TEAM FORSTER

INTERNATIONAL CENTRE FOR

SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY RULES

In the Matter of an Arbitration under the ICSID Additional Facility Rules

Between:

VEMMA HOLDINGS INC.

Claimant

v.

THE FEDERAL REPUBLIC OF MEKAR

Respondent

STATEMENT OF DEFENSE

23 September 2021

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LIST OF ABBREVIATIONS

Amicus	Amicus Curiae
Art./Arts.	Article/Articles
BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement between The Commonwealth of Bonooru and The Federal Republic of Mekar
CFO	Chief Financial Officer
CILS	Centre for Integrity in Legal Services
Claimant	Vemma
CRPU	Committee on Reform of Public Utilities
Facility Rules	ICSID Additional Facility Rules
FET	Fair and Equitable Treatment Standard
FMV	Fair Market Value
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Comission of the United Nations
Lapras	Lapras Legal Capital
LPM	Labourers' Party of Mekar
Mekar	The Federal Republic of Mekar
MFN	Most Favored Nation clause
MON	Mekar´s Official Currency
MRTP	Monopoly and Restrictive Trade Practice Act
MV	Market Value
p./pp.	Page/pages
PCIJ	Permanent Court of International Justice
PO	Procedural Order
Respondent	Mekar

SOE	State-owned enterprise
Tribunal/Tribunals	Arbitral Tribunal
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollars
VCLT	Viena Convention on the Law of Treaties
Vemma	Vemma Holdings Incorporated

JUDGMENTS

ADF Group Inc. v. United States of America	ADF Group Inc. v. United States of America, ICSID, ARB (AF)/00/1, Award (January 9, 2003)
AES v Hungary	AES Summit Generation Ltd v Hungary, ICSID Case no. ARB 07/22, Award (September 23, 2010)
Aguas Provinciales v. The Argentine Republic	Aguas Provinciales v. The Argentine Republic ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*. (March, 17, 2006)
Al Tamini v Oman	Adel A Hamadi Al Tamini v Sultanate of Oman, ICSID Case No ARB/11/33, Final Award (November 3rd, 2015)
Al-Warraq v Indonesia	Al-Warraq v Indonesia, OIC/UNCITRAL Arbitration, Final Award (December 15, 2014)
Apotex v. USA	Apotex v. USA ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-disputing Party
B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia	B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia (ICSID Case No. ARB/15/5), Award (April 5, 2019)
Biwater Gauff v.Tanzania	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008)
BUCG v Yemen	Beijing Urban Construction Group Co Ltd (BUCG) v Republic of Yemen ICSID Case No ARB/14/30 Decision on Jurisdiction (31 May 2017)
Cargill v Mexico	Cargill, Incorporated v United Mexican States. ICSID Case No. ARB(AF)/05/Z, Final Awars (September 18th, 2009)
Carlos Ríos and Francisco Ríos v. Republic of Chile	Carlos Ríos and Francisco Ríos v. Republic of Chile, ICSID Case No. ARB/17/16, Award (Jan. 11, 2021)
Chevron v Ecuador	Chevron Corporation &. Texaco Petroleum Company v The Republic of Ecuador, PCA CASE NO. 2009-23. Partial Award on the Merits (March 30, 2010)

Chorzów Factory Case	*Chorzów Factory Case* (1928), Merits, P.C.I.J. Series A, No. 17 (Sep. 13)
Eastern Sugar v The Czech Republic	Eastern Sugar v The Czech Republic, UNCITRAL SCC Case No. 088/2004, Partial Award, (Mar. 27, 2007)
EDF v Romania	EDF Limited v Romania, ICSID CASE NO. ARB/05/13, Final Award (October 8th, 2009)
Elsi case	Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgement (July 20, 1989)
Gami v Mexico	Gami Investments v Mexico, Nafta/Uncitral, Final Award, (Nov.15, 2004)
Genin v Estonia	Alex Genin, Eastern Credit Limited, inc. And A.S. Baltoil v. The Republic of Estonia ICSID Case No. ARB/99/2, Award, (June 25, 2001)
Glamis v USA	Glamis Gold, Ltd. v. United States of America, NAFTA/UNCITRAL, Award, (June 8, 2009)
Grand River v USA	Grand River Enterprises Six Nations, Ltd., Et Al. v. United States of America, NAFTA/UNCITRAL, Award, (Jan. 12, 2011)
Iberdrola Energía S.A. v Republic of Guatemala	Iberdrola Energía S.A. v Republic of Guatemala ICSID Case No. ARB/09/5, Award, (August 17, 2012)
Kerderi v Ukraine	Kerderi Ltd. v. Ukranie, ICSID Case No. ARB/14/17 Award
Lemire v. Ukraine	Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (Mar. 28, 2011)
LG&E v. Argentina	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007)
Loewen v USA	The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, (June 26, 2003)
Maffezzini v Spain	Emilio Agustín Maffezzini v The Kingdom of Spain, ICSID CASE NO. ARB/97/7, Final Award (November 13th, 2000)
Mamidoil v Albania	Mamidoil v Albania, ICSID Case No. ARB/11/24, Award (March 30, 2015)

Mondev v USA	Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, (October 11, 2002)
MTD v. Chile	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004)
Neer v Mexico	U.N Codification and Progressive Development of International Law, Reports of International Arbitral Awards Volume IV, L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (October 15, 1926), (1948)
Phillip Morris v. Oriental Republic of Uruguay	: Phillip Morris v. Oriental Republic of Uruguay ICSID Case No. ARB/10/7 (March 24, 2015)
Piero Foresti v. The Republic of South Africa	: Piero Foresti v. The Republic of South Africa ICSID Case No. ARB(AF)/07/1 (September 25, 2009)
Rompetrol Group v Romania	The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award (May. 6, 2013)
S.D. Myers, Inc. v. Government of Canada	S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award (Nov. 13, 2000)
Saluka v Czech Republic	Saluka Investments v Czech Republic, UNCITRAL, Partial Award (March 17th, 2006)
Tenaris and Talta v. Venezuela	Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26, Award, ¶396 (Jan. 29, 2016)
Thunderbird v Mexico	International Thunderbird Gaming Corporation v The United Mexican State, NAFTA/UNCITRAL, Arbitral Award (January 26, 2006)
Toto v Lebanon	Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction
Waste Management v Mexico	Waste Management, Inc. v. United Mexican States, ICSID Case N° ARB(AF)/00/3 Award, (April 30, 2004)
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I. STATEMENT OF FACTS

Parties to the Dispute

1. Vemma ("**Claimant**") is an airline holding company incorporated under the laws of Bonooru. It has been historically tied to the Government of Bonoroou, which has maintained a significant stake in the company.
2. Mekar ("**Respondent**") is an undeveloped country located in the Greater Narnian region which organizes itself as a federal republic.

Historical Background

3. Mekar has suffered from recent political and economic adversities. Since its independence, it has seen an exponential increase in its population, and has also maintained a cautious approach to economic governance.
4. Although Mekar has opened up to foreign investments, it has been careful not to compromise its right to regulate. In this sense, its Legislative branch has ratified the ICSID Additional Facility Rules and the CEPTA.

The Investment

5. As a result of a competitive bidding process, Vemma acquired 85% of Caeli's shares for 800 million USD. The CCM approved the investment, but remained skeptical about its level of economic cooperation. Caeli was dully notified that any anti-competitive behavior would be subject to its review.
6. Vemma adopted an extravagant economic approach against the warnings of Mekar Airservices Ltd. Although this strategy made Caeli earn prompt profits, these were accompanied by a favorable circumstances, and it failed to maintain an economic balance in a context of harsher conditions.

Vemma´s misconduct in the conduction of Caeli

7. Vemma engaged in anticompetitive practices, such as predatory pricing and secondary slot-trading with its fellow member of the Moon Alliance, Royal Narnian. In consequence, the CCM investigated Caeli and placed airfare caps as an interim measure.
8. Vemma recognized that the airfare caps were reasonable, but then decided to seek judicial review.
9. The investigation resulted in the confirmation of the CCM´s concerns. It consequently imposed a penalty and maintained the airfare caps.
10. A second investigation was initiated, as was requested by a smaller competitor. The CCM found that caeli had also maintained anti-competitive behaviour in its activity in Phenac Buisness Airport.
11. Frustrated by the consequences of its own making, Vemma tried to sell its shares. However, it failed to secure a *bona fide* third party offer, as the offer made by Hawthrone was not an arm´s length, and was invalid due to their membership in the Moon Alliance. Pursuant to the Shareholder´s agreement, the dispute was submitted to arbitration under the rules of the Sinnoh Chamber of Commerce, with the seat of the arbitration at Sinnoh. The sole arbitrator ruled in favor of Mekar Airservices Ltd.
12. Vemma alleged that the sole arbitrator had been bribed. Although the Supreme Arbitrazh Court of Sinnograd did not find conclusive evidence, it decided to set aside the award. Nevertheless, the courts appropriately exercised their discretion to enforce the award, in accordance with national and international law, and pursuant to Mekar´s public policy.

II. THE TRIBUNAL HAS NO JURISDICTION SINCE THIS IS A STATE-TO-STATE

13. The ICSID Additional Facility Rules and the CEPTA only contemplate proceedings between a State (or a constituent subdivision or agency of a State) and a national of another state pursuant to article 2 and chapter 9 of the Additional Facility Rules and the CEPTA respectively. Therefore, as Vemma acted as an agent of the State of Bonooru, this Tribunal has no jurisdiction over this controversy, as this dispute constitutes a State-to-State arbitration.

14. In order to determine if Vemma acted as an agent of the State of Bonooru, it is jurisprudence constante to apply 2 legal tests; the Broches test and the ARSIWA. As mentioned in BUCG v Yemen "the Broches factors are the mirror image of the attribution rules in article 5 and 8 of the ILC´s Articles on State Responsibility".[1]

15. Under this view , the question whether a SOE is "*acting as an agent of the government*"[2] (first limb of the Broches Test) mirrors Draft article 8, which attributes conduct to the State if in fact acted "*on the instructions of, or under the direction or control of" the State.*[3] *Correspondingly, the question whether a SOE is "discharging an essentially governmental function*"[4] (second limb of the Broches Test) mirrors Draft article 5, which attributes to the State the conduct of entities "*empowered by the law of [the] State to exercise elements of the governmental authority", provided that the entity "is acting in that capacity in the particular instance*".[5]

16. If the requirements for any one of these two limbs of the Broches test or the ARSIWA articles are met the conclusion to attribute a SOE conduct to a certain state is justified.[6]

17. Considering the facts presented in this case we claim that both legal criteria are thoroughly fulfilled. Vemma acted as an agent of the State of Bonooru exercising an essential governmental function now of the investment and throughout the investment period.

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[1] *BUCG v Yemen* ¶ 34.
[2] BROCHES, P. 202.
[3] ILC Draft Articles, Article 8.
[4] BROCHES, P. 202.
[5] ILC Draft Articles, Article 5.
[6] BROCHES, P. 202.

A. Vemma discharged an essential governmental function of the State of Bonooru in their operation in Caeli Airways

18. Vemma discharged an essential governmental function through their operations in Caeli Airways. In order to sustain our argument, it is necessary to contextualize Vemma's investment considering Bonooru´s archipelagic State and Article 70 of Bonooru Constitution Act.

19. Due to Bonooru's archipelagic nature, comprising 109 islands, its major public facilities such as healthcare and educational institutions are concentrated on 4 major islands.[7] Recognizing the unique geography of Bonooru, Article 70 of the Constitution of the mentioned State establishes that Bonooru shall ensure that all their citizens are guaranteed travel to and from its many islands.[8] In the interpretation of the Constitutional Court of Bonooru this article "*imposes positive obligations on the State to enable citizens´ mobility through the archipelago*." [9]

20. Precisely one of Vemma´s objectives, as stated in Vemma´s MoA., is "h) to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population *in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities*;".[10] In other words, one of the main objectives for which Vemma was established is to operate in order to fulfill a positive obligation bestowed by art. 70 to the State of Bonooru.

21. Private entities do not regularly carry out obligations that are expressly bestowed upon States, even less so in a matter as unambiguous as Vemma did in its MoA. In this regard, the Tribunal in Maffezini v Kingdom of Spain recognized that

> "[H]ere a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is the **carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State**".[11]

22. This applies perfectly to our controversy, as one of Vemma´s objectives is the carrying out of a function that is bestowed to the State of Bonooru.

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[7] Statement of Uncontested Facts, ¶ 5.
[8] Constitution Act of Bonooru, 1947 Article 70(2).
[9] Consitutional Court of Bonooru on Privatisation of BA Holdings CCB Case No. 1981-17 ¶ 56
[10] Annex IV, Memorandum of Association of Vemma Holdings Inc., ¶ Article 3(h).
[11] Maffezini v Spain ¶ 77. Emphasis added.

23. Furthermore, this interpretation of the facts laid out in this case was confirmed by Claimant's authorities. The Constitutional Court of Bonooru stated that:

> "The provisional Memorandum of Association of Vemma Holdings Inc., the primary successor to BA Holdings, ensures that Royal Narnian will continue to operate routes to remote communities. The airline, as the flag carrier, will also continue to enjoy subsidies under Bonoori law for flights offered on routes of significance to mobility of disparate communities. Combined with Bonooru's continued, although minority, participation through Vemma Holdings Inc., we are sufficiently convinced that Bonooru will be able to **ensure the utilization of the Royal Narnian for public benefit**."[12]

24. Coincidently the then Primer Minister of Bonooru, on November 1989, declared in regards to Bonooru Air (Vemma's predecessor) privatization "*Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, **regardless of profitability***".[13]

25. The former head of Vemma's board of directors and now Secretary of Transport and Tourism of the State of Bonooru, Ms. Sabina Blue, corroborates our point as she expressly stated that Vemma's operations in Caeli Airways enhanced the mobility rights of Bonooru's population and that Vemma had lived up to the standards set by its predecessor in Bonooru.[14]

26. In accordance with their purpose, Vemma investment in Caeli Airways pursue the compliance of Article 70. Thus, their activity was not commercial in nature, rather it was governmental. The expectation of economic profit is an inherent feature of a commercial operation, and this was not present in Vemma's activity in Caeli Airways. As mentioned before, by their own authorities, Vemma was established to operate routes to all remote islands of Bonooru, **regardless of profitability**.

27. Vemma's operation of Caeli Airways reflected this purpose, as Vemma's proposed route expansion proved to be damaging for Caeli. The flying routes that Vemma implemented in their direction of Caeli Airways only benefitted the State of Bonooru and the mobility rights of their people, they made no commercial sense and there is plenty of evidence indicating this.

28. This was stated by a former high-ranking employee within Bonooru's Ministry of Tourism, Ms. Misty Kasumi. She affirms that these routes are not profitable for Caeli Airways and

[12] Consitutional Court of Bonooru on Privatisation of BA Holdings CCB Case No. 1981-17 ¶ 59. Emphasis added.
[13] Statement of Uncontested Facts, ¶ 8. Emphasis added.
[14] Procedural Order No.4 of September 1 2021 ¶ 6.

that the only real beneficiary in this operation is the State of Bonooru.[15] And the facts support her claim, as these routes became a source of economic losses for both Vemma and Caeli. Vemma's fall-winter losses in 2014 were particularly concentrated in the high-traffic routes between Bonooru and Mekar, but despite the losses that these routes were generating for both enterprises Caeli continued to perform them.[16]

29. Hence, Caeli Airways continued to operate routes that benefited only the State of Bonooru despite the economic losses that these routes where generating to both Caeli and Vemma. The lack of pursue of profit is incompatible with a commercial activity, and is in coincidence with a governmental operation of Vemma.

30. It is clear from the background leading to the constitution of Vemma that the intent of the government of Bonooru was to create an entity to carry out an essential governmental function. This was not only confirmed by the claimant´s authorities, but also by their economic operations in Caeli, pursuing routes despite of profitability in order to fulfill Article 70 of their Constitution. All of this facts, approached altogether, points towards a clear conclusion; Vemma was established to carry out a governmental function.

B. Vemma acted as an agent of the State of Bonooru

31. Bonooru controlled Vemma´s operations through a Controlling Minority Structure (CMS), owning a sizable stake of the shares throughout the investment period.

32. While it is true that Bonooru did not retain a majority of the shares throughout the investment period, that does not mean that Bonooru did not have effective control over Vemma. In this regard Feldman states that level of ownership does not always serve as a reliable indicator of level of control, this is because a variety of voting leverages mechanisms can be used to provide certain shareholders with a disproportionate amount of decision-making power.[17] That is to say that it is not imperative to be a majority shareholder in order to control an enterprise. Precisely, in this cases, since the minority shareholder also constitutes the controlling shareholder this regimes are referred as Controlling Minority Structure.[18]

[15] Annex VII, Phenac Business Today Podcast Transcript, 17 November 2014.
[16] Statement of Uncontested Facts, ¶ 33.
[17] FELDMAN P. 3.
[18] *SANG YOP KANG* P. 852.

33. Bonooru retained minority shareholding in Vemma, which ranged between 31% to 38% throughout the investment period. [19] Nevertheless, no other shareholder holds more than 7% stakes in Vemma, turning Bonooru in the shareholder with more amount of shares.[20] But, as we stated previously, the fact that Bonooru only retained 31% to 38% of the shares, does not mean that they were not a controlling shareholder.

34. Vemma's articles of incorporation require 50 % of voting shares for a quorum at regular meetings, which includes meetings for electing directors. Bonooru's representatives were present for every meeting. Therefore, due to the absence of other shareholders, in some meetings Bonooru's representatives even formed a majority and took the decisions in Vemma as they saw fit.[21]

35. While it is true that the only distinctive attribution provided to Bonooru by Vemma´s MoA is to select a non-executive Director,[22] this fact in combination with the decision-making mechanisms of Vemma, the fact that Bonooru funded Vemma through the Horizon 2020 Program[23] and that Vemma provided a public service regardless of profit, all indicate Bonooru as a controlling shareholder of Vemma.

36. As mentioned before, while Bonooru owned a sizable stake of shares throughout the investment period (31% to 38% from its date of incorporation until March 2021), no other shareholder holds more than 7% of the stakes in Vemma. This distribution of the stakes makes it extremely difficult for other shareholders to form a voting block against Bonooru´s voting rights. The fact that Vemma´s MoA requires 50% of voting shares for a quorum only emphasizes our argument.

37. The facts laid out previously, approached as a whole, prove that the standard of control has been reached. Bonooru, as the shareholder with the most amount of shares, was able to control Vemma's direction throughout their decision-making mechanism due to the absence of other shareholders in meetings. Additionally, as mentioned before, the distribution of Vemma´s stakes are extremely dispersed, which prevents other shareholders to form a voting block against Bonooru's representatives in Vemma.

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[19] Statement of Uncontested Facts, ¶ 10.
[20] Procedural Order No.4 of September 1 2021 ¶ 2.
[21] Procedural Order No. 3 of July 16 2021 ¶ 3.
[22] Memorandum of Association of Vemma Holdings Inc., ¶ 152.4.
[23] Procedural Order No. 4 of September 1 2021 ¶ 6.

III. THE COMPETITION COMMISSION OF MEKAR´S COURSE OF ACTION DID NOT AMOUNT TO A BREACH IN THE FAIR AND EQUITABLE TREATMENT STANDARD AS ESTABLISHED IN ARTICLE 9.9 OF THE CEPTA

38. In the year 2016, the CCM launched two separate investigations on Caeli Airways, the first one being *suo moto* and the second one resulting from a formal complaint brought by a consortium of direct competitors. The CCM conducted both investigations in compliance with the MRTP and its course of action by no means constituted a breach in the Fair and Equitable Treatment Standard.

1. The investigations and their subsequent results complied with due administrative proceeding and were not arbitrary or discriminatory

39. The claimant states that the actions taken by the CCM amount to a violation of article 9.9 of the CEPTA, and therefore a breach of the fair and equitable treatment standard. Case law has historically set a high bar when it comes to the requirements for a breach in the standard. The claimant lacks the proper legal foundation to claim a breach in the standard caused by the investigations, the fines or the caps given that the CCM not only acted within the parameters of due administrative proceedings but also never incurred in arbitrary or discriminatory doings.
40. The tribunal in *Al Tamimi vs Oman* stated that for a breach in the standard to be established, the state must act with a gross or blatant disregard for the basic principals of fairness, consistency, even-handedness, due process (referring to administrative decision making) or natural justice expected under international law. Furthermore, the tribunal found that the good-faith application or enforcement of a state´s regulations could not constitute a breach[24], even less so when such regulation addresses recognized public interests.
41. On a similar note, the *AES Summit v Hungary* tribunal explained that for an infringement of the standard the state had to incur in manifestly and unfair procedural omissions.[25] Moreover, as established in *Waste Management v Mexico*, the lack of due administrative process must lead to an outcome that offends judicial propriety, given a lack of transparency and candor.[26]

[24]Al Tamini v Oman, ¶ 390.
[25] AES v Hungary, ¶ 9.3.40.
[26] Waste Management v Mexico, ¶ 98.

As it shall be explained further below, the CCM's actions were consistent with local law, followed duly procedural rules and the judicial propriety of the alleged failure in administrative proceedings was correctly denied.[27]

42. When it comes to arbitrary measures, it is necessary to establish which conducts can be considered as such in order to visualize how the CCM never breached the standard in that regard. Firstly, the tribunal in *EDF v Romania* accepted Professor Schreuer´s parameters to identify a measure as arbitrary:[28] damage to the investment in the absence of legitimate purpose, that the measures are not based on legal standards but on the exercise of discretion, prejudice or personal preference; that the measure is taken for reasons other than those indicated by a decision maker or a willful disregard of due process. The CCM acted in the purpose of sustaining a competitive environment under the legitimacy of local law, its measures were based on legal standards[29] and in compliance with due administrative process.

43. Secondly, in *Cargill v Mexico* the purpose and goals of a measure were emphasized when assessing whether that measure was arbitrary or not. The tribunal stated that the state's action must constitute an unexpected and shocking repudiation of a policy's purpose and goals, or otherwise grossly subvert a domestic law or policy for an ulterior motive.[30] The fines and airfare caps imposed by the investigations were aligned with the very purpose of the CCM, as cited by the MRTP in its introduction,[31] and did not subvert domestic law.

44. Discrimination is promptly discarded given that the CCM imposed sanctions as a result of a conduct defined by law, with no regard of specific circumstances surrounding Caeli. In *Saluka v Czech Republic*, the tribunal stated that an action is discriminatory when a similar case is treated differently without a proper justification.[32] The definitions provided by the MRTP would apply in an equal manner with any market competitor, regardless of a lack of precedent.

45. Furthermore, the claimant does not address its own responsibility in the fines and caps imposed. Aside from the fact that ignorance of the law is no defense, the tribunal of *Maffezzini v Spain* rejected a claim on the grounds that an investor must take responsibility

[27] Statement of uncontested facts, ¶ 44.
[28] EDF v Romania, ¶ 303.
[29] Particularly those of the MRTP.
[30] Cargill v Mexico, ¶ 293.
[31] MRTP paragraph of introduction, ¶ 1590.
[32] Saluka v Czech Republic, ¶ 313.

for mistaken advice and management, accurately stating: "*Bilateral investment treaties are not insurance policies against bad business judgements".*[33] Caeli´s illegally aggressive strategies are what led to the investigations and ultimately the fines, in complete ignorance of the competition regulations in force.

46. Under the claimant´s administration, Caeli engaged in several reprehensible business strategies that led to the investigations. The fines and caps that followed were legal, performed under due administrative proceedings, were not arbitrary and not discriminatory either. With this taken into consideration, we can conclude that the fair and equitable treatment standard was not breached.

2. <u>The first investigation was initiated and conducted according to the MRTP and due administrative proceeding</u>

47. In the year 2016 the CCM initiated a *suo moto* investigation on Caeli under paragraph 2 of Chapter III of the CEPTA. Such investigation concluded that Caeli had breached the MRTP by engaging in anti-competitive actions. Such assessment was made in accordance to the MRTP and was not arbitrary or unfair to the Claimant.

48. The launch of the first investigation was based on subparagraph (a) of Chapter III of the MRTP, which grants the CCM the power to initiate an investigation when a corporation exceeds 50% of the market share. In this case the cooperation between Caeli and Royal Narnian consisting in secondary slot trading was grounds for the exercise of discretion,[34] not the mere fact that they compose an airline alliance, as the claimant may argue.

49. The exercise of discretion in this case is based on the fact that Caeli and Royal Narnian were incurring in the anti-competitive action described in subparagraph (h) of Chapter IV, given that they were making preferential trading of airport slots, which are a limited resource that is essential for an airline´s operation in a given airport.[35] Preferential trading has the only purpose of withholding a commodity from other market players, even more so when both parties are owned by the same company.[36]

[33] Maffezzini v Spain, ¶ 64.
[34] This prerogative is found in the second line of subparagraph (a), Chapter III.
[35] Pheasant, p. 2.
[36] Statement of uncontested facts, ¶ 10.

50. The exercise of such prerogative is duly justified, meaning that the launch of the investigation was made in perfect compliance with the MRTP, being based on legal premises rather than in arbitrariness or discrimination.

51. The investigation found a breach of subparagraph (i) of Chapter IV (Offences) of the MRTP, caused by predatory pricing and the reduction of fares below avoidable cost. Against Mekar Airservices' advice,[37] Caeli maintained an ill-advised business strategy based on the reduction of fares and the addition of destinations that ultimately drove competitors out of the market.[38] The investigation found that lowering prices well below their cost was only made possible because of the subsidies received under the Horizon 2020 program, which sustained the company's financial health up until 2017.

52. Lowering airfares below the avoidable cost while eliminating competitors from the market is the exact conduct reprehended by anticompetitive action (i) in the MRTP, and even if it was not, it can very well fit within the generality of the term, as provided by the MRTP.[39]

53. All in all, the first investigation was conducted in accordance to law, the CCM acted within its duties and the imposition of fines resulted from the correct application of the MRTP.

3. <u>The fine imposed by the second investigation was the result of Caeli´s unlawful business strategy</u>

54. Due to a formal complaint by competitors in 2016, the CCM launched a second investigation focused specifically on price undercutting on routes to and from Phenac International Airport. The investigation found that Caeli abused its dominant position on said airport to access privileges regarding service fees, which allowed them to undercut fares and push competitors out of the market consisting of routes to and from the airport, thus violating the MRTP.

55. More specifically, this business strategy did not bring new costumers to the routes to and from the airports, uncovering Caeli's true intention behind the strategy: driving competitors from this specific market. The investigation found that the same competitors who brought

[37] Statement of uncontested facts, ¶¶ 29, 31 and 35.
[38] This is explicitly established regarding the years 2014 and 2015 in the Statement of uncontested facts, ¶ 34.
[39] Many specific laws around the world prevent predatory pricing directly or indirectly, such as section 50 of the *Competition Act of Canada*, article 102 of the *Treaty on the Functioning of the European Union*, the *Competition Act of India*, section 19 and 20 of the *Act Against Restrains of Competition* of Germany and several different rulings in the US. Caeli´s predatory pricing strategy would be considered anticompetitive in any of these jurisdictions.

the formal complaint to the CCM back in 2016 were the same forcefully pushed out of the market by Caeli in the last decade, all because of this aggressive predatory business model that took advantage of an anticompetitive dominant position in the airport, with the advantage in operative service fees that such position entails.

56. This advantage in conjunction with the subsidies received under the Horizon 2020 program allowed the undercutting of prices, but this strategy remained even when Mekar's economy was hit by the MON depreciation, causing deep losses in Caeli´s operations in the last quarter of the decade.[40] This evidenced that Caeli continued to set fares well below their operative cost.[41]

57. Legally speaking, the undercutting of prices with the intention to push competitors out of a market is the exact conduct foreseen by the MRTP in subparagraph (i) of the paragraph of anticompetitive acts.

58. The fines imposed as a result of the second investigation were an adequate application of law in the aim of promoting competition and punishing those who hinder other investments unfairly.

4. The fines applied as a result of both investigations do not amount to a breach of the obligation of fair and equitable treatment under Chapter 9.9 of the CEPTA

59. Following the cited tribunal decisions, we can conclude that the imposition of fines do not constitute a breach of the fair and equitable treatment standard contained in the CEPTA. This is explained by the fact that they meant a fair and good-faith enforcement of the MRTP, with no procedural omissions and with no sings of a lack of transparency. Moreover, the judicial propriety of the matter was officially denied,[42] the CCM acted under the legitimate and legal[43] purpose of preventing practices with an adverse effect on competition, all with the observance of due administrative proceeding, discarding arbitrariness in its course of action.[44] Caeli acted knowingly against local law and was punished accordingly, therefore

[40] This precarious financial situation drove Caeli to the verge of bankruptcy in 2019, as evidenced in the Statement of uncontested facts, ¶¶ 40, 51 and 55.
[41] The Price undercutting strategy did not create new costumers and haltered revenues, as indicated by ¶ 49 of the Statement of uncontested facts.
[42] Statement of uncontested facts, ¶ 54.
[43] Introduction to the MRTP, Annex V.
[44] This assessment aligns with the cited awards, including *Al Tamimi v Oman, AES Summit v Hungary, EDF v Romania* and *Cargill v Mexico.*

the Respondent complied with its obligation to grant fair and equitable treatment to the Claimant´s investment.

B. Mekar complied with its obligation not to deny justice to Vemma

60. Mekar administered its judicial system accordingly, and its conduct did not amount to a denial of justice. The evidence on record illustrates that Vemma had access to Mekari courts, and made use of multiple administrative and judicial resources. The procedures that involved them were resolved in due time, and the decisions were prompt and adequate.

61. According to article 9.9 of the CEPTA, the obligation of FET is breached if a measure or measures constitute a denial of justice. In this regard, it must be analyzed strictly in light of customary international law, as tribunals have acknowledged that the protection against denial of justice mentioned in FET clauses is not broader than that of the customary standard.[45] The threshold for denial of justice to entail state responsibility remains high[46]. The denial of justice has been associated with minimum standards of administration of justice, including denial of access to courts, undue delays, disregards of due process and gross defects in the content of the judgement.

62. In the present case, the absence of measures that constitute a denial of justice signifies that Vemma has been afforded FET, in this regard. Vemma had free access to the courts, the procedures being resolved in due time **(1)**; if this tribunal considered that there were delays, it should note that these would be justified in light of all circumstances**.** Such procedures were also conducted in respect of due process **(2)**: the administrative proceedings were transparent (2.1), and the judicial procedures complied with the standard of due process, there being no proof of bias (2.2). Vemma shall not argue that the decisions had gross defects, because they were taken responsibly and within a range of discretion **(3)**. This tribunal does not have competence to review decisions that were taken in accordance with national and international law; even if it considered them inadequate, a mere error of a court cannot constitute a denial of justice *ipso facto*.

[45] Chevron Corporation &. Texaco Petroleum Company v The Republic of Ecuador II, ¶ 8.24.

[46] Chevron Corporation &. Texaco Petroleum Company v The Republic of Ecuador I ¶ 244; Al-Warraq v Indonesia, ¶ 620; White Industries Australia Ltd. v India, ¶ 10.4.5.

1. The Judicial Procedures were conducted and resolved by Mekar in due time

63. In light of all the available facts, Mekari courts took an adequate time to resolve the disputes in which Vemma was involved. These proceedings embedded matters of high complexity, and Vemma's need for celerity was not extraordinary. Furthermore, Vemma itself contributed to the eventual delays. Despite the fact that Mekar is a developing country, its system of justice being stressed by overcharged dockets, the courts resolved the disputes in due time, and even faster than in most of its commercial cases.

64. An undue or unreasonable delay requires an appreciation of all circumstances so as to be considered an international delict.[47] These include the complexity of the matter, the need for celerity and the diligence of the claimant in prosecuting its claim.[48] The Tribunal can also take into consideration the circumstances that affect the court docket in the particular country.[49] In White Industries, the Tribunal considered it relevant to bear in mind that India was a developing country with huge population, and a "*seriously overstretched judiciary*".[50] In this case, the claimant had sought to enforce a commercial arbitration award in 2002, and in spite of the lack of inactivity of the Indian Courts, the case was filed in 2010. However, the circumstances led the Tribunal to reject the denial of justice claim.

65. It is also crucial to distinguish the main difference between the undue delays encompassed in the concept of denial of justice, and that of a provision to provide effective means, which is not expressly included in the CEPTA. The Chevron Tribunal has stated that the effective means "*constitutes a lex specialis and not a mere restatement of the law on denial of justice*".[51] The denial of justice standard is a stringent one, the effective means being less demanding than the former.[52]

66. Here, the judicial procedures embedded highly complex matters. First, the judicial review of the airfare caps and fines imposed by the CCM, had to be analyzed in the light of the MRTPA, which authorized it to impose interim and final remedies under certain circumstances. The parties engaged in an intense debate with respect to the interpretation of

[47] McLachlan, Shore and Weiniger, p. 300.
[48] Toto v Lebanon, ¶ 163, Kerderi v Ukranie, ¶ 459; McLachlan, Shore and Weiniger, p. 300.
[49] McLachlan, Shore and Weiniger, p. 300.
[50] White Industries Australia Ltd v India, ¶ 10.4.18
[51] Chevron Corporation &. Texaco Petroleum Company v The Republic of Ecuador I, ¶ 242.
[52] White Industries Australia Ltd v India, ¶¶ 10.4.5 and 11.3.2

the regulatory framework and the evidence on record. Second, the enforcement of the award had to be carefully analyzed because, even though it had been set aside at the seat of the arbitration, the courts retained a discretion to decide the matter, as will be expounded further below.

67. In this context, Vemma did not have an extraordinary demand for celerity, as is reflected by its lack of diligence in the prosecution of the claims. Indeed, it has recognized that, when implemented (September, 2016), the airfare caps were reasonable,[53] and it did not seek their judicial review until 27 March, 2018.[54] Moreover, Vemma was intended to delay the enforcement of the fines,[55] and these could not be enforced pending court review.[56] In any case, while it initiated this procedure on 20 January, 2019, it sold its stake in Caeli before the hearing that was scheduled in May 2020.[57] Additionally, Vemma objected to the enforcement of the award, so it clearly did not have any interest in the celerity of such procedure.

68. Finally, this Tribunal should take into account the following circumstances that affected the courts' docket: (a) Mekar is a developing country that has suffered from recent political, social and economic crisis; [58] (b) it has seen very significant growth in its population, in a very short period of time, which made it impossible for the judiciary to expand at the same rate; [59] and (c) this made it necessary to prioritize criminal cases, due to their "*far-reaching consequences*"[60]. However, the above-mentioned procedures were resolved speedily: the review of the airfare caps was decided in 14 and a half months. In contrast, commercial matters took a period of approximately 22 months.[61] This supports the argument that Mekar complied with the FET obligation in good faith.

69. For the above-stated reasons, the judicial procedures were resolved in an adequate time. The eventual delays would be justified in light of all circumstances, and could not possibly

[53] Notice of Arbitration, ¶ 15
[54] Statement of Uncontested Facts, ¶ 44.
[55] Statement of Uncontested Facts, ¶ 45.
[56] Statement of Uncontested Facts, ¶ 50.
[57] Statement of Uncontested Facts, ¶ 50.
[58] Statement of Uncontested Facts, ¶ 12.
[59] Statement of Uncontested Facts, ¶ 13.
[60] Statement of Uncontested Facts, ¶ 44.
[61] Statement of Uncontested Facts, ¶ 13.

constitute a denial of justice. IIA tribunals have considered that, in similar circumstances, much longer delays did not amount to such international wrong..

2. Mekar performed due process in both administrative and judicial procedures

70. Mekar did not deny justice to Vemma because it conducted the administrative and judicial procedures in compliance with due process. Indeed, the first of these were carried out with transparency (*a*), and the latter were also impartial and accorded Vemma its procedural rights (*b*). None of the facts that may be invoked by the claimant could amount to a fundamental breach of transparency or due process.

71. Pursuant to article 9.9 (b) of the CEPTA, the FET obligation is breached if a measure or measures constitute "*a fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings*". In addition, authorities recognize that fundamental breaches of due process are a central concern of denial of justice.[62] However, an ordinary violation of due process does not occasion a denial of justice, by itself.[63] In this sense, the addition of a qualifier, such as *fundamental*, impacts on the intensity of the review, leaving a margin of appreciation to the original decision-maker.[64]

72. As will be expounded further below, none of the measures that might be referred to by Vemma meet the threshold for constituting a fundamental breach of due process, and nor do they constitute a denial of justice.

(a) The administrative procedures were conducted by the CCM in respect of due process.

73. Mekar performed due process in the administrative procedures, as they were carried out transparently by the CCM. Although Vemma knew the regulatory framework and was given the chance to comply with it, it deliberately chose not to do so. In addition, the CCM's decisions were consistent, and did not entail any arbitrariness; conversely, its rationale was bound to the MRTPA, and was sufficiently exposed. Furthermore, Vemma's claim may only

[62] The Loewen Group, Inc. and Raymond L. Loewen v United States of America, ¶ 132; Mondev International Ltd. v United States of America, ¶ 127; Paulsson, p. 59; McLachlan, Shore and Weiniger, p. 297; Newcombe and Paradell, pp. 240-41.
[63] See Iberdrola Energía S.A. v Republic of Guatemala, ¶ 448.
[64] Campbell McLachlan, Laurence Shore, Matthew Weiniger, p. 280

be aimed towards an alleged breach of national law, whereas this does not imply that it was not afforded due process in accordance with the standard construed by international law.

74. The standards of due process and procedural fairness in administrative procedures are lower than that of a judicial process.[65] First, the *Waste Management II* tribunal understood lack of due process in administrative proceedings as a "*complete lack of transparency and candor*", leading to an outcome that offends judicial propriety.[66] Accordingly, a certain lack of transparency that relates to the complexity of the regulation, does not involve a breach of FET; "*the standard is not one of perfection*."[67]

75. In *Mondev*, arbitrary conduct was equated to a willful disregard of due process "which shocks, or at least surprises, a sense of judicial propriety."[68] From the *due process approach,* arbitrariness can also be determined by applying a proportionality test: only if the governmental measure has been justified in a way that does not correspond with its underlying policy, will the measure be arbitrary.[69] The determination oughts to be made in light of the the right of domestic authorities to regulate matters within their own borders.[70] The CEPTA contains the right to regulate in article 9.8.

76. Here, Vemma was well aware of the regulation that prohibited anti-competitive actions (the MRTPA) and that it would be sanctioned in the event of a failure to comply with such policy. First, Vemma was "*sufficiently notified that any anti-competitive behaviour would be subject to the review of the CMM*"[71]. Furthermore, the CCM dully submitted its preoccupation that Caeli "*would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance member*".[72] For this reason, as soon as Caeli's market share increased, in the context of potentially anti-competitive practices, the CCM launched a *suo-moto* investigation and placed airfare caps as an interim measure. These concerns included evidence of preferential

[65] International Thunderbird Gaming Corporation v The United Mexican State, ¶200; Diehl, p. 439; Campbell McLachlan, Laurence Shore, Matthew Weiniger, p. 318.
[66] Waste Management, Inc. v United Mexican States, ¶ 98.
[67] AES Summit Generation Ltd v Hungary, ¶ 9.3.40.
[68] Mondev International Ltd. vUnited States of America, ¶ 127
[69] Diehl, p. 454.
[70] S.D. Myers, Inc. v Government of Canada, ¶ 263
[71] Response to the Notice of Arbitration, ¶ 12.
[72] Statement of Uncontested Facts, ¶ 25.

secondary slot-trading with its fellow Moon Alliance member, Royal Narnian, and the use of foreign subsidies as means to undertake a predatory pricing strategy.[73] Caeli did not protest the airfare caps,[74] and Vemma has recognized that they were reasonable.[75]

77. The investigation and the airfare caps were implemented in accordance with the MRTPA, and was not arbitrary. The CCM used this discretion to consider Royal Narnian and Caeli´s market shares in conjunction, which cumulatively exceeded the 50% requirement, due the above-mentioned concerns; in particular, the threat of driving out smaller competitors.[76] This rationale was dully exposed and later approved by a competent Mekari judge.

78. In light of these circumstances, maintaining the airfare caps and establishing a penalty were obvious and necessary consequences of the infringement found by the CCM. Moreover, the second investigation was initiated at the request made by another competitor,[77] pursuant to the MRTPA, and additional fines were imposed as a result of Caeli´s anticompetitive behavior in Phenac International Airport.[78]

79. In conclusion, it cannot be argued that the measures were arbitrary or non-transparent, because they were decided under the MRTPA, and thus rooted in the objectives of the underlying public policy. In any case, it cannot meet the threshold for constituting a fundamental breach of transparency; the CCM applied the law, and used its powers accordingly, as had been opportunely warned to Vemma. Even if this Tribunal found it to be erroneous, it cannot shock a sense of judicial property; as was confirmed by Judge VanDuzer, the CCM´s decision was "*within a range of potentially reasonable conclusions, given the facts before it*."[79]

80. A mere desire to be treated fairly and equitably, or in regard of due process, does not constitute a legitimate expectation; these are circular arguments.[80]

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[73] Statement of Uncontested Facts, ¶¶ 36-37.
[74] Statement of Uncontested Facts, ¶ 37.
[75] Notice of Arbitration, ¶ 15.
[76] Statement of Uncontested Facts, ¶ 36.
[77] Statement of Uncontested Facts, ¶ 38.
[78] Statement of Uncontested Facts, ¶ 49.
[79] Statement of Uncontested Facts, ¶ 54.
[80] Crystallex v Venezuela, ¶551 ; Diehl, p. 432.

(b) The judicial procedures complied with due process

81. Mekar's judiciary afforded Vemma its due process rights. The procedures were impartial and resolved in due time. Conversely, in light of the evidence on record, Vemma could not establish a fundamental breach of due process.

82. In assessing if due process was accorded, tribunals have examined different circumstances, including whether the State complied with its own procedural rules, and have set a high threshold for such claims;[81] "*the modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice*."[82] Procedural errors must amount to "*such a manifest disrespect of due process that they offend a sense of judicial propriety*"[83], and the claimant has the burden of proof .[84]

83. In the present case, Vemma could not prove an allegation of a fundamental breach of due process. First, the disputes that engaged Caeli and the CCM were unbiased. The judge's decision to dismiss the merits without appeal, due to the lack of chances of success, was made pursuant to Executive Order 5-2014.[85] The judge acknowledged that the matter gave effect to a range of potentially reasonable conclusions, and took into account Caeli´s economic position.[86] As a result, the judge decided to approve the investigation and the airfare caps. There is no evidence of impartiality or bias in this regard. Furthermore, Caeli's pleas were heard, and the matter was resolved in due time.

84. Second, the enforcement of the award also complied with due process. As will be addressed in the following section, the allegation of bribery in the commercial arbitration has not been sufficiently proved, which is why the courts appropriately exercised their discretion to enforce the award, despite the fact that it was set aside at the seat of the arbitration. In any case, that proceeding was alien to Mekar's judiciary, as the seat of the arbitration was in Sinnoh.

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[81] Sabahi and Rubins, p. 672
[82] Paulsson, p. 60
[83] See Arif v Moldova, ¶447
[84] Campbell McLachlan, Laurence Shore, Matthew Weiniger, p. 304.
[85] Procedural Order no. 3, ¶ 8
[86] Statement of Uncontested Facts, ¶ 54.

3. The judicial decisions were not defective, and they are not subject to review by this Tribunal

85. The judicial decisions respected national and international law. On one hand, Judge VanDuzer´s decision was taken pursuant to the MRTPA and Executive Order 5-2014, and does not manifest any impartiality. On the other hand, the courts exercised appropriately the discretion to recognize and enforce a commercial award that was set aside at the seat of the arbitration. This tribunal does not have the authority to review these decisions.

86. The 1929 Harvard Draft on *The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners* is well-known for indicating that an error of a national court shall never constitute a denial of justice *ipso facto*. Accordingly, the *Loewen* Tribunal stated that "*[t]oo great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself*".[87] Moreover, there is a *jurisprudence constante* in the sense that IIA tribunals are not courts of appeal.[88] On the contrary, as mentioned in *Mondev,* there must be a shock or surprise that leads an impartial tribunal to "justified concerns as to the judicial propriety of the outcome", as may happen in light of a "clearly improper and discreditable" decision.[89] The *Chevron* Tribunal developed further this idea, arguing that "*a court is permitted a margin of appreciation before the threshold of a denial of justice can be met*".[90] In this sense, it has been held that "*[i]t would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if '[a] simple difference of opinion on the part of the international tribunal is enough' to allow a finding that a national court has violated international law.*"[91]

87. Here, for the reasons stated in the previous section, Judge Van Duzer´s decision could not be considered "*clearly improper and discreditable*". In regard to the enforcement of the

[87] Loewen v USA, ¶ 242

[88] Mondev International Ltd. vUnited States of America, ¶ 118. Loewen v USA, ¶ 242; Arif v Moldova ¶ 441; Waste Management Inc. v United Mexican States, ¶ 129; Chevron Corporation &. Texaco Petroleum Company v The Republic of Ecuador II, ¶ 4.100; Pantechniki v Albania ¶ 94; Mamidoil v Albania, ¶¶ 764-770; see Kinnear and Doak Bishop, p. 305.

[89] Mondev International Ltd. vUnited States of America, ¶ 118; See Paulsson, p. 72

[90] Chevron Corporation &. Texaco Petroleum Company v The Republic of Ecuador II, ¶ 8.42

[91] Arif v Moldova ¶ 441

award that had been set aside at the seat of the arbitration, the issue must be analyzed in light of the discretion granted by section 36 of the Commercial Arbitration Act (which is based on article 36 of the UNCITRAL Model) and article V of the New York Convention. This regulation envisages that the recognition and enforcement of awards *may* (but not *must*) be refused on certain grounds, including the fact that it has been set aside at the seat of the arbitration. Authorities have argued that such provisions are "*unambiguously permissive*"; its structure establishes an affirmative obligation to recognize and enforce awards, subject to specified exceptions – but they do not establish an affirmative obligation to deny recognition or enforcement.[92] The courts retain the authority to enforce the award.

88. The Mekari courts exercised appropriately the discretion to enforce the annulled award, owing to the lack of proof on the event of bribery. Indeed, although the Supreme Arbitrazh Court of Sinnogard decided to set aside the award on the grounds of conflict with its public policy, it remained skeptical towards the evidence presented by Vemma, and the Courts had to evaluate whether the enforcement of the award would have offended the public policies of Mekar. English Courts have developed a similar rationale, known as the *"Preferred Approach"*.[93] Moreover, acknowledging the discretion provided by the above-quoted regulation, it has been argued that:

> "It is highly questionable whether an award that was annulled in the place of arbitration specifically on the ground of non-arbitrability or violation of public policy of that place should, for that reason alone, become categorically ineligible for recognition or enforcement in a jurisdiction whose rules of non-arbitrability and public policy would not be offended by the award´s recognition of enforcement (and whose public policy may actually be offended by a failure to enforce)."[94]

89. In this sense, the courts of Mekar correctly interpreted that there had not been sufficient evidence on the event of bribery, and thus it would have been manifestly unjust to refuse the enforcement of the award; in fact, it would be contrary to its own public policy. The Supreme Arbitrazh Court of Sinnograd acknowledged that it could not "*conclusively rule on whether*

[92] See Born, p. 3742
[93] Živković
[94] Bermann, p. 414

the act of bribery had in fact taken place".[95] Thus, this was a highly debatable matter.. The Superior Court of Mekar consistently established a high standard for refusing the enforcement of award on the grounds of contrariness to public policy.[96] It is important to note that the main evidence weighing in Vemma's favor had been released by the CILS. This organization has been understood as *"an entity funded by foreign donations to interfere in Mekar's domestic affairs*", and its foreign funding is being investigated.[97] Hence, the Mekari courts' suspicions regarding the validity of such evidence, which led them to enforce the award, in an appropriate use of the discretion granted by national and international law.

90. To conclude, the procedures in which Vemma participated embedded serious controversies on highly debatable topics, and the judicial decisions must not be interpreted as international wrongs, owing to a mere difference of opinion.

IV. THIS TRIBUNAL SHOULD NOT GRANT VEMMA'S REQUEST FOR FULL COMPENSATION IN THE AMOUNT OF FAIR MARKET VALUE OF ITS INVESTMENT

91. Vemma seeks compensation for 700 Million USD corresponding to the "fair market value" ("**FMV**") of the investment before the violation by Mekar, according to both principles of international law and the most favored nation obligation contained in CEPTA[98].

92. This Tribunal should not grant Vemma's request for full compensation in the amount of FMV of its investment because **(A)** Mekar Has No International Obligation to Compensate Vemma for Damages and **(B)** Clause 13 of the Arrakis-Mekar BIT cannot be imported into CEPTA. Alternatively, in case the Tribunal finds Mekar reliable then **(B)** the Tribunal should reduce any compensation awarded considering Vemma's contributory fault and the ongoing economic crisis in Mekar

[95] Vemma v Mekar, ¶ 11
[96] High Commercial Court of Mekar, ¶ 5.
[97] High Commercial Court of Mekar, ¶ 13.
[98] Notice of Arbitration, ¶ 29.

A. The obligation of a State responsible for internationally wrongful acts to make reparation does not arise automatically

93. Mekar does not dispute that in the absence of rules in the BIT that regulate compensation for violations of its standards of protection, compensation is established according to the principles applicable to customary international law. According to these principles *"[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*"[99]

94. In any case, the obligation of a State responsible for internationally wrongful acts to make reparation does not arise automatically. In words of the Tribunal in Rompetrol v. Romania, the Claimant "*must, as a matter of basic principle [...] prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach*"[100]. At no time does Vemma prove either the existence of an injury or that it was caused by Mekar's allegedly internationally wrongful acts.

95. The International Law Commission has clarified that a State is only liable for "*any damage [...] caused by the internationally wrongful act of a State*".[101] This position has been reaffirmed in investment arbitration. The tribunal in *S.D. Myers v. Canada* explained that "*compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached; the economic losses claimed […] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes*". [102]

96. The tribunal in *LG&E v. Argentina* explained that the determination of the reparation owed by the State was preceded by the identification of the "actual loss" suffered by the investor "as a result" of the Respondent's conduct.[103] For this, the tribunal asked: "*what did the investor lose by reason of the unlawful acts*?"[104]

[99] Article 31 of Articles on Responsibility of States for Internationally Wrongful Acts.
[100] Rompetrol Group v. Romania, ¶190.
[101] International Law Commission commentary to Article 36 (3).
[102] S.D. Myers, Inc. v. Government of Canada, ¶ 316.
[103] LG&E v. Argentina, ¶45.
[104] Ibídem.

97. Under international law, the answer to this question requires (a) to demonstrate a sufficient nexus between the internationally wrongful act and the injury in question[105], and (b) in turn, that this nexus is not indirect, or remote.[106] Therefore, the answer requested by international law; the standard of causation, is constituted by the factual requirement that the injury would not have occurred, "*but for*" the internationally wrongful act,[107] and the legal requirement that such act was the "actual" and "proximate cause" of the injury.[108]

98. In addition, not just any evidence is sufficient to meet the causation standard described above. Vemma is required to prove with reasonable certainty, based on of sufficient and cogent evidence, that Respondent caused its financial performance to decline, and to exclude from its damages claim losses resulting from any other likely cause.[109] As explained below, Vemma does not meet this standard.

99. In particular, Vemma claims "700 Million USD in compensation corresponding to the "fair market value" of the investment prior to the violation by Mekar, according to both principles of international law and the most favoured nation obligation contained in CEPTA"[110] However, according to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts "*[t]he fundamental concept of 'damages' is ... reparation for a loss suffered* ".[111] In the words of the Permanent Court of International Justice ("**PCIJ**") compensation under international law means: "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained".[112]

100. In this case, the compensation sought by Vemma is not the "loss suffered" by it, as its investment lost all its value due to the fault of its penetration pricing strategy. Vemma took an extravagant approach to its investing activities, funneling assets into quick development and poorly-planned business plans rather than focusing on long-term financial stability. It

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[105] *See* Joseph Charles Lemire v. Ukraine, ¶163: "the positive aspect requires that the aggrieved party prove that an **uninterrupted and proximate logical chain leads from the initial cause** (in our case the wrongful acts of Ukraine) **to the final effect** (the loss in value of Gala)" (emphasis added)
[106] Biwater Gauff v.Tanzania, ¶785.
[107] Elsi case, ¶101.
[108] Biwater Gauff v.Tanzania, ¶ 787.
[109] B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia, ¶1121.
[110] Notice of Arbitration, ¶ 30.
[111] Article 36(3), Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Comission of the United Nations.
[112] Chorzów Factory Case.

did so despite obvious warnings from Mekar officials on Caeli Airways' board of directors[113]. Therefore, no "sum" nor "damages for the losses suffered" would correspond to Vemma. All of the above is because the loss of its investment was only nominal, not a "loss suffered" subject to compensation. Vemma had to sell its shares in Caeli before they became worthless. The above principle has been upheld and applied in investment arbitration; particularly in the assessment of the financial value of shares in companies, such as those of Vemma in Caeli.[114]

101. In conclusion, Mekar has no obligation to compensate Vemma for damages because Vemma never proved their existence, illicitness, or causal link with the specific CEPTA provision that supposedly has been breached.

B. In any case, Vemma's damages were not caused by Mekar but only for its own extravagant and ill-advised approach to its investment activities

102. In Vemma failed to prove the causal link between the alleged damages and the specific CEPTA provision that was supposedly breached by Mekar because its risky business choices are the only reason that lead to its destroyed investment.
103. As demonstrated, the existence of an injury representing a "loss" is not sufficient for the Tribunal to order the payment of compensation as a form of reparation for the damage caused by an internationally wrongful act. Moreover, Vemma must prove that such damage was caused precisely by the internationally wrongful act in question.
104. The decision of the tribunal in *B3 v. Croatia* is particularly relevant to the facts of this case. In that decision, even though the tribunal had already concluded on the international responsibility of the State, it rejected the claim for damages allegedly caused by the latter, since the claimant's financial situation "*had started to deteriorate prior to [the State] unlawful conduct*" in question.[115] Here, likewise, the loss of value of Vemma's shares in Caeli was not due to Mekar's actions.
105. Mekar rather caused the rescue of Vemma from the fate of failure to which it had arrived as a consequence of its risky business choices. Given Vemma's knowledge of the airline sector

[113] Response to the Notice of Arbitration, ¶ 11.
[114] Of particular relevance is the recent decision of the Tribunal in Carlos Ríos and Francisco Ríos v. Republic of Chile, ¶¶ 11-15.
[115] B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia, ¶1121.

in its home state and around the world, it could not have been unaware of its volatility. Despite this, the Claimant took a lavish approach to its investing activities, funneling assets into quick development and poorly-planned business plans rather than focusing on long-term financial stability. Once again, we reaffirm to the Tribunal the fact that Vemma did so despite obvious warnings from Mekar officials on Caeli Airways' board of directors[116].

106. At the time of the critical date of the violations alleged by Vemma, it still enjoyed a considerable market share in Mekar, which would have allowed it to make quick recoveries when the crisis abated. The Claimant not only ran Caeli Airways into the ground, but it also left the company on its own volition. Government officials from Bonooru have repeatedly put pressure on Mekar to treat the Claimant favorably during the course of the Claimant's investment. They have threatened to withhold cash pledged as part of the Caspian Project to reconstruct Phenac's port. The current claim is clearly revenge for Mekar's reluctance to budge on Bonooru's demands, and it must be dismissed as unfounded.[117]

107. Thereafter, Vemma failed to prove the causal link between the alleged damages and the specific CEPTA provision that was supposedly breached by Mekar because its risky business choices are the only reason that lead to its destroyed investment. The existence of an injury representing a "loss" is not sufficient to order the payment of compensation as a form of reparation for the damage caused by an internationally wrongful act. Vemma fails to prove this.

C. Vemma only calculates expropriation damages

108. Vemma claims compensation equivalent to the FMV of its investment[118] but under customary international law, the FMV serves as a basis for calculating compensation only for internationally wrongful acts that have expropriatory effects.

109. The FMV is applicable for "*compensation reflecting the capital value of property taken or destroyed*", *i.e.* that suffered expropriatory effects.[119] This is, the FMV only applies to calculate compensation for internationally wrongful acts that had expropriatory effects such as, for example, depriving title to the property, making its use impossible, or destroying its

[116] Response to the Notice of Arbitration, ¶ 11.
[117] Response to the Notice of Arbitration, ¶18.
[118] Notice of Arbitration, ¶30.
[119] Kantor, p. 52 (2008); Tenaris and Talta v. Venezuela, ¶396.

value. International arbitration has confirmed the above, rejecting the FMV to assess the amount of compensation when the internationally wrongful act does not have expropriatory effects.[120]

110. In conclusion, the FMV standard is not applicable to Vemma's claim. And, fatally, Vemma does not provide an alternative valuation method for breaches that had non-expropriation effects. Accordingly, relief for such alleged damages should be denied.

D. Clause 13 Of The Arrakis-Mekar Treaty Cannot Be Imported Into CEPTA

111. Clause 13 of the Arrakis-Mekar BIT cannot be imported into CEPTA because there is already a provision in the latter that determines the compensation standard: the market value.
112. This would imply eliminating a provision that already exists in the BIT and replacing it with another, without Vemma having proven that the already existing clause in the CEPTA is less favorable than the one it wants to import.
113. Importing a new rule of protection into the main treaty is one of the various ways to invoke MFN. In other words, investors request the tribunal to add a new provision to their own BIT that they can use to claim that the host state has breached it. Mekar does not reject the possibility to import, but this is not the case to make it possible.
114. In the CEPTA, there is a clause that determines the standard of valuation of damages, in Article 9.21. However, Vemma as an investor needs to prove that the compensation clause in the CEPTA is less favourable that clause 13 in the Arrakis-Mekar BIT[121] and failed to do so. This goes hand in hand with what has already been stated about the causal link, which Vemma also failed to prove.

[120] Joseph Charles Lemire v. Ukraine, ¶148: "[t]he BIT establishes the rule that compensation for expropriation is to be based on "fair market value" of the investment; this principle, however, is of little use in the present arbitration, because the breach does not amount to the total loss or deprivation of an asset. Gala Radio still exists and Claimant still owns it: compensation thus cannot be based on fair market value of assets expropriated".
[121] *In this regard, see* ADF Group Inc. v. United States of America.

E. Alternatively, in case the Tribunal finds Mekar reliable the Tribunal should reduce any compensation awarded considering Vemma's contributory fault and the ongoing economic crisis in Mekar

115. In case the Tribunal finds Mekar owes compensation for damages to Vemma, any compensation awarded should be reduced considering Vemma's contributory fault and the ongoing economic crisis in Mekar.

116. When a Claimant's conduct materially contributed to its loss, the contributory fault principle allows the Tribunal to apportion liability between the Claimant and the Respondent. This principle is recognized in international law, and it is generally accepted that the conduct must be willful or negligent[122].

117. Article 39 of the ILC Articles provides as follows: "*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*".[123] The Commentary to the ILC Articles explains that such acts or omissions "*manifest a lack of due care on the part of the victim of the breach for his or her own property or rights*" and that the standard of negligence should be "*serious*" or "*gross*".[124]

118. MTD v. Chile is an example of its applicability. The tribunal found that Chile had breached the treaty in this case, but also that the claimant contributed to its own loss by purchasing the property in question before getting the necessary permissions for the project.[125]

119. Mekar has had a difficult time regaining economic stability. The colonial Pevensian administration in Mekar has focused its industrial-development efforts in this underpopulated and resource-rich province since the mid-1920s, resulting in a significant influx of migrants from neighboring rural provinces. Mekar's economy has suffered since the fall of the Pevensian empire, since both people and resources have departed the country. As a result, Mekar has taken a cautious approach to economic governance in the post-independence period. While Mekar has welcomed foreign investment since 1994, it has been

[122] Craig Miles and David Weiss, p. 99-10.
[123] Article 34(12), Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Comission of the United Nations.
[124] International Law Commission commentary to Article 39 in Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (5).
[125] MTD v Chile, ¶¶ 242-246. *In the same regard, see* Yukos v. Russia, ¶¶ 1594-1637; Marboe pp. 123-124.

careful not to jeopardize its ability to control its own affairs. Vemma inherited debt issues related with Caeli Airways when it invested in the Mekar area in 2011. Despite this, the Claimant took an extravagant approach to its investing activities with its penetration pricing method rather than focusing on long-term financial stability.[126]

120. When the economic downturn hit Mekar, it was because of this risky approach that Vemma found itself in this catastrophic financial situation. For this reason, in case the Tribunal finds Mekar owes compensation for damages to Vemma, any compensation awarded should be reduced considering Vemma's contributory fault and the ongoing economic crisis in Mekar

V. REQUEST FOR RELIEF

121. Respondent respectfully requests the Arbitral Tribunal:

- DECLARE that it has no jurisdiction to hear the disputes submitted by Claimant under the CEPTA treaty.

- If the Tribunal find it has jurisdiction to hear this case:

a. Find that the impugned conduct is not attributable to Respondent.
b. Find that Respondent complied with the FET Standard and therefore has not violated Article 9.9 of the CEPTA.
c. Find Respondent owes Claimants´ no compensation.

- AWARD the Respondent all costs and fees of these proceeding and ORDER Claimant to bear the cost of the Tribunal.

[126] Response to the Notice of Arbitration, ¶¶ 7- 18.