ARBITRATION UNDER

CHAPTER 9 OF THE BONOORU -

MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT,

ICSID ARBITRATION RULES (ADDITIONAL FACILITY)

TEAM GRAY

VEMMA HOLDINGS INC.

(Claimant)

v.

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

ICSID CASE NO. ARB(AF)/20/78

MEMORANDUM FOR RESPONDENT

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LIST OF ABBREVIATIONS

¶ /¶¶	Paragraph(s)
AF	Additional Facility
BIT	Bilateral Investment Treaty
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
Cf.	Confer (see)
CILS	Centre for Integrity in Legal Services
CMP	Mekar's Common Man Party
CRPU	Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
First Investigation	CCM first investigation into Caeli's activities
IIA	International Investment Agreement
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commissions' Draft Articles on State Responsibility
Lapras	Lapras Legal Capital
LPM	Labourers' Party of Mekar
Mekar	Federal Republic of Mekar
MFN	Most Favored Nation
Monopoly Act	Monopoly and Restrictive Trade Practice Act
NofA	Notice of Arbitration
NYC	New York Convention
p/pp.	Page(s)
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
RNofA	Response to the Notice of Arbitration
Second Investigation	CCM second investigation into Caeli's business activities
SHA	Shareholders' Agreement relating to Caeli Airways

SofUF	Statement of Uncontested Facts
Statute of the ICJ	Statute of the International Court of Justice
Vemma	Vemma Holdings Inc.
VCLT	Vienna Convention on the Law of Treaties
1994 BIT	1994 Bonooru – Mekar BIT

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STATEMENT OF FACTS

1. The Parties to this arbitration are Vemma Holdings Inc. ("CLAIMANT") and the Federal Republic of Mekar ("RESPONDENT").

2. CLAIMANT is an airline holding company incorporated in Bonooru, a developing country which sits at the northern tip of Greater Narnia.

3. RESPONDENT is located approximately 1,600 km to Bonooru's South; its population is approximately 10.8 million and its currency is the Mekari Mon ("MON").

1984	Bonooru Air Holdings' was split into three airlines. Royal Narnian was chosen as the flag carrier of Bonooru, owned and operated by CLAIMANT, Bonooru Air Holdings' successor.
23 October 2011	The Szeto Times reported that Ms. Sabrina Blue, erstwhile head of CLAIMANT's board of directors, had been appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.
2011	Bonooru's Minister of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project to "optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures". A key part of this Scheme was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru.
28 October 2011	CLAIMANT received the first subsidy under the Horizon 2020 Scheme.
29 March 2011	CLAIMANT entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. Simultaneously, CLAIMANT and Mekar Airservices Ltd. entered into a Shareholders' Agreement.
2012	CLAIMANT decided to offer low-fare, long-distance flights into Mekar and to add 20 new destinations, against the recommendation of Mekar Airservices.
15 October 2014	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement ("CEPTA") was signed between The Commonwealth of Bonooru and The Federal Republic of Mekar.
17 November 2014	A podcast published by Phenac Business Today suggested that Caeli should cut back its operation on high-traffic routes between Bonooru and Mekar.

2016	Mekari MON began to rapidly decline in value.
2016	As an interim measure, the CCM placed caps on Claimant airfare to prevent it from earning supra-competitive profits. These airline caps were set reasonably above the rates Caeli charged on set routes.
December 2016	Airlines in Greater Narnia brought a complaint before the CCM, alleging that Caeli's commercial actions made it impossible for other companies to penetrate the Mekarian Market
July 2017	Due to its own poor business decisions, Caeli was unable to secure a steady stream of revenue.
November 2017	Labourers' Party of Mekar (LPM) was elected by an overwhelming parliamentary majority.
2018	Oil prices rose to the highest since 2013.
17 December 2019	CLAIMANT communicated its intention to sell their stake in Caeli and presented an offer from Hawthorne Group LLP, which was rejected by Mekar Airservices, deeming the price offered to be artificially inflated and not an arm's length commercial price.
8 October 2020	CLAIMANT sold its stake in Caeli to Mekar Airservices for USD 400 million.
15 November 2020	CLAIMANT filed a notice of arbitration against RESPONDENT as an attempt to compensation for its losses under the CEPTA.
March 2021	Bonooru increased its shares on CLAIMANT to 55%.

SUMMARY OF ARGUMENTS

ISSUE 1: CLAIMANT does not fulfill the jurisdiction *ratione personae* requirement for being a party to the dispute, since it qualifies as an agent of the Bonoori State and not an investor under the CEPTA. In addition, CLAIMANT cannot argue that it is also a protected investor under the 1994 BIT, given that the Contracting Parties consented to terminate its effects by means of Art. 1.6 of the CEPTA. In any case, the ICSID AF Rules do not encompass State-to-State arbitration. Hence, this Arbitral Tribunal does not have jurisdiction *ratione personae* to decide the present dispute according to Art. 9 CEPTA and Art. 2 ICSID AF Rules.

ISSUE 2: According to Article 41(3) ICSID AF Rules and Article 9.19 CEPTA, after consulting both parties, the arbitral tribunal may allow a person or entity that is not a party to the dispute to file a written submission. In determining whether to allow such a filling, the arbitral tribunal shall consider the requirements established therein. In this case, CRPU's external advisors and CBFI requested leave to file *amici* submissions. The leave sought by the latter, however, differently from that of the former, fails to meet the minimum requirements set forth by Article 41(3) ICSID AF Rules and Article 9.19 CEPTA. Consequently, CRPU's external advisors *amicus* application shall be accepted by the Arbitral Tribunal and CBFI's rejected.

ISSUE 3: Neither individually nor taken together, RESPONDENT's actions have not violated Article 9.9 CEPTA. The elements comprised under the FET standard, as provided for in Article 9.9(2) CEPTA, were not infringed. Moreover, in light of RESPONDENT's right to regulate, it has not frustrated CLAIMANT's legitimate expectations. And finally, RESPONDENT cannot be held accountable for CLAIMANT's risky business choices.

ISSUE 4: As CLAIMANT's plea for a compensation for damages at a fair market value finds no grounds under CEPTA and international law, this Arbitral Tribunal shall determine that the correct compensation standard is the market value established in Article 9.21 CEPTA. Therefore, RESPONDENT has already paid up the correct value of CLAIMANT's investment in Caeli. Besides, if the Arbitral Tribunal is to understand that a compensation for damages should be awarded to CLAIMANT, then this compensation shall be reduced to the extent that CLAIMANT failed to mitigate the losses on its investment in Caeli.

ISSUE I: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE PRESENT DISPUTE

1. RESPONDENT objects to the jurisdiction of the Arbitral Tribunal on the ground that CLAIMANT is not an investor protected under the CEPTA, as the present dispute constitutes a State-to-State arbitration. That is so, as it shall be demonstrated, since CLAIMANT shall be considered as acting as an agent of the Bonoori State.

2. Pursuant to Chapter 9 of the CEPTA and Art. 2 ICSID AF Rules, the Arbitral Tribunal does not have jurisdiction to decide the present dispute. Art. 9.17 CEPTA provides Mekar's standing offer to submit disputes with Bonoori investors to arbitration pursuant to the ICSID Convention and Rules or, if not applicable, to the ICSID AF Rules.[1] This standing offer regards only claims brought by nationals of Bonooru – and not by the State itself through its agencies.

3. In this sense, contrary to what was alleged by CLAIMANT, under Art. 9.1 CEPTA, CLAIMANT is not an investor. CLAIMANT is acting as an agent for the government and is discharging an essentially governmental function. For this reason, even if the Arbitral Tribunal finds that CLAIMANT is a privately-owned enterprise, *quad non*, Vemma is not a protected investor under the CEPTA (**I.**). In any event, even if CLAIMANT argues that it is a protected investor under the 1994 BIT, said treaty has been terminated by the Contracting Parties, who have also expressly derogated from the sunset clause therein contained when they signed the CEPTA (**II.**). Finally, the ICSID AF Rules do not encompass State-to-State arbitration (**III.**). Hence, this Arbitral Tribunal does not have jurisdiction *ratione personae* over the dispute.

I. CLAIMANT IS NOT A PROTECTED INVESTOR UNDER THE CEPTA

4. The Arbitral Tribunal does not have jurisdiction to decide the present dispute since CLAIMANT is not considered an investor under the CEPTA.

5. The jurisdiction *ratione personae* of the Arbitral Tribunal has not been perfected pursuant to the CEPTA (**A.**). Also, the CEPTA does not encompass State-to-State arbitration (**B.**).

[1] CEPTA, Article 9.17

A. UNDER THE CEPTA, THE JURISDICTION *RATIONE PERSONAE* OF THE ARBITRAL TRIBUNAL HAS NOT BEEN PERFECTED

6. The jurisdiction *ratione personae* has not been perfected since CLAIMANT falls outside of the scope of the definition of an 'investor' provided under Chapter 9 of the CEPTA. The latter is true considering that, *first*, Bonooru has historically beholden shares at CLAIMANT (**1.**). *Second*, CLAIMANT is acting in the capacity of Bonooru as it has historically exercised elements of the government authority (**2.**). In this sense, following from the interpretation provided by the International Law Commission's Draft Articles on State Responsibility (ILC), CLAIMANT'S acts are to be considered Bonooru's own acts (**3.**).

1. CLAIMANT has been historically controlled by Bonooru

7. CLAIMANT is an airline holding company that has been historically controlled by Bonooru.[2]

8. The CEPTA does not define the term 'control' nor 'ownership'. It is, then, up to the contracting parties of an international investment agreement to decide on the applicable criteria.[4] A possible criterion to be used is the "control test". This test takes into account the percentage of ownership or voting power in a company.[3]

9. The applicable criteria also concerns the general issue to what extent the "theory of control". The development of this legal theory is based on the judgment in the *Elsi case*, in which the ICJ reviewed and rejected a claim by the United States that the Italian government had interfered with the investment of a United States corporation in Italy, in violation of the Treaty of Friendship, Commerce and Navigation between the two countries.[4] In that case, Elsi was an Italian company, but all the shareholders were American, and the Court recognized the right of the United States to protect the shareholders.[5]

10. In the present case, the nationality of the CLAIMANT is undisputed by the Parties. Nonetheless, RESPONDENT objects that, under Chapter 9(1) of the CEPTA, CLAIMANT does not fall within the scope of an 'investor' as it is (*i*) not <u>owned</u> or <u>controlled</u> by a <u>natural person of Mekar;</u> (*ii*) nor by a <u>Mekari enterprise</u>. CLAIMANT is – and has always been – controlled by the Bonoori government.

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[2] SofUF, ¶9.
[3] Yannaca-Small/ Liberti, p. 24; Vacuum Salt v. Ghana, ¶35-38.
[4] ELSI case, ¶1.
[5] ELSI case, ¶122.

11. Bonooru has always held a considerable shareholding on CLAIMANT, that ranged between 31%-38%[6]. Nowadays, it holds 55% of shares and it is the only governmental shareholder.[7] In addition, no other shareholder holds more than a 7% stake.[8] Furthermore, Bonooru's representatives on CLAIMANT's board are present for every board meeting. As a consequence, at some meeting Bonooru's representatives form a majority of members.[9]

12. Taking into account all these conditions, Bonooru significantly controls CLAIMANT.

2. CLAIMANT is discharging an essentially governmental function

13. Even if the Arbitral Tribunal understands that State-owned enterprises can submit claims to an investor-State arbitration, CLAIMANT cannot submit a claim under ICSID AF Rules once it is discharging an essentially governmental function.

14. The manner to verify the possibility of a State-owned enterprise as a party in an investment arbitration under the ICSID is through the Broches test.[10] This test allows a State-owned enterprise as a claimant provided that it is not acting as an agent for the government or is not discharging an essentially governmental function.[11] This test has been broadly applied by international investment tribunals.[12]

15. In *Al-Kharafi v. Lybia*, brought under the Arab Investment Agreement, although the host-State itself was being charged by acts of a company, the arbitral tribunal applied this exact legal reasoning. By quoting professor Born[13], it reached the conclusion that, in certain circumstances, the separate personality of an entity controlled by a State can be discarded and the State considered bound by the terms of a contract entered into by such an entity if this entity acted as an instrument of the state.[14]

16. In *CSOB v. Slovakia*, brought under the Czech Republic-Slovak Republic BIT, the arbitral tribunal also relied on the Broches test. In that case, the respondent objected to the tribunal's jurisdiction since CSOB was a State-owned enterprise, with the Czech Republic holding 65% of their shares. The same reasoning was also applied by the arbitral tribunal in *Beijing Urban v. Yemen*.[15]

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[6] SofUF, ¶10.
[7] SofUF, ¶65.
[8] PO4, ¶2.
[9] PO3, ¶3.
[10] Schreuer, p. 161, ¶271; Feldman, pp. 31,32; Beijing Urban v. Yemen, ¶34.
[11] Schreuer, p. 161, ¶271; Feldman, p. 35; Beijing Urban. v. Yemen ¶31.
[12] Maffezini v. Spain, ¶82; Salini v. Morocco, ¶31.
[13] Born, p. 203.
[14] Al-Kharafi v. Lybia, p. 263.
[15] Beijing Urban v. Yemen, ¶¶39-44.

17. *In casu*, CLAIMANT is discharging an essentially governmental function characterized by Bonoori citizens' rights. On CLAIMANT's Memorandum of Association, it is stated as one of the company's objectives: "*[t]o 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*".[16] In turn, on CLAIMANT's Articles of Association, it is stated that Bonoori Ministry of Transport and Tourism is the person entitled of the nomination of one of its officials for the non-executive director position.[17]

18. Also, CLAIMANT is the fruit of the privatization of Bonooru Air, a former State-company disintegrated into CLAIMANT and its wholly-owned affiliate Royal Narnian – chosen as the flag carrier of Bonooru. CLAIMANT was also the first company to benefit from Bonooru's Horizon 2020 Scheme, under which it received subsidies in late 2008.[18] On the issue, Ms. Sabrina Blue, the head of CLAIMANT's board of director and also Secretary of Transport and Tourism expressly stated that Vemma's subsidies had the purpose of enlarging Bonooru's tourism and economy.[19]

19. Thus, according to the Broches test, CLAIMANT cannot submit a claim in an investor-State arbitration.

3. CLAIMANT's acts are to be considered Bonooru's own acts

20. Considering that CLAIMANT is a State-owned enterprise that exercises governmental functions, its acts shall be considered acts of Bonooru.

21. The ILC has become part of the mental landscape of international lawyers, so much so that it is as entitled to respect that the questions of State responsibility concern the international community of States as a whole.[20] Art. 5 ILC provides that:

> *"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance*".[21]

22. In this sense, entities that are not part of the organization of the State – such as organs that exercise legislative, executive, judicial or any other function – but the State

[16] Case file, p. 44.
[17] Case file, p. 46.
[18] SofUF, ¶28.
[19] SofUF, ¶28, PO4, ¶6.
[20] Crawford II, 436.
[21] United Nations - Responsibility of States for Internationally Wrongful Acts, Art. 5.

delegates some of its governmental functions to them are to be considered State agents and create State responsibility under Article 5.[22]

23. In the present case, CLAIMANT, an airline holding company, exercises governmental functions by aiming at the promotion of mobility rights to the citizens of Bonooru as provided under Art. 70 of Constitution of Bonooru.[23] Hence, CLAIMANT shall be considered a State agency in which every act is characterized as an act of Bonooru itself.

B. THE CEPTA DOES NOT ENCOMPASS STATE-TO-STATE ARBITRATION

24. CLAIMANT alleges that by submitting the Notice of Arbitration, it has accepted Mekar's standing consent to arbitrate contained in Article 9.17 of the CEPTA.[24] Indeed, RESPONDENT has a standing offer to arbitrate incorporated on Article 9.17, but that offer concerns claims submitted by Bonoori investors, not by agents of Bonooru representing the State. Thus, State-to-State arbitrations are not encompassed by the CEPTA, since the Contracting Parties have not consented to it, but rather to a standing offer applicable exclusively to investors.

25. *First*, consent is the cornerstone of the Arbitral Tribunal's jurisdiction.[25] When a party has not consented to arbitrate, either by its express agreement to an arbitration clause or by standing offer to arbitrate, an arbitral tribunal has no jurisdiction over that party. RESPONDENT has never consented to arbitrate with the State of Bonooru neither expressly nor impliedly. In fact, RESPONDENT consented to the submission of a claim under the ICSID AF Rules by Bonoori investors.

26. *Second*, the Contracting Parties could have stipulated the settlement of disputes between each other in a jurisdictional level, besides the provision stipulating settlement of disputes between a host State and an investor of the other State. For instance, the 1994 BIT had that provision expressed under Art. 2, in which it defines the term 'enterprise' encompassing also government-owned entities.[26] Therefore, if it were the Contracting Parties' wish to maintain that provision in the CEPTA after the 1994 BIT termination, they would have done so.

27. In conclusion, CEPTA is only applicable to investor-State arbitration, thus, it cannot regulate any dispute regarding State-to-State arbitration.

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[22] Gallus, p. 765.
[23] Case file, p. 41.
[24] NofA ¶2.
[25] Muchlinski, p. 831; Schreuer, p. 190, ¶374; Reed/Paulsson/Blackaby, p. 34; Waibel, p. 2.
[26] 1994 BIT, Art. II(2).

II. IN ANY EVENT, CEPTA'S CONTRACTING PARTIES DERROGATED FROM THE SUNSET CLAUSE IN THE BIT

28. In the event that CLAIMANT argues that it is a protected investor under the 1994 BIT, this treaty has been terminated by the Contracting Parties, who have also expressly derogated from the sunset clause therein contained in Art. XI. Hence, CLAIMANT cannot bring claims forward under the 1994 BIT.

29. Art. XI(2) of the 1994 BIT determines that it shall continue in force for 10 years and, following from its termination, it shall remain in force for investments made prior to the termination for an extended period of 10 more years. As a resolution, it may also be terminated at any time by either Contracting Parties giving one year's notice.[27]

30. In contrast, when Mekar and Bonooru signed the CEPTA in 2014 – after the termination of the 1994 BIT – the Contracting Parties expressly agreed to terminate also the effects of the sunset clause contained in the 1994 BIT by means of Art. 1.6 of the CEPTA:

> *Article 1.6: Term of the Bilateral Investment Treaty*
>
> *The Parties hereby agree that the Bilateral Investment Treaty, as well as all the rights and obligations derived from the said Treaty, will cease to have effect on the date of entry into force of this Agreement.*
>
> 1. *Investments made under the 1994 Bilateral Investment Treaty shall be governed by this Agreement starting from the date of entry into force of this Agreement.*
> 2. *No investor has the right to bring a claim under the Bilateral Investment Agreement following the entry into force of this Agreement.*[28]

31. In this sense, Bonooru and RESPONDENT agreed to terminate the pre-existing BIT on 15 October 2014, same date in which CEPTA entered into force.

32. Hence, in the event that CLAIMANT alleges that it falls within the scope of 'investor' provided under the 1994 BIT, thus, being able to submit a claim under it, the Tribunal shall deny the application of the 1994 BIT.

III. ICSID AF RULES DOES NOT ENCOMPASS STATE-TO-STATE ARBITRATION

33. CLAIMANT alleges that the ICSID AF Rules governs the present dispute, however, those rules do not encompass State-to-State arbitration as the present case.

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[27] 1994 BIT, Article XI(2).

[28] CEPTA, Article 1.6.

34. CLAIMANT bases its allegation on the fact that Section E of the CEPTA – which concerns the settlement of disputes – establishes that a claim may be submitted under the ICSID Convention or under the ICSID AF Rules, if the former is not applicable. Since Bonooru is a Contracting State to the ICSID Convention whereas Mekar is not, the ICSID AF Rules would be applicable.

35. Nonetheless, Art. 2 ICSID AF Rules establishes that the Centre is authorized to administer proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State. In this sense, ICSID AF Rules do not encompass State-to-State arbitration.[29]

36. Since CLAIMANT cannot be considered a national of State, but an agent of the State itself, as previously demonstrated, the claim cannot be submitted under the ICSID AF Rules. In conclusion, the Arbitral Tribunal does not have jurisdiction to decide upon the present dispute once it is established under the ICSID AF Rules.

Conclusion to the First Issue

37. RESPONDENT respectfully requests this Arbitral Tribunal to find that it does not have jurisdiction under Chapter 9 of the CEPTA to decide the present dispute, given that CLAIMANT represents a State which cannot be considered a protected investor under the CEPTA.

ISSUE II: THE ARBITRAL TRIBUNAL SHALL GRANT THE LEAVE SOUGHT BY CRPU AND REJECT THE LEAVE SOUGHT BY CBFI FOR FILLING *AMICI* SUBMISSION

38. The Arbitral Tribunal shall accept the leave sought by CRPU's external advisors but reject the leave sought by CBFI for filling *amici* submissions.

39. According to Article 41(3) ICSID AF Rules and Article 9.19 CEPTA, after consulting both parties, the arbitral tribunal may allow a person or entity that is not a party to the dispute to file a written submission. In determining whether to allow such a filling, the arbitral tribunal shall consider, among other things, if (*i*) the non-disputing party submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (*ii*) the referred submission would address a matter within the scope of the dispute; (*iii*) the non-disputing party has a significant interest in the proceeding;

[29] Schreuer pp. 84-85.

and (*iv*) the grant would not disrupt the proceedings, unduly burden or unfairly prejudice either party.[30]

40. In the present dispute, two petitioners seek grant to present submissions in pursuit of matters related to the arbitration: CRPU's external advisors, which are members of Mekari civil society whose professional focus is investment banking[31] and CBFI, a non-profit industry association that represents Bonoori investors investing in the Greater Narnian region and internationally[32].

41. The leave sought by the latter, however, differently from that of the former, fails to meet the minimum requirements set forth by Article 41(3) ICSID AF Rules and Article 9.19 CEPTA. Consequently, CRPU's *amicus* application shall be accepted by the Arbitral Tribunal (**I.**) and CBFI's rejected (**II.**).

I. CRPU'S EXTERNAL ADVISOR'S *AMICUS* APPLICATION SHALL BE ACCEPTED BY THE ARBITRAL TRIBUNAL

42. The Arbitral Tribunal shall accept the leave sought by CRPU for filling *amicus* submission.

43. Unlike stated by CLAIMANT and differently from CBFI's application, CRPU complied with the legal criteria set forth by Article 41(3) ICSID AF Rules and Article 9.19 CEPTA. In particular, whereas the Parties do not dispute that the other requirements of said articles have been fulfilled, CLAIMANT is seeking to bar the *amicus* under ill-founded claims that the CRPU submission is outside the scope of the present dispute. Nonetheless, RESPONDENT shall demonstrate that, although the CRPU addresses jurisdiction objections not raised by the Parties, it is still a matter within the scope of the present dispute.

44. Pursuant to Article 41(3)(b) ICSID AF Rules and Article 9.19(3) CEPTA, the non-disputing party submission must address a matter of fact or law within the scope of the dispute.

45. The *amicus* participation is restricted to suggestions relative to matters apparent on the record or to matters of practice. This criterion serves the purpose of avoiding the undesirable broadening of the scope of the dispute by *amicus* intervention[33] while also preventing the discussion of interests exclusive of the non-disputing party.[34]

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[30] Born/Forrest, p. 632; Delaney/Magraw, pp. 732-734; Reed/Paulsson/Blackaby, p. 140; Schreuer, pp. 704-706.
[31] Case File, p. 19, line 616.
[32] Case File, p. 16, lines 505 – 506.
[33] Apotex v. United States, ¶¶27-30; Resolute Forest v. Canada, ¶4.5.
[34] Alicia v. Mexico, ¶51; Apotex v. United States, ¶¶27-30.

46. In the ICSID case *Eco Oro vs. Colombia*[35], the arbitral tribunal laid down as a fundamental requirement for admission of *amicus curiae* the correlation between the information the non-disputing party intends to present and the subject matter of the dispute.

47. This does not mean, however, that the *amicus curiae* cannot present allegations that differ from those submitted by the disputing parties – the only requirement is that they are within the scope of the dispute. In the case *Gran Colombia v. Colombia*[36], the arbitral tribunal accepted to hear allegations raised by the *amicus curiae* that where within the scope of the dispute, even though they were not raised by the parties.

48. Specially in matter of jurisdiction, it is essential that the arbitral tribunal is presented with all the relevant information in order to access its ability to decide on the case. This is why in the cases *Infinito Gold v. Costa Rica*[37] and *Fynerdale v. Czech Republic*[38] the arbitral tribunals consented to the inclusion of additional allegations brought by the *amicus curiae* on the jurisdictional issues, including considerations on the legality of the investments made that had not been present by the parties thus far.

49. In the present case, CRPU met this threshold by not raising a jurisdictional issue that has a close connection to the matters raised by both Parties in the arbitration.

50. CLAIMANT argued that the assertion by CRPU that "*the assessment of the legality of Vemma's investment is crucial to the determination of the Tribunal's competence-competence*"[39] would condition the Arbitral Tribunal's jurisdiction to the assessment of the legal nature of CLAIMANT's investments and that this matter was not raised by either party until this time, concerning the *ratione legis* jurisdiction of the Arbitral Tribunal.

51. Differently to what was stated by CLAIMANT, considering the parties' submissions, the jurisdictional claim is not limited to the alleged lack of jurisdiction of this Arbitral Tribunal to hear the case, given RESPONDENT's claim that CLAIMANT being a State-owned enterprise turns this arbitration into a State-to-State arbitration not encompassed by Article 9 CEPTA.

52. On the contrary, considering that the assessment of the subject matter of this dispute revolves around the investments made by CLAIMANT, any information connected to the legality of such investments must be analyzed by the Arbitral Tribunal. As such, despite not argued by the Parties, the legality of CLAIMANT's investment considering corruption allegations is of relevance to the Arbitral Tribunal's assessment of its duties.

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35 Eco Oro v. Colombia, ¶¶27-30.
36 Gran Colombia Gold v. Colombia.
37 Infinito Gold v. Costa Rica, ¶¶29-44.
38 Fynerdale v. Czech Republic,¶¶42-45.
39 Case File, p. 17, lines 544 – 549.

53. Considering the above, the Arbitral Tribunal is respectfully requested to find that CRPU's application shall be accepted.

II. CBFI'S *AMICUS* APPLICATION SHALL BE REJECTED BY THE ARBITRAL TRIBUNAL

54. The Arbitral Tribunal shall reject the leave sought by CBFI for filling *amicus* submission.

55. Unlike stated by CLAIMANT, CBFI's *amicus* application does not comply with the legal criteria set forth by Article 41(3) ICSID AF Rules and Article 9.19 CEPTA. In particular, CBFI did not file its *amicus* application in pursuit of matters of public interest (**A.**), in a way unhindered by partiality (**B.**) and cannot assist the Arbitral Tribunal by offering a different point of view from that of the disputing parties (**C.**).

A. CBFI DID NOT FILE ITS *AMICUS* APPLICATION IN PURSUIT OF MATTERS OF PUBLIC INTEREST

56. CBFI did not file its *amicus* application in pursuit of matters of public interest.

57. Article 41(3)(c) ICSID AF Rules and Article 9.19(3) CEPTA provide, as a requirement, that the non-disputing party shall *"ha[ve] a significant interest in the proceeding*". This criterion concentrates on two elements: *first*, whether there is a public interest that plays an important role in a given dispute and, *second*, whether the non-disputing party in question seeks to vindicate that interest by its participation in the dispute[40] and has declared so in its submission.[41]

58. *First*, this requirement was elucidated in the ICSID *Suez cases*[42], both decided jointly by the same arbitral tribunal, which found that the existence of a *'particular public interest'* to be addressed by the *amicus* is a mandatory requirement for the non-disputing party to intervene in an investor-State dispute. Such public interest exists if the decision of the arbitration has the ability and likelihood to impact a large group of people or raises important concerns of public international law and human rights[43].

59. *Second*, the mere existence of public interest is not sufficient to justify *amicus* intervention. It is also necessary that de non-disputing party demonstrates that *(i)* it is not a

[40] Kawharu, p. 291; Zachariasiewicz, p. 214.
[41] Biwater v. Tanzania, ¶22.
[42] Suez cases, ¶¶19-22.
[43] Zachariasiewicz, p. 214; Suez cases; Biwater v. Tanzania, ¶50; Methanex v. USA, ¶49; UPS v. Canada, ¶65.

particular nor a professional interest of the non-disputing party[44] and *(ii)* its submission is intended to address such subject-matters[45].

60. In the case *Apotex v. United States*, the tribunal reject the leave sought by an *amicus curiae* by ruling that the non-disputing aim was exclusive of particular and professional nature, despite the proceedings concerning a matter of public interest[46].

61. In the present case, even though the subject-matter of the proceedings is to be considered of public interest, the participation of CBFI as *amicus curiae* would exclusively serve the purpose of its own business interests.

62. From CBFI's submission, it is evident that its interest in these proceedings is to vindicate its own private and professional concern to guarantee that this Arbitral Tribunal rules a favorable decision to its members – Bonoori foreign investors, which are often investors in Mekar.

63. CBFI IS a non-profit industry association that represents Bonoori investors investing in the Greater Narnian region and internationally. As such, its professional objective is to guarantee the interest of its members are observed.

64. That is why CBFI presented a generic and abstract submission, by means of which it connected its potential contributions only to matters that are intrinsically related to the interests of its members, mainly the context regarding the business scenario of Bonooru, the existing corporate framework in which enterprises operate and the impact of uncertainty on access to capital in Greater Narnia[47].

65. In addition, differently from CBFI's allegations, the subject matter of the arbitration does not require consideration on the decision granted by Mekar's court to enforce the award rendered by Mr. Cavannaugh on the Hawthrone Group's offer in respect of CLAIMANT's shares in Caeli despite it being set aside in Sinnoh[48].

66. In order to assess CLAIMANT's allegations in the merits, the Arbitral Tribunal does not need not to access Mekar's judicial system in abstract, but only whether or not the decision to enforce the abovementioned award, which was rendered in accordance with Mekar's public policy, disrespected CLAIMANT's rights under the CEPTA.

67. In other words, it is not Mekar's judicial system that will be the subject of deliberation by this Arbitral Tribunal - which would give rise to public interest considerations -, but only

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[44] Alicia v. Mexico, ¶53; Apotex v. United States, ¶¶34-42.
[45] Kawharu, p. 291; Zachariasiewicz, p. 214; Apotex v. United States, ¶¶34-36; Resolute Forest v. Canada, ¶4.7.
[46] Apotex v. United States, ¶¶34-42.
[47] Case File, p. 16, lines 524 – 536.
[48] Case File, p. 4, lines 139 – 140.

the content of a decision rendered by Mekar's national court to enforce the abovementioned award – which can only impact the Parties involved in this arbitration.

68. Therefore, it is not capable of affecting the interests of individuals other than the disputing Parties.

69. As such, the Arbitral Tribunal is respectfully requested to find that CFBI did not file its *amicus* application in pursuit of matters of public interest.

B. INDEPENDENCE IS AN OBSTACLE TO THE GRANT OF CBFI'S *AMICUS* APPLICATION

70. Contrary to what was argued by CLAIMANT, it is required that the *amicus* be independent from the disputing Parties to file *amicus* submissions and, in the present case, CBFI failed to comply with this requirement.

71. Pursuant to Article 41(3)(c) ICSID AF Rules and Article 9.19(3) CEPTA, as well as Article 4(2) UNCITRAL Transparency Rules, which are applicable to the present dispute pursuant to Article 9.20(6) CEPTA, any *amicus* is obliged to disclose affiliation, direct or indirect, with any disputing party.[49]

72. In *Bernhard v. Zimbabwe*[50] and *Border Timbers v. Zimbabwe*[51], it was ruled that an *amicus* should be independent of the parties, for it if were not so, the *amicus* would not be able to provide a perspective, particular knowledge or insight that is different from that of the parties.

73. In the present case, CBFI's application is tainted with partiality, for two mains reasons: *one,* CLAIMANT is a member of CBFI[52] and, *two*, as one of CBFI's members – Lapras – is actively interfering with CLAIMANT's participation in the present proceedings by providing it with funding strategies with respect to its claim against RESPONDENT.[53]

74. Therefore, CBFI's capacity to provide a perspective, particular knowledge or insight that is different from that of the Parties is compromised by the involvement between CLAIMANT and Lapras.

75. Therefore, the Arbitral Tribunal is respectfully requested to find that CFBI is not independent from the disputing parties.

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[49] Born/Forrest, pp. 655-656; UPS v. Canada, ¶62.
[50] Bernhard v. Zimbabwe, ¶49.
[51] Border Timbers v. Zimbabwe, ¶49.
[52] Case File, p. 16, lines 520 – 522.
[53] Case File, p. 16, lines 520 – 522.

C. CBFI CANNOT ASSIST THE ARBITRAL TRIBUNAL BY OFFERING A DIFFERENT POINT OF VIEW FROM THAT OF THE DISPUTING PARTIES

76. CBFI cannot assist the Arbitral Tribunal by offering a different point of view from that of the disputing Parties.

77. Article 41(3)(c) ICSID AF Rules and Article 9.19(3) CEPTA set forth that the non-disputing party submission must 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.

78. To that effect, the *amicus* shall demonstrate that its submissions will be sufficiently different in content and perspective from those of the parties and evince that its participation is likely to produce material benefits that would not otherwise be available.[54]

79. In interpreting this requirement, in *Apotex v. United States*, the arbitral tribunal found that, in matters of public interest, it was to be construed broadly, to allow the arbitrator access to the widest possible range of views and guarantee that "*all angles on, all interest in, a given dispute are properly canvassed*".[55]

80. In *Bernhard v. Zimbabwe*[56] and *Border Timbers v. Zimbabwe*[57], it was ruled that only independent *amicus* can provide a perspective, particular knowledge or insight that is different from that of the parties.

81. The CBFI is the national leader in public policy advocacy on national and international business issues and is focused on fostering strong and competitive economic environment that facilitates growth and development of Bonooru and the Greater Narnian region.[58]

82. Due to CBFI's operation, it alleged that it could assist the Arbitral Tribunal by providing context regarding the business climate of Bonooru, the existing corporate framework in which enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia.[59]

83. However, considering CLAIMANT is CBFI's member[60], all this information can be presented by the disputing-party involved in the arbitration, without the need for a third party to intervene. In addition, because of the connection between the parties, CBFI failed

[54] Born/Forrest, p. 644.
[55] Apotex v. United States, ¶22.
[56] Bernhard v. Zimbabwe, ¶49.
[57] Border Timbers v. Zimbabwe, ¶49.
[58] Case File, p. 16, lines 505 – 510.
[59] Case File, p. 17, lines 557 – 559.
[60] Case File, p. 16, lines 520 – 522.

to demonstrate that the content of its submissions would be sufficiently different in content and perspective from those of the Parties – its indications were extremely general and did not point out specific matters of public interest, but only to individual and professional concerns.

84. In this sense, the Arbitral Tribunal is respectfully requested to find that CFBI cannot assist the Arbitral Tribunal by offering a different point of view from that of both RESPONDENT and CLAIMANT.

CONCLUSION TO THE SECOND ISSUE

85. RESPONDENT respectfully requests this Arbitral Tribunal to find that CRPU's external advisors filed it *amicus* application in accordance with Article 41(3) ICSID AF Rules and Article 9.19 CEPTA, while CBFI has not.

ISSUE III. THE FEDERAL REPUBLIC OF MEKAR HAS NOT VIOLATED ITS OBLIGATIONS CONTAINED IN ARTICLE 9.9 CEPTA

86. Under Article 9.9 CEPTA, the host-State has the duty to treat investors fairly and equitably. The facts of the present case evince that *first*, RESPONDENT'S actions have not violated the requirements comprised under the fair and equitable treatment standard, as provided for in Article 9.9(2) CEPTA (**I.**). *Second*, in light of RESPONDENT'S right to regulate, it has not frustrated CLAIMANT'S legitimate expectations described under Article 9.9(3) CEPTA (**II.**). And *third*, BITs are not safeguards against bad business decisions (**III.**).

I. THE FEDERAL REPUBLIC OF MEKAR HAS NOT VIOLATED ARTICLE 9.9(2) CEPTA

87. The FET can be understood as a standard that the legal systems of hosts States have to embrace for the treatment of foreign investors.[61] Article 9.9(2) CEPTA lists measures which constitute a breach of the obligation of FET. Since RESPONDENT'S actions do not fall within the hypotheses presented by Article 9.9(2) CEPTA, this Arbitral Tribunal is respectfully requested to hold that there was not a violation of the FET standard.

A. RESPONDENT HAS NOT VIOLATED ARTICLE 9.9(2)(A) CEPTA

88. Under Article 9.9(2)(a) CEPTA, a Contracting Party breaches the obligation to provide FET if a measure carried out by it results in denial of justice in criminal, civil or administrative proceedings.[62]

[61] IILJ Working Paper 2006/6, p. 10.
[62] CEPTA, Article 9.9(2)(a).

89. In the *Neer case*, the tribunal stated that for an act to be considered as a denial of justice, it should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[63] In the *Azinian case*, the arbitral tribunal held that "*[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if it is subject to undue delay, or if they administer justice in a seriously inadequate way*".[64]

90. In addition, international law attaches state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action.[65] As Judge Aréchaga, former President of the ICJ observed, States are internationally liable only if all remedies available are exhausted.[66] In other words the exhaustion of remedies means that the decision is final, and although this includes partial awards, it excludes interim awards.[67] In *Loewen v. United Stated*, for instance, the tribunal concluded that, for a court decision to amount to a denial of justice at the international level, that decision must be the last resort of the state's judiciary.[68] Therefore, there will be a denial of justice only if the justice system as a whole produces denial of justice[69].

91. Considering that CLAIMANT did not exhaust the local remedies (**1.**) and that the proceedings were dealt with a reasonable time (**2.**), there was not a denial of justice.

1. Mekar's Executive Order 5-2014 has not denied CLAIMANT justice

92. The Executive Order 5-2014 determines that courts may dismiss, by way of summary judgement, a case where the judge finds there is very little chance of success on the merits, without appeal.[70]

93. *In casu*, the interim decision of 15 June 2019 – a decision on a motion for injunctive relief – Justice VanDuzer dismissed CLAIMANT'S requests on the merits by way of summary judgment, based on Executive Order 5-2014.[71] However, in spite of this unfavorable decision, interim awards do not entail the *res judicata* effect.

94. Thus, given that the subject may be rediscussed, the FET standard was not violated.

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[63] Neer case, pp. 60-61.
[64] Azinian v. Mexico, ¶102.
[65] Paulsson, p. 133; Crawford I, pp. 40-41; Borchard, pp. 195-196.
[66] Aréchaga, pp. 281-282.
[67] Pika, p. 67; Berger/Kellerhals, ¶1645.
[68] Loewen v. United States, ¶¶168-169.
[69] Dodge, p. 362; Finnish Ships case, p. 1495.
[70] PO3, ¶8, p. 86.
[71] PO3, ¶8, p. 86.

2. Mekari Courts heard the case within a reasonable time

95. Court delays are measured against the rules or practices prevailing in local courts; so long as the timing in a particular case comports with the usual practices, delays will not be fatal.[72] And although the length of the delay required for a denial of justice to occur is unclear[73], some cases could shed a light on this issue.

96. In *El Oro Mining case*, the arbitral tribunal found that the holding of a case for nine years without any action could not be considered as an undue delay.[74] In *Frontier Petroleum Services v. Czech Republic*, the arbitral tribunal argued that a delay of 39 months amounts to a breach of the FET standard.[75] In the same vein, in the *Jan de Nul case*, the arbitral tribunal held that, while ten years to obtain a first instance judgement is a long period of time, in light of the complexities of a given case, such time lapse shall not amount to a denial of justice.[76] In fact, in *White v. India*, the arbitral tribunal established that whilst three and a half years for enforcement proceedings were less than ideal, not only the circumstances of the case itself were to be considered, but the ones of the host-Stare. India was a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary[77].

97. In the present case, between 1980 and 2015, the population of Mekar grew from 6 million to 10.8 million. As a result, the average time taken from commencing an action to receiving a final decision of commercial matters in Mekari was approximately 27 months.[78] Even so, the courts have managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters, by rendering a decision concerning the airfare caps after 14 months.[79]

98. Therefore, according to the cases presented, a time lapse of 14 months does not amount to a violation of the FET standard. Moreover, the delay experienced by CLAIMANT is below the prevailing practice of the local courts. Therefore, such a delay was not undue and RESPONDENT has not denied CLAIMANT justice.

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[72] A. Bjorklund, pp. 845-846.
[73] Paulsson, p. 177.
[74] El Oro Mining and RailWay Co. case, p. 191.
[75] Frontier Petroleum Services v. Czech Republic, ¶334.
[76] Jan de Nul case, ¶204.
[77] White v. India, ¶5.2.18.
[78] SofUF, ¶13.
[79] SofUF, ¶¶44, 54.

B. RESPONDENT'S COURTS HAVE NOT VIOLATED ARTICLE 9.9(2)(B) CEPTA

99. Under Article 9.9(2)(b) CEPTA, a Contracting Party is in breach of the obligation to provide FET if a measure carried out by it leads to a fundamental breach of due process, in judicial proceedings.[80]

100. Due process requires decisions to be reasoned and consistent, through authorities' duty to conduct fact-finding and verifying evidence before a final decision is taken.[81] In the *Chattin case*, for instance, the arbitral tribunal held that due process would be violated in the absence of proper investigations and insufficient scrutiny of evidence.[82] However, the authority does not need to delve into every argument made by the parties.[83] In this sense, the Second Circuit of the United States Court of Appeals held that a well-reasoned award needs only to set forth the basic reasoning of the arbitral panel on the central issue or issues raised before it.[84]

101. In addition, concerning the recognition awards, the drafters of the NYC intended to establish only the minimum conditions, leaving to each State the freedom to act less restrictively.[85] That is evinced by the fact that if the decision of a court in the state of origin were automatically binding, then a stay would be necessary – otherwise, any enforcement prior to a decision in the seat of arbitration would be liable to lose its effect.[86] On the contrary, the Convention insists upon the right of national courts to enforce and review awards.[87] Moreover, the NYC contains a set of absolute obligations on the part of signatory States. For example, under Article II, courts shall recognize an agreement in writing under which the parties undertake to submit to arbitration.[88] The Convention also contains discretionary provisions: Article V, under which enforcement may be denied; and Article VI, under which enforcement may be adjourned pending the outcome of a challenge against the award.[89] In the *Pemex case*, the court reaffirmed the possibility to confirm an annulled award.[90]

102. In the present case, neither the High Commercial Court of Mekar's (**1.**) nor the Superior Court of Mekar's (**2.**) actions are tantamount to a breach of due process.

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[80] CEPTA, Article 9.9(2)(b).
[81] IILJ Working Paper 2006/6, p. 25.
[82] Chattin case, p. 295.
[83] Leeward v. American University of Antigua, p. 640.
[84] Leeward v. American University of Antigua, p. 640.
[85] Paulsson, 1998, p. 7.
[86] Gaillard, p. 33.
[87] Gaillard, p. 34; Paulsson, 1998, p. 7.
[88] NYC, Article II.
[89] NYC, Articles V and VI; Paulsson, 1998, p. 10.
[90] Pemex case, ¶¶537-541.

1. The High Commercial Court of Mekar has not breached due process

103. The High Commercial Court decided that the award concerning the dispute over the validity of the Hawthorne offer, although being annulled in the seat of arbitration[91], should be enforced in Mekar.[92] This decision has not breached CLAIMANT's due process, since the Court verified the annulled award before the decision was rendered and also that it was a well-reasoned award.

104. In its reasoning, the Court alleged that CLAIMANT'S case rests merely on one evidence – a report by the Centre for Integrity in Legal Services. Comparatively, in the United States the annulment of an award based on corruption requires the demonstration of fraud by clear and convincing evidence.[93] Similarly, English Courts', in the *Westacre Investments case*, the court stated that the evidence of corruption must be so strong that it could reasonably be expected to be decisive.[94]

105. Further, the analysis of the award by the High Court suggests that Mr. Rett Eichel Cavannaugh considered both parties' submissions equitably and arrived at a well-reasoned decision.[95]

106. Given that the annulled award was well-reasoned and that which sufficiently scrutinized the evidence presented, RESPONDENT did not breach due process.

2. The Superior Court of Mekar has not breached due process

107. At the Superior Court of Mekar, the decision rendered by the High Commercial Court was later confirmed. The Court alleged that Article V(1)(e) New York Convention provides that the recognition of an award may, but not must, be denied when an award is annulled in the country where it was issued.[96]

108. Section 36 of the Commercial Arbitration Act states that the enforcement of an arbitral award may be refused if the court finds that the enforcement would be contrary to the public policy of Mekar.[97] Similarly, in *TermoRio v. Electranta*, the District of Columbia Circuit affirmed that a foreign judgement is unenforceable as against public policy to the extent it is repugnant to fundamental notions of what is decent and just in the United States, the country in which the award was to be enforced.[98]

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[91] Case file, pp. 62-64.
[92] Case file, pp. 65-66.
[93] Uluc, p. 79; Karaha Bodas case.
[94] Westacre Investments case; Hanotiau, 2003
[95] Case file, p. 66, ¶10.
[96] Case file, pp. 67-68, ¶6.
[97] Case, file, p. 65.
[98] TermoRio v. Electranta, ¶¶955-969.

109. Mekar's Courts had discretion to decide whether or not to enforce the award rendered in Sinnograd. Moreover, the parameter is the public policy of Mekar and an allegation of corruption not supported by unequivocal evidence is not contrary to Mekar's public policy.

110. Therefore, the award could be properly enforced and this do not violate CLAIMANT's right to due process.

C. RESPONDENT HAS NOT VIOLATED ARTICLE 9.9(2)(C) CEPTA

111. In line with Article 9.9(2)(c) CEPTA, a party breaches the obligation to provide fair and equitable treatment if its conducts are arbitrary or discriminatory.[99] In the present case, despite CLAIMANT's allegations, it was neither treated arbitrarily (**1.**) nor discriminatorily (**2.**) by RESPONDENT'S administrative bodies.

1. CLAIMANT was not treated arbitrarily by RESPONDENT'S administrative bodies

112. CCM investigations strictly followed the text of the law and thus, CLAIMANT was not treated arbitrarily.

113. In the *Elsi case*, the tribunal defined arbitrariness as a willful disregard of the law.[100] In *Azurix v. Argentina*, the tribunal stated that arbitrary means derived from mere opinion, capricious, unrestrained, despotic.[101] In *LG&E v. Argentina*, the tribunal established that arbitrary measures comprise actions that affect the investments of nationals of other parties without engaging in a rational decision-making process.[102]

114. At the present case, the Competition Commission of Mekar, had the discretion to initiate an investigation concerning potentially anti-competitive behavior, by virtue of the Monopoly and Restrictive Trade Practice Act, as Amended in 2009. According to the Act, the CCM may open an investigation if the corporation obtains a market share greater than 50%; if the corporation poses a unique threat to the competition in a particular market; and if there is evidence that the corporation's actions have push competitors out of the market, or are likely to in the near future.[103] By analyzing CLAIMANT'S actions, all the requirements mentioned were met in the First Investigation.

115. Although CLAIMANT enjoyed a 43% market share in Mekar, when considered in conjunction with Royal Narnian, its Moon Alliance partner, CLAIMANT'S market share

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[99] CEPTA, Article 9.9(2)(c).
[100] ELSI case, ¶128.
[101] Azurix v. Argentina, ¶396.
[102] LG&E v. Argentina, ¶158.
[103] Case file, p.47, III(2).

exceeded 54%. Despite alleging that the CCM could have analyzed the enterprises together[104], an analysis in conjunction is imperative, given that, according to the CCM Vice-President, there was evidence of preferential secondary slot-trading between Royal Narnian and CLAIMANT.[105]

116. In this sense, it is important to understand the slot-trading at airports. Historically, any airline could fly to and from any airport without first being allocated a specific take-off or landing time. But over time, where demand at peak hours and on peak days began to exceed supply, airlines came to be faced with long queues, either on the ground or in the air, in order to land or take off.[106] One of the solutions founded to maximize the efficient use of airports was the market of slots: first, the airport slot coordinator vertically allocates the slots. After, airlines are allowed to exchange slots with competitors through bilateral trades.[107] These operations can be detrimental to consumers if the competition between airlines decrease, which could be caused, for example, by preferential treatment between airlines.[108]

117. Furthermore, the foreign subsidies offered to the company by Bonooru, under the Horizon 2020 program, enabled CLAIMANT to use predatory price strategies which could impede a fair competition and was likely to push competitors out of the market in the near future.[109]

118. On the other hand, the CCM shall open an investigation where a complaint is brought to the CCM by a direct competitor in the market; the corporation has at least a 10% market share; and there is enough evidence brought by the direct competitor.[110] All these three requirements were met in the Second Investigation.

119. The complaint was brought before the CCM by a consortium of small regional airlines in Greater Narnia.[111] The CCM enjoyed at least 43% market share in Mekar.[112] And also, there was sufficient evidence offered by the competitors of anti-competitive practices: by launching flights on specific routes, CLAIMANT hampered other competitors, given that it enjoyed privileges at Phenac International Airports.[113]

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[104] RNofa, ¶14.
[105] SofUF, ¶36.
[106] MacDonald, p. 2-1, ¶3.
[107] Pellegrini/Castelli/Pesenti, p. 1011.
[108] De Wit/Burghouwt, p. 156.
[109] SofUF, ¶36.
[110] Case file, p. 47, III(3).
[111] SofUF, ¶38.
[112] SofUF, ¶36.
[113] SofUF, ¶38.

120. Finally, the fines imposed by the CCM were merely an application of the Monopoly Act, which was in force when CLAIMANT made its investment.[114]

121. Thus, the CCM merely subsumed the legal text to the facts presented and this cannot be assumed as arbitrary.

2. There is no discrimination whenever unequal treatment is justified

122. According to Article 9.6 CEPTA, the host country shall accord to an investor treatment no less favorable than the treatment it accords, in similar situations, to its own investors and to their investments.[115] Under Article 9.7 CEPTA, the host country cannot treat an investor less favorably than it treats investors of a third country in similar situations.[116]

123. In *Alex Genin v. Estonia*, the tribunal established that customary international law does not require that a state treat all aliens equally or treat aliens as favorably as nationals.[117] A violation of FET is only considered if the investor is specifically targeted.[118]

124. In the *Andrews case*, the court stated that the question of whether or not discrimination exists cannot be determined by applying a purely mechanical test, but depends on an examination of the context in which a measure is established and applied and the specific circumstances of each case.[119] In the *SD Myers case*, the arbitral tribunal defined the scope of the expression "like situations" contained within the NAFTA. According to the tribunal "*the assessment of 'like circumstances' must take into account circumstances that would justify governmental regulations that treat them differently*". Thus, "*the concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor*".[120] In *Investmart v. Czech Republic*, the tribunal, after carefully examining the legal context in which state aid was granted to some Czech banks but not to the claimant, held that there was no similarity between claimant and the other Czech banks. And to support its argument, the tribunal stated that the analysis requires more than an identification of single points of similarities; there must be a broad coincidence of similarities covering a range of factors.[121]

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[114] Case file, p. 47, ¶4(d).
[115] CEPTA, Article 9.6.
[116] CEPTA, Article 9.7.
[117] Alex Genin v. Estonia, ¶368.
[118] IILJ Working Paper 2006/6, p. 20.
[119] Andrews v. Law Society of British Columbia, ¶¶27-31.
[120] SD Myers v. Canada, ¶250.
[121] Investmart v. Czech Republic, ¶415.

125. In December 2017, due to the increasing economic crisis in Mekar, the government approved a series of acts authorizing bailouts to State-owned and controlled corporations.[122] In addition, by virtue of Executive Order 9-2018, Mekar attempted to alleviate some of the airline industry's concerns by granting subsidies to airlines for each Mekari citizen travelling on board.[123]

126. Although CLAIMANT did not receive bailouts or subsidies, RESPONDENT is not required to treat all aliens equally, or treat aliens as favorably as nationals. In addition, CLAIMANT was not "specifically targeted" since government-owned Larry Air also did not receive subsidies under Executive Order 9-2018. Furthermore, CLAIMANT was not in similar circumstances as the national Mekari enterprises that received bailouts or as the private enterprises which received subsidies under Executive Order 9-2018. As to the national enterprises, the bailouts were given especially in the hydrocarbon sector. And concerning the Executive Order 9-2018, subsidies were given to private airlines, not to State-owned ones, which contrastingly, had less than 5% market share on Mekar's important routes.[124]

127. Therefore, since RESPONDENT did not "specifically targeted" CLAIMANT and that there is no discrimination whenever unequal treatment is justified, RESPONDENT did not discriminate CLAIMANT.

II. THE FEDERAL REPUBLIC OF MEKAR HAS NOT VIOLATED ARTICLE 9.9(3) CEPTA

128. Under Article 9.9(3) CEPTA, when assessing the FET obligation, the Arbitral Tribunal may consider whether a party made a specific representation to an investor that created a legitimate expectation.[125] Also, by virtue of Article 9.8 CEPTA, the Contracting Parties agreed that mere regulation, even if it affects investments or interfere with investors' expectations, does not amount to a breach of the FET standard.[126] In view of its right to regulate, recognized under the CEPTA, RESPONDENT has not frustrated CLAIMANT'S legitimate expectations, and hence, the FET standard was not violated.

129. Although the stability of the legal framework is an essential factor for the investment decision of foreign investors, one cannot presume host states to renounce their right to legislate and change domestic legal rules by entering into international investment treaties.[127]

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[122] SofUF, ¶41.
[123] SofUF, ¶46.
[124] PO4, ¶7.
[125] CEPTA, Article 9.9(3).
[126] CEPTA, Article 9.8.
[127] Muchlinski, p. 282; IILJ Working Paper 2006/6, p. 28.

Accordingly, the tribunal in *Saluka v. Czech Republic* specifically warned of the danger of taking the idea of the investor's expectation too literally since this would impose upon host States obligations which would be inappropriate and unrealistic. It thus stated that no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.[128]

130. In addition, specific representations play a central role in the creation of legitimate expectations.[129] In *Charanne v. Spain*, the tribunal emphasized that only specific commitments may give rise to legitimate expectations under the FET standard.[130]

131. As an experienced professional, the foreign investor should act with diligence and take into account all circumstances, including the political, economic, and social background of the host state, and make its best efforts to assess the likelihood of any change in that environment.[131] Investors should have an obligation to inform themselves about relevant facts that may affect their investment.[132] No expectation can legitimately be based on the failure to carry out such a duty.[133]

132. For example, in *Metalpar v. Argentina*, the tribunal considered, in light of the investor's business experience in the relevant industry in Argentina, that it was unlikely that it legitimately expected that their investments would not be subject to the ups and downs of the country in which they were made or that the crisis that could already be foreseen would not make it necessary to issue legal measures to cope with it. Accordingly, the tribunal found that there was no breach of the fair and equitable treatment standard.[134] In *Biwater v. Tanzania*, the tribunal underlined that, in establishing a violation, countervailing factors such as the responsibility of foreign investors in terms of prior due diligence should be considered.[135] In *GenerationUkraine v. Ukraine*, the tribunal considered that the economic reality of the State had to be taken into account to assess the fair and equitable treatment through the investor's legitimate expectations. According to the tribunal, the claimant invested in Ukraine on notice of both the prospects and the potential pitfalls, thus, the host-State did not violate the investor's legitimate expectations.[136]

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128 Saluka v. Czech Republic, ¶¶304-305; El Paso v. Argentina, ¶374.
129 Dolzer/Schreuer, p. 371.
130 Charanne v. Spain, ¶510.
131 Dupuy/Dupuy, p. 292.
132 Viñuales, 2017.
133 Levashova, 2020.
134 Metalpar v. Argentina, ¶187.
135 Biwater v. Tanzania, ¶601.
136 GenerationUkraine v. Ukraine, ¶20.37.

133. In the case at hand, similarly, CLAIMANT could not have expected that the circumstances under which it made its investment would be kept intact. The election of members of parties with different ideologies to compose the majority of the parliament is something usual. Moreover, RESPONDENT never made any specific representation to CLAIMANT to induce it to invest in the country.

134. Also, CLAIMANT could have been ware of legacy issues surrounding the investment - such as debt liabilities attached to the airlines - given that potential investors have cites these issues as a sticking point.[137]

135. Thus, RESPONDENT did not frustrate CLAIMANT'S legitimate expectations.

III. BITs ARE NOT SAFEGUARDS AGAINST POOR BUSINESS DECISIONS

136. Although CLAIMANT alleges that RESPONDENT had violated the FET standard and that it led it to a dire financial situation[138], in fact, CLAIMANT is the one to blame, by virtue of its ill-strategized plans.

137. In *Maffezini v. Spain*, the tribunal emphasized BITs are not insurance policies against bad business judgments.[139] In *MTD v. Chile*, the tribunal contended that BITs are not an insurance against business risk and, thus, the claimant should bear the consequences of its own actions as an experienced market player. Further, the tribunal affirmed that claimant's lack of assurance throughout the investment was a risk that the investor took irrespective of the host-State.[140]

138. Similarly, *in casu*, CLAIMANT took an extravagant approach during its investment, by expanding routes for cross-continental travel to Mekar using its A340 fleet and adding 20 new destinations in 2012. This was warned by representatives of Mekar Airservices, which cautioned CLAIMANT about the volatility of demand in Mekar, especially during fall and winter months.[141] Even Ms. Misty Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism, commented that CLAIMANT's business model was not a good long-term model[142]. Further, in September 2019, Fitch Ratings noted that CLAIMANT'S debt structure left insufficient funds for a sustainable growth, which led to a pressure for it to conclude a sale of its airline operations in Mekar to shore up liquidity. [143]

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[137] PO3, ¶21.
[138] ANofA, ¶21.
[139] Maffezini v. Spain, ¶64.
[140] MTD v. Chile, ¶178.
[141] PO3, ¶29.
[142] Case File, p. 55.
[143] PO4, ¶5.

139. Thus, CLAIMANT made bad business decisions, irrespective of any action by RESPONDENT. This lack of diligence was the only reason for its financial losses and so, the damages of it cannot be bore by RESPONDENT in the form of compensation.

CONCLUSION TO THE THIRD ISSUE

140. RESPONDENT respectfully requests this Arbitral Tribunal to find that neither individually nor taken together, its actions have not violated Article 9.9 CEPTA. The elements comprised under fair and equitable treatment standard, as provided for in Article 9.9(2) CEPTA, were not infringed. Further, in light of RESPONDENT'S right to regulate, it has not frustrated CLAIMANT'S legitimate expectations described under Article 9.9(3) CEPTA. And finally, RESPONDENT cannot be held accountable for Claimant's risky business choices.

ISSUE IV: NO COMPENSATION SHOULD BE AWARDED TO CLAIMANT

141. If the Arbitral Tribunal is to understand that a compensation should be awarded, then it should apply the market value of Claimant's investment in Caeli Airways. This is so, for both Article 9.21 CEPTA and international law provide an adequate standard of compensation based on the market value – which means CLAIMANT is owned no compensation (**I.**). If the Arbitral Tribunal is to find otherwise, CLAIMANT's compensation should be reduced, for Claimant bears the responsibility for the damages it has incurred (**II.**).

I. THE MARKET VALUE STANDARD ESTABLISHED BY BOTH INTERNATIONAL LAW AND CEPTA HAS ALREADY BEEN OBSERVED

142. CLAIMANT's contention that a compensation at a fair market value should be awarded shall be dismissed. Pursuant to the CEPTA, any potential awards ought to be valuated solely at the market value of CLAIMANT'S investment (**A.**); besides, there is no valid reasoning under both CEPTA and international law for a fair market value to be considered in the transaction involving Caeli Airways' shares (**B.**). That is to say, CLAIMANT is not entitled to any further payments under the CEPTA.

A. THE REQUIREMENTS TO SUSTAIN THE FAIR MARKET VALUE ALLEGED BY CLAIMANT ARE NOT PRESENT

143. CLAIMANT may not resort to the fair market value as to evaluate its investment in Caeli Airways, as the requirements for ascertaining a fair market value have not been met in the offer made by the Hawthorne Group.

144. A fair market value is determined by the price that a willing purchaser would pay to a willing vendor in an open market with both sides having reasonable knowledge of the facts

relevant to the transaction.[144] As per the Shareholders' Agreement, the willing purchaser needs to be a third-party in the context of an arm's length transaction.[145]

145. In the case at hand, there was no willing third-party purchaser at an arms-length transaction. The Hawthorne Group does not fit to the "arm's length" standard[146], as both CLAIMANT and the Hawthorne Group are part of the Moon Alliance. Both being part of the same airline alliance implies that they are involved in a strong exchange of resources, such as information and physical assets, to improve their market position.[147] That is to say, CLAIMANT and Hawthorne Group know a lot about each other – at least way much more than an independent third-party would. This scenario falls short of the arm's-length standard, which is the core for both a fair market value approach and the right of first offer established in the Shareholders' Agreement.

146. Thus, the use of a fair market value approach by CLAIMANT of its investment in the present case is contrary to the very definition of fair market value. For there is no information to support that CLAIMANT and Hawthorne Group engaged negotiations in equitable, market conditions, the offer on which CLAIMANT sustain the fair market value approach is quintessentially one from an interested party, strategically aligned to CLAIMANT, without the necessary conditions to equitably engage a transaction – as is required by the Shareholders' Agreement.

B. THE MARKET VALUE APPROACH OF ARTICLE 9.21 CEPTA IS THE CORRECT ONE IN LIGHT OF INTERNATIONAL LAW

147. The fair market value approach is not the suitable one under international law for CLAIMANT's plead. It is not an appropriated method for valuating compensations for damages, and any award arising therefrom should observe what CEPTA regulates on the issue by Article 9.21, that means, observe the market value of the monetary damages (**1.**). Further, the most favored nation treatment of Article 9.7 CEPTA does not apply to procedural issues (**B.**).

1. The market value standard provided in Article 9.21 CEPTA is the correct one

148. In *ADC v. Hungary*, the arbitral tribunal under the rules of the ICSID decided that, whenever a bilateral investment treaty decides on which compensation standard should be

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144 Reisman/Crawford, p. 965.
145 SHA, Article 39.1(a), p. 52.
146 Art. 39.1(a) SHA states that Vemma shall not engage any transaction relating to the disposal of Caeli's shares except if Respondent is offered a right of first refusal if "*Vemma Holdings receives a bona fide written offer for a Third-Party arm's length Transaction that Mekar Airservices desires to accept.*"
147 de la Torre, p. 24.

applied to a situation, and there are no illegalities committed – just as in the present case[148] , that is the standard that shall be observed.[149] Besides, according to the reasoning laid down by *Bridas et al v. Turkmenistan*, the cornerstone to assess damages under the ICSID Rules is foreseeability: a party may be compensated only for the damages occurred during the period of investment. As such, the fair market value of the investment in the future is irrelevant.[150]

149. In the case at hand, not only the CEPTA does provide for a standard, but also CLAIMANT relies on an approach that is not adequate under international law. Article 9.21 CEPTA is crystal clear in establishing that awards shall be deemed in relation to "monetary damages at a market value".[151] The applicable rule is not Article 9.12 CEPTA, for the CLAIMANT'S plea for damages is explicitly regulated in Article 9.21. As to the foreseeability, despite all warnings RESPONDENT gave to CLAIMANT about the latter's reckless financial and managerial decisions on Caeli, CLAIMANT stubbornly attached to its position and led to the – foreseeable – financial ruin of the airline, and now it wrongfully wants to take an advantage of this.

150. That said, the standard of Article 9.21 based on the market value is the one that must be applied. Not only it is the rightfully standard established by the CEPTA, but also CLAIMANT relies on a standard that is inadequate to evaluate the compensation it claims. In light of that, for RESPONDENT has already paid up to CLAIMANT the amount of USD 400 million equivalent to the market value of the latter's investment in Caeli Airways, there is nothing more to be paid by RESPONDENT.

2. The most favored nation rule provided on Article 9.7 CEPTA does not apply to arbitral proceedings.

151. CLAIMANT cannot be awarded a compensation for damages at a fair market value under the most favored nation clause (MFN), for a domestic award under a treaty is a procedural issue. Not only CEPTA expressly forbids the application of the MFN clause to procedural issues, but also international law recognizes that it may only apply to substantive issues.

152. The MFN rule is quintessentially a conventional, and not a customary rule[152]. That said, its application is limited to the substantive issues convened in a treaty[153]. Further, it is

[148] Cf. supra, ¶¶88-142.
[149] ADC v. Hungary, ¶¶429-444; Torres, pp. 220-221.
[150] Bridas et al v. Turkmenistan, ¶¶23-29.
[151] Case file, p. 82.
[152] Muchlinski, p. 367; Newcombe/Paradell, p. 197; Sabahi/Rubins/Wallace Jr., pp. 553-554.
[153] Art. 9 ILC's Draft Articles on Most-Favoured-Nation Clauses; Newcombe/Paradell, p. 193.

not applicable to any questions arising in dispute settlements, but only to the substantive issues that are seized by a third-party on the beneficiary[154] – and cannot be extended to other subject matter on a treaty[155]. That lies on the very purpose of the MFN rule: it is designed to protect actual investors – differently from CLAIMANT – throughout the investment period on substantive issues; it may not supplant the procedural safeguards already established in a treaty, situation in which the treaty itself would be rendered null.

153. In the case at hand, Art. 9.7 CEPTA expressly establishes that the range of substantive issues under the protection of the MFN clause "*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*". CLAIMANT's plea for an equalization of the Arrakis-Mekar BIT regarding a compensation for damages falls short from the application of the MFN clause, as the compensations for damages discussed therein are restricted to an award that may arise from an arbitral procedure – that is, it is a procedural mechanism.

154. Thus, the award – as a fair market value compensation mechanism established in the Arrakis-Mekar BIT – cannot be extended to the CEPTA under the MFN clause established in the latter. Article 9.7 CEPTA applies strictly to substantive issues, and cannot be applied to dispute settlements, which impedes CLAIMANT of pleading for a compensation at a fair market value under such rule.

II. ANY COMPENSATION THAT MAY BE AWARDED TO CLAIMANT MUST BE REDUCED

155. If the Arbitral Tribunal is to understand that CLAIMANT should be awarded a compensation for damages arising from RESPONDENT's conducts, then this compensation shall be reduced as CLAIMANT bears the responsibility for damages it has incurred during its period as a shareholder of Caeli Airways.

156. There is a well-recognized duty in international law that a failure to mitigate losses by the injured party precludes recovery to that extent.[156] If an investor contributed to the losses that arose from its investment and failed to mitigate these losses, then the state should not bear the costs of the losses such investor could have avoided – or at least mitigated. As per Article 9.21(a) CEPTA, these losses should be estimated at a market value.

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154 Anglo-Iranian Oil Case, ¶ 109.

155 Salini v. Jordan, ¶ 119; Tecmed v. Mexico, ¶ 69.

156 McGregor, pp. 6/60; Case Concerning Gabčíkovo–Nagymaros, ¶¶79-80; AIG Capital Partners, Inc. and CSJC Tema Real Estate Company v. Kazakhstan, ¶10.6.4.

157. In fact, the many actions that led to CLAIMANT'S investment downfall were risky and thoroughly not recommended by RESPONDENT at least since 2011.[157] There is no ground to support that RESPONDENT should be held accountable for all the losses that are nothing but a consequence of CLAIMANT'S decisions as controlling shareholder of Caeli. Besides, RESPONDENT'S actions during the term of the investment were no more than within the limits drawn by the state law of Mekar as well as by the limits allowed by the CEPTA[158]. Any compensation for damages should consider strictly what is a consequence of RESPONDENT'S actions, and solely RESPONDENT'S.[159]

158. Therefore, if this Arbitral Tribunal is to award CLAIMANT a compensation, this one shall be no more than the market value of what truly reflects RESPONDENT'S actions that caused damages to Claimant (if any), with respect to both international law and CEPTA.

CONCLUSION TO THE FOURTH ISSUE

159. The fair market value compensation standard pleaded by CLAIMANT has no grounds under both CEPTA and international law. Furthermore, RESPONDENT has already paid what would be the correct compensation to CLAIMANT, that is, the amount of USD 400 million equivalent to the market value of CLAIMANT'S investment in Caeli Airways, accordingly to CEPTA. Moreover, if this Arbitral Tribunal rules that CLAIMANT shall be awarded a compensation, then the Arbitral Tribunal should consider damages strictly related to RESPONDENT'S actions that effectively led CLAIMANT to suffer any damage.

PRAYER FOR RELIEF

160. In light of the above, RESPONDENT respectfully requests the Arbitral Tribunal to find that:

a. It does not have jurisdiction under the CEPTA nor under the ICSID AF Rules to decide the current proceedings;
b. The leave sought by CRPU's external advisors shall be granted and the leave sought by CBF shall be rejected;
c. RESPONDENT has not violated Article 9.9 CEPTA; and
d. No compensation shall be awarded to CLAIMANT.

Respectfully Submitted on September 23, 2021

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[157] ANofa, ¶11
[158] Cf. supra ¶¶ 138-141
[159] Bridas et al v. Turkmenistan, ¶23.

By Team Gray.