, the promotion of fair business practices shall prove beneficial to the general public, especially in the context of widespread corruption in Mekar.[70] In other words, the outcome of this arbitration can impact individuals and entities beyond the disputing parties, indicating a certain level of public interest in the case.[71] On the other hand, the amici, as members of a civil society whose professional focus

[68] *Amicus Submission by External Advisors to the Committee on Reform of Public Utilities*, line 635-637.
[69] *Infinito Gold v Costa Rica*, [33].
[70] *Amicus Submission by External Advisors to the Committee on Reform of Public Utilities*, line 635-637.
[71] *Methanex v. USA*, [30]; *Apotex v. USA (Appleton)*, [26]; *Resolute Forest v Canada*, [4.7].

is investment banking,[72] would directly benefit from the transparent investing environment in Mekar.[73]

e. The submission by external advisors does not disrupt or unduly burden the arbitration

55. The mentioned *amicus* submission by no means disrupts or unduly burdens the arbitral proceedings, or unfairly prejudices any disputing party.

56. Therefore, the Respondent submits that the Tribunal shall grant leave to the submission made by external advisors to the CRPU.

B. The amicus submission by the CBFI shall be rejected

57. The *amicus* submission by the CBFI fails to meet the conditions set out in the CEPTA, the ICSID Additional Facility Rules and the UNCITRAL Rules on Transparency and thus, shall be dismissed by this Tribunal. In particular, (i) the participation of Lapras Legal Capital in the proceedings thorough CBFI raised a conflict of interest, (ii) CBFI's submission offered no different point of view from that of the disputing parties nor advanced any novel arguments before the Tribunal and (iii) the submission not was made in pursuit of any "public interest".

a. The CBFI lacks independence from the disputing parties

58. Under the CBFI's "Amicus Brief Submission Guidelines," members of the CBFI's Executive Committee cannot participate in discussions or votes in relation to a dispute in which they have a conflict of interest. Such a conflict is presumed to exist when an Executive Committee member "is a party to the case or has a direct financial interest in the outcome of the case."[74] In this case, however, the participation of Lapras Legal Capital through the CBFI raised a conflict of interest and undermined the independence of the said *amicus curiae*.[75]

59. Particularly, given the fact that Lapras Legal Capital and Vemma Holdings Inc. are members of the CBFI in good standing,[76] there are substantial grounds to believe that Lapras, in participating in the arbitration, possesses material interests in the outcome of the

[72] *Amicus Submission by External Advisors to the Committee on Reform of Public Utilities*, line 616.
[73] *Amicus Submission by External Advisors to the Committee on Reform of Public Utilities*, line 644-646.
[74] *Procedural Order No.3*, [12], p.87.
[75] *Von Pezold*, [56]; *Phillip Morris v. Uruguay*, [55].
[76] *Amicus Submission by the Consortium of Bonoori Foreign Investors*, [7].

disputes. In other words, a favorable decision to Vemma would benefit Lapras financially as the corporation would be able to make profits in its future commercial activities with not only Vemma, to whom it maintains a close tie, but also other enterprises, given its advisory services in the present proceedings.

b. The CBFI's amicus submission provided the Tribunal with no novel arguments

60. Moreover, in its *amicus* submission, the CBFI put forward five issues for the consideration of the Tribunal.[77] However, none of them was able to provide this Tribunal with any novel perspective on the matter of the dispute. Instead, The CBFI intends to provide information on the context of the business climate of Bonooru, corporate framework and the nature of the industry.[78] Such information would provide minimal assistance to the Tribunal as it was neither specific nor novel in comparison with the arguments already presented by the disputing parties.[79]

c. The CBFI possesses no significant interest or public interest in the arbitration

61. The CBFI's submission only addressed the benefits which its members may gain from the outcome of the arbitration, yet failed to provide any rationale for which the submission should be accepted that proves beneficial to the general public. Indeed, in this case, the CBFI does not have any significant interests in the proceedings.[80]

62. Ergo, there is insufficient grounds to prove that that the CBFI's *amicus* submission should be accepted by the Tribunal.

[77] *Amicus Submission by the Consortium of Bonoori Foreign Investors*, [10].
[78] *Amicus Submission by the Consortium of Bonoori Foreign Investors*, [10].
[79] *Apotex v. USA, (BNM),* [26]; *Bear Creek Mining v. Peru*, [38].
[80] *Apotex v. USA (Appleton*), [38]; *Resolute Forest v. Canada,* [4.6].

Part three: FAIR AND EQUITABLE TREATMENT

63. Under Article 9.9 of the CEPTA, Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment[81] and a Party breaches the obligation of fair and equitable treatment if a measure or measures constitute: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; arbitrary or discriminatory conduct; abusive treatment of investors, such as coercion, duress, and harassment.[82] It should be noted that the text of Article 9.9 of the CEPTA must be interpreted according to the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT.[83]

64. The Respondent asserts that it has treated the Claimant's investment with fairness and equity.

A. The Respondent's measures were not arbitrary

65. With regards to arbitrariness, the term "arbitrary" is left undefined under CEPTA. However, the Tribunal in *EDF v. Romania* has accepted that a measure that inflicts damage on the investor without serving any apparent legitimate purpose or is not based on legal standards but on discretion, prejudice, or personal preference, would be considered arbitrary.[84]

66. In this case, measures taken by the Respondent, including the two investigations, the imposition and maintenance of the airfare caps, and the policy concerning Mekar's currency were not arbitrary.

a. The two investigations carried out by the CCM are not arbitrary

(i) The first investigation carried out by the CCM is not arbitrary

67. According to Chapter 3 Article 2a of the MRTPA, The CCM may open an investigation into behaviour it deems anti-competitive if the following circumstances are met: (i) a corporation obtains a market share greater than 50%. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns

[81] *CEPTA*, Art 9.9.1.
[82] *CEPTA*, Art 9.9.2..
[83] Both Bonooru and Mekar are parties to the Vienna Convention on the Law of Treaties.
[84] *EDF v. Romania*, [303].

a lower market share; (ii) the corporation poses a unique threat to the competition in a particular market; and (iii) there is evidence the corporation's actions have, or are likely to in the near future, push competitors out of the market.[85] Moreover, the CCM also sought an undertaking from Caeli that it would not engage in high-level co-operation with its Moon Alliance member, on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members.[86]

68. In this case, although the market share of Caeli was not 50% at the time of the investigation,[87] the CCM had exercised its discretion. Firstly, the CCM is concerned about the level of cooperation between Caeli and the Royal Narnian. Since Caeli Airways and Royal Narnian were both owned by the Claimant[88] and both have membership in the Moon Alliance,[89] this type of relation between the two companies allows them to engage in high-level cooperation, especially through preferential slot trading and eventually benefits from the low prices. This kind of association had made the airline industry an industry that required special attention by the CCM. In addition, the CCM is also concerned about the use of the subsidies received from the "Horizon 2020" scheme[90] enabled Caeli to adopt predatory pricing. To ensure the low price adopted by Caeli cannot drive smaller competitors out of the market, Caeli has exercised its discretion, in the form of the first investigation, which should not be considered as a breach of due process or arbitrary.

(ii) The second investigation carried out by the CCM is not arbitrary

69. According to the Chapter III of the MRTPA, the CCM can also open an investigation into potentially anti-competitive behavior of a Corporation where: (i) a complaint is brought to the CCM by a direct competitor in the market; and (ii) the corporation has at least a 10% market share.

70. In this case, Caeli's fall-winter losses were particularly concentrated in the high-traffic routes between Bonooru and Mekar, where regional competitors offering low-fare flights operating,[91] this indicated that they were operating in these routes without making profits.

[85] *MRTPA*, Chapter III(2).
[86] *UF*, [25] p.32.
[87] *UF*, [36] p.34.
[88] *UF*, [10] p.29 and [25] p.32.
[89] *UF*, [11] p.29 and [25] p.32.
[90] *UF*, [28] p.32.
[91] *UF*, [33] p.33.

Moreover, a consortium of small regional airlines in Greater Narnia brought another complaint before the CCM, alleging that Caeli "launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalizing on its undercutting policies and the privileges it enjoyed at Phenac International Airport".[92] It was claimed that Phenac International became a "fortress hub" for Caeli, making it nearly impossible for them to penetrate into the market.[93] Therefore, the second investigation was launched into Caeli's business activities focusing specifically on price undercutting on certain routes to and from Phenac International airport[94] and should not be considered as a breach fo due process or arbitrary.

b. The interim measure imposed by the CCM is not arbitrary

71. According to Chapter III of the MRTPA, the Tribunal shall have the power to impose any interim or other measures to bring a corporation in line with this Act.[95] Such a decision shall apply for a specified period of time and maybe renewed insofar this is necessary and proportionate.[96]

72. The Claimant may argue that the imposition and the maintenance of the airfare caps were arbitray. However, it is important to consider the reason why the airfare caps were imposed in the first place. The CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits.[97] Caeli never protested the airfare caps, and there is no evidence the caps hurt its profitability in 2016.[98] Before the result of the 1st investigation was released, the removal of the airfare caps should not be granted unless the first investigation had been concluded since it was the first investigation that gave rise to the airfare caps. Therefore it's unreasonable that the airfare caps be removed before the conclusion of the first investigation. With the regards to the maintenance of the airfare caps after the result of the 1st investigation was released, the CCM concluded that Caeli did engage in anti-competitive practices,[99] therefore, the airfare caps were maintained, this is also the reason

[92] *UF*, [38] p.35.
[93] *UF*, [38] p.35.
[94] *UF*, [38] p.35.
[95] *MRTPA*, Chapter III(4)(d).
[96] *MRTPA*, Chapter III(4)(e).
[97] *UF*, [37] p.34.
[98] *UF*, [37] p.34.
[99] *UF*, [45] p.36.

why the airfare caps was maintained after the second investigation.[100] It is should be noted that the economic crisis in Mekar happened for every company, therefore, smaller companies may even be in a worse condition, and a company, a giant in the industry like Caeli, that engaged in anti-competitive practices with the aim to push other competitors out of the market should be controlled in the form of the airfare caps. Moreover, the airfare was only kept in place until 2019 due to clear evidence of anti-competitive behaviour by Caeli, which again should not be considered as a breach of due process or arbitrary.

c. The Respondent's policy concerning its currency is not arbitrary

73. According to Article 9.8 of the CEPTA, "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".[101] The tribunal in Continental v Argentina held that monetary sovereignty pertains to "The fixing of an exchange rate and deciding the mechanism by which national currency may be exchanged for foreign currency and its conditions, including the possibility of maintaining accounts, deposits denominated in foreign currency with the country".[102] These indicate that the Respondent has the right to minimize the risk posed upon its economy and the change in policy to require investors to price goods and services in MON were reasonable and necessary.
74. While dealing with an economic crisis, Mekar first allowed the denomination of airfare in US Dollars for all airlines operating in Mekar.[103] However, as the microeconomic situation in Mekar continued to deteriorate,[104] Mekar needed to establish credibility in its currency by requiring all companies operating in the country to offer goods and services exclusively in MON.[105] This need was even emphasized by the IMF.[106] The Respondent maintains that requiring all companies to provide goods and services in MON was only to deal with the economic crisis, not to aimed at damaging Vemma's investment.

d. Measures taken by the Respondent were proportionate and necessary

[100] *UF*, [49] p.37.
[101] *CEPTA*, Art 9.8.2.
[102] *Continental Casualty Company v. Argentine Republic*.
[103] *UF*, [40] p.35.
[104] *UF*, [41] p.35.
[105] *UF*, [42] p.35.
[106] *UF*, [39] p.35.

75. According to Article 9.8 (2) of CEPTA "For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section". The tribunal in LG & E Corp v Argentina found that measures taken by State during an economic crisis must be deemed necessary if they were implemented to "protect essential security interests and to maintain public order".[107] The tribunal in Total SA v. Argentina in order to prove proportionality, "a measure will be proportional if the measures were suitable with the policy objective behind them". In conducting those measures, they were achieving a legitimate policy objective that can be found, which is consumer protection. in investigating Caeli airways, they were achieving a legitimate policy objective that can be found. Caeli Airways, having adopted supra competive practices and predatory pricing strategy, was eventually going to become a monopoly in the State of Mekar. If it became a monopoly, it would be able to offer inflated prices, that is in the form of air tickets and this would hurt our consumers. Therefore, measures taken by the Respondent were proportionate and necessary.

B. The Respondent did not frustrate the Claimant legitimate expectation

76. Under the CEPTA, when applying the fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment.[108] Legitimate expectation was defined by the tribunal in Thunderbird v. Mexico as "where a State's conduct creates reasonable and justifiable expectations on the part of an investor to act on the said conduct, such that failure by the State to honor those expectations could amount to damages". The tribunal in Duke Energy v. Ecuador sustains that if legitimate expectation were to apply, to be protected, the Claimants must show that their expectations were predicated on specific representations or assurances made by the host State to the particular investor.[109]

[107] *LG&E Energy Corp v Argentine* [135].
[108] *CEPTA*, Art 9.9.3.
[109] *Duke Energy v. Ecuador*, [351].

77. In the instant case, the Claimant may assert that their legitimate expectation was breached because of the measures taken by the CCM. However, the MRTPA amendment, which provides the CCM with the power to investigate and impose measures, came into force over a year before there was any business transaction between the Claimant and the Respondent.[110] At the time, the Claimant had not even announced an interest in buying the share in Caeli airlines.[111] The MRTPA was simply general legislation that was meant to increase the confidence of investors,[112] not specifically towards the Claimant. Thus, it could not have possibly been a specific representation made by the Respondent towards the Claimant to create a legitimate expectation.

78. Furthermore, the Claimant cannot claim that the Respondent frustrates its legitimate expectation to have their share sold at a fair market price. Under the Shareholders' Agreement, it is required that Claimant has to find a bona fide third party that would purchase the shares at an arms-length transaction.[113] While an arms-length transaction is a transaction in which the buyer and seller act independently, impartially, hold equal bargaining power, and are not under pressure or duress from either party,[114] the Claimant failed to find a *bona fide* to purchase their shareholding in Caeli Airways. This is because of the affiliation between Hawthorne Group – the buyer and the Claimant – the seller had created the possibility that both parties might not act impartially and independently.[115] Given the fact that Claimant failed to attract another suitable buyer for the shareholdings, the shares in Caeli Airways were purchased at market value and thus, legitimate expectation was not breached.

C. The Respondent did not act in a discriminatory manner

79. Indeed, under the CEPTA, A Party breaches the obligation of fair and equitable treatment if a measure constitutes discriminatory conduct.[116] According to the case of Saluka v. Czech Republic, there is a test or a standard measuring for discrimination against investors,

[110] *UF*, [19] p.30.
[111] *UF*, [19] p.30.
[112] *UF*, [19] p.30.
[113] *Shareholders' Agreement relating to Caeli Airways*, Art 39.
[114] Corporate Finance Institute "*What is an Arm's Length Transaction*?" 2015 https://corporatefinanceinstitute.com/resources/knowledge/deals/arms-length-transaction/ (21-09-2021).
[115] *UF*, [58], p.39.
[116] *CEPTA*, Art 9.9.2(c).

discrimination can be found if: (i) similar cases, are (ii) treated differently and (iii) without justification.[117]

80. The Respondent through a presidential order in 2018, granted subsidies to airlines that were operating in Mekar to alleviate the burden during the economic downfall.[118] When the Claimant try to apply for the subsidies, they were denied and may contend that they were discriminated. However, it was not only Caeli airlines that was denied of the subsidies. Larry Air, another wholly government-owned company was also denied of the subsidies.[119] Furthermore, this denial is justified for the following reasons.

81. Since the country is undergoing an economic crisis, the Executive Order 9-2018 was to provide assistance not only to businesses but also to individuals and families.[120] None of the wording in the Order indicated that the subsidies would be given to every business but in fact will be decided by the Secretary to assure that giving subsidies to eligible business would not in favour one or more enterprises and make the market conditions imbalance.[121] Mekar recognized the benefits that State-owned enterprises receive compare to other companies. The Claimant had been receiving large amounts of recurring subsidies through the Horizon 2020 programme, whereas other private competitors were not receiving much assistance from their home States. As the first enterprise to receive continuous subsidy from the Bonooru's "Horizon 2020" Scheme,[122] Vemma was able to carry out anti-competitive practices.[123] While experiencing an economic crisis, with the objective to support businesses without hindering competition from companies, Mekar decided not to give subsidies to state-owned company like Caeli, which should not be deemed as discriminatory.

D. The Respondent did not deny the Claimant of justice

a. There was no undue delay in the court proceedings to constitute a denial of justice

[117] *Saluka v. The Czech Republic*, [313].
[118] *UF*, [46] p.36.
[119] *UF*, [47] p.37
[120] *Executive Order 9-2018*, Preamble, p.56
[121] *Executive Order 9-2018*, Chapter 31(c), p. 56
[122] *UF*, [28] p.32
[123] *UF*, [45] p.36 and [49] p.37

82. Measures constitute the denial of justice can amount to a breach of fair and equitable treatment under the CEPTA.[124] Indeed, denial of justice could be pleaded if the relevant courts subject a case to undue delay.[125] However, the tribunal ought to take into consideration that various factors may contribute to delays that should not be considered undue. For instance, the Chevron tribunal stated that the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves are factors to consider in the analysis of a claim of undue delay constituting a denial of justice.[126]
83. In this case, the claimant may contend that there was a denial of justice because of the 13 months period of time[127] that it took for the case to be heard. However, the Claimant was given access to Mekari courts, both High Commercial Court and Superior Court,[128] its claims were heard and there was no undue delay in the proceedings.
84. Mekar's judicial system has been overwhelmed by cases, normally commercial matters would take approximately 22- 27 months to reach a final decision.[129] The tribunal in White Industry v. India considers it is relevant to distinguish between criminal proceedings (and applications before human rights courts), where there is a particular need for the urgent resolution of cases, and purely commercial matters.[130] While it is understood that this is not a purely commercial matter, the hearing for the interim measures was scheduled after 13 months, which was actually a lot shorter compared to the average time of waiting even though Mekar prioritized criminal cases.
85. The Claimant may argue that the Respondent cannot justify the delay by citing its overburdened judiciary. The tribunal in White Industry v. India agreed with the decision in EI Oro Mining and Railway (UK) v. Mexico that "the amount of work incumbent on the Court and the multitude of lawsuits with which they are confronted, may explain, but not excuse, the delay. If this number is so enormous as to occasion an arrear of nine years". The overburdened judiciary cannot be the excuse for the delay if the number is so enormous

[124] CEPTA, Artible 9.9(2).
[125] *Azinian v. Mexico*, [102].
[126] *Chevron*, [250].
[127] *UF*, [44] p.36.
[128] *UF*, [62] p.39.
[129] *UF*, [13] p.29.
[130] *White industry v. India*, [10.4.14].

and in that case, 9 years. While in the instant case, it was 13 months and even sooner than the anticipated time of waiting.

b. The decision of Justice Vanduzer does not constitute the denial of justice

86. Even though the refusal of courts to address a claim can amount to a denial of justice, it is not incumbent on courts to deal with every argument presented to reach a conclusion.[131] In addition, under Mekar's Executive Order 5-2014, a court is granted the ability to dismiss without appeal a case by way of summary judgment where the court finds there is very little chance of success on the merits.[132] The decision of the court to refuse the judicial review of the caps placed by the CCM was based on the fact that the remedy which would have been received by the claimant will be the removal of the airfare caps, which would have possibly led to the continuity of the anti-competitive strategies adopted by Caeli Airways. In light of the predatory pricing, exclusion of the competitors, and the financial capabilities of Caeli the decision by the Mekari courts is reasonable. In this case, since the Court does not foresee the possibility of reaching a different final decision, the Court decided to dismiss the merits to save the precious resources of this court and prevent parties from prolonged waiting in anticipation.[133]

c. The Court's decision of recognizing the 9 May 2020 award does not constitute the denial of justice

87. According to the New York Convention, it is stated that when an award is set aside by the seat of arbitration, it may not be enforced by the host state.[134] The wording "may" itself allows the discretion for the court to look into the issues of law and fact and make a decision. First, there was no there has been no evidence on the background of the making of the report, therefore, it would not be reasonable to consider that this report by the CILS[135] is decisive evidence of bribery or corruption. Furthermore, both the High Commercial Court and the Supreme Court held that to determine whether the enforcement of the award would give rise to corruption the court must consider "…all relevant elements of facts and at law". While the Supreme Arbitrazh Court of Sinnograd stated that they do not find

[131] *Philip Morris v. Uruguay*, [557].
[132] *Procedural Order No.3*, [8].
[133] *UF*, [54] p.38.
[134] *New York Convention*, Art 5.1(e).
[135] UF, [60] p.39.

themselves in a position to conclusively rule on whether the act of bribery had taken place,[136] Mekari courts, after considering all the surrounding circumstances, ruled that the award would not be set aside.

88. All things considered, the Respondent submits that its measures did not violate its FET obligation under the Bonooru – Mekar CEPTA. Therefore, Mekar owes no compensation to the Claimant.

[136] *Supreme Arbitrazh Court of Sinnograd Ruling*, [11] p.64.

Part four: DAMAGES

A. The Respondent has already compensated according to the market value standard

a. The standard for compensation shall be the market value standard

89. Although the Respondent respectfully requests the tribunal to find that the Respondent has not breached the Fair and Equitable Standard of Treatment under CEPTA Article 9.9, in case the tribunal finds that the Respondent did violate Article 9.9 of the CEPTA, the standard for compensation should be the market value standard. According to the CEPTA, where a tribunal makes a final award against a respondent, the tribunal may award monetary damages at a market value.[137] In this case, if the tribunal finds that Respondent did violate Article 9.9, the monetary damages for compensation should be assessed based on the market value method.

b. Under the "Market Value" standard, compensations have already been paid to Claimant through the acquisition of the shares on 8 October 2020

90. Market value standard refers to the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.[138] In this case, Vemma, as a willing seller which failed to find another buyer for its shares, resultantly sold its stake in Caeli to Mekar Airservices, a willing buyer. Both parties were aware of the state of the market, including inflation and unstable currency, and the condition of the investment, which is Caeli Airways. The investment in Caeli Airways was sold to Mekar Airservices as the result of the losses from the rapid expansion and exorbitant business strategy adopted by the Claimant. Applying the market value standard, the compensation of 400 million dollars has already been paid by the Respondent.

B. The Claimant cannot invoke the Most-favoured nation standard to import the Fair Market Value standard from another treaty

91. Article 9.7 CEPTA states that "Each Party 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 with respect to the

[137] *CEPTA*, Art.9.21(1)(a)
[138] Sanders, V, M. "*Market Value: What Does It Really Mean*?" (2018) The Appraisal Journal, 211

establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory".[139] It further states that "For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations". This indicates that the MFN clause does not allow the Claimant to import the compensation standard from another treaty as it shall not be considered as a treatment.

92. In case the compensation is considered as a treatment under the CEPTA, Article 9.9.7 of CEPTA further asserts that 'the provisions of this Article shall not apply to invoke a more favourable treatment accorded by either Party under bilateral investment treaties or other agreements containing provisions relating to investments signed prior to the entry into force of this Agreement'. Furthermore, drafters of the CEPTA intended for the fair market value standard to e applied in the case of expropriation,[140] a compensation at market value is the only standard available for the Claimant under the CEPTA.

C. In case the Fair Market Value standard was to apply, the Claimant is not entiltled to full compensation

93. The tribunal in Biwater – Gauff v Tanzania found that the existence of unfair or inequitable treatment is not necessarily an indication that injury has been caused to the Claimant.[141] In particular, "causing injury" must mean more than simply the wrongful act itself, but instead the linkage between each of the wrongful acts, and each of the actual, specific heads of loss and damage.[142] In the instant case, the Respondent submits the damages are attributable to other factors.

a. The Claimant's conducts contributed to their loss in Caeli Airways

94. Article 39 of the ILC Articles provides that: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of

[139] *CEPTA,* Art 9.7.1.
[140] *CEPTA,* Art 9.12.
[141] *Biwater – Gauff v Tanzania,* [804]
[142] *Biwater – Gauff v Tanzania,* [803] and [805]

the injured State or any person or entity in relation to whom reparation is sought".[143] The Commentary to Article 39 goes on to explain that this provision "deals with a situation where damage has been caused by an internationally wrongful act of a State which is accordingly responsible for the damage, but where the injured State has materially contributed to the damage by some wilful or negligent act or omission". In Yukos v Russia, 39 the tribunal looked at whether there was any "wilful or negligent act or omission of the claimant that had a material and significant contribution to the damage suffered".[144] In other words, if the injured party has acted negligently and thereby contributed to the occurrence of damage, the obligation to pay damages can be reduced, or even offset.[145] In this instance, the Claimant's exorbitant approach to its investment, including funneling funds towards rapid expansions and ill-strategised business plans, without improving long-term financial health of Caeli Airways,[146] should be regarded as negligent behaviour by the Claimant

95. Before Vemma made the investment in Mekar, the country was known for its instability,[147] which is one of the reasons for Caeli's staggered growth,[148] leading to the privatization of this airline. During the tendering process for the purchase of Caeli, Vemma was aware of Caeli's debt liability and stated that it would refinance to deal with the issue.[149] However, as Vemma took over Caeli, they decided to offer slashed price, open routes and purchased more aircraft, ignoring the advice from Mekar Airservices. Their risky strategy has been commented on for several times for the fact that they should also consider the exorbitant cost of maintaining its fleet on low demand seasons and the issues of surged oil price. While budgetary restraint was one of the reasons that forced Mekar to sell its stake to Vemma, the issue would have been different if Vemma had been careful in their strategy. Thus, the compensation should be reduced as Vemma contributed to the loss in their investment.

b. The economic situation in Mekar should also be taken into consideration

[143] *ILC Draft Articles,* Art 39.
[144] *Yukos v. Russia*, [146].
[145] *Eisenbach Brothers and Co* (*United States* v *Germany*, [199–200]
[146] *Mekar's Response to Notice of Arbitration*, [11]
[147] *UF*, [12] p.29
[148] *UF*, [14] p.30
[149] *UF*, [23] p.31

96. The tribunal in LG & E v Argentine recognized the economic hardship that happened in the crisis and social realities that at the time may have influenced the Government's response to the growing economic difficulties. In this case, Mekar has been in instability for a long period of time,[150] the 2008 financial crisis pushed Caeli to greater distress, forcing it to privatize Caeli Airways.[151] Starting in late 2016, the MON began to nosedive.[152] High foreign-currency debt also resulted in Mekar running deficits in both its fiscal and current accounts and by March 2017, a currency crisis ensued in Mekar.[153] Simultaneously, increasing inflation led to a surge in costs of everyday items and reduced consumer spending power.[154] This situation, combined with the fact that a giant in the airline industry like Caeli Airways at the time was engaging in anti-competitive practices to push other competitors out of the market, requires the Respondent to take action with the aim to mitigate against capital outflows and secure its macroeconomic situation[155] and protect its consumers. Therefore, any compensation that may be awarded would have to take the dire economic situation in Mekar into account.

[150] *UF*, [12] p.29
[151] *UF*, [17] p.30
[152] *UF*, [39] p.35
[153] *ibid*
[154] *ibid*
[155] *Response to Notice of Arbitration*, [14]

PRAYER OF RELIEF

To conclude, the Respondent respectfully request this tribunal to find that:

1. The Tribunal should decline to exercise jurisdiction due to the Claimant's status as a State entity;
2. The Tribunal should grant leave to the amicus submission by external advisors to the CRPU and reject that of the CBFI.
3. Find that Mekar did not violate Article 9.9 of CETPA; and
4. 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 not accept the evaluation of compensation submitted by the Claimant considering the Claimant's contributory fault.

On behalf of the Respondent,

Team Fischer