INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No ARB(AF)/20/78

September 16th 2021

Vemma Holdings Incorporation

(Claimant**)**

v.

Federal Republic of Mekar

(Respondent**)**

MEMORIAL FOR THE RESPONDENT

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TABLE OF AUTHORITIES

Treaties

Abbreviation	Citation
CEPTA	Compehensive Economic parthnership and Trade agreement between Mekar and Bonooru 1994
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [1965] 575 UNTS 159
ICSID AFR	ICSID Additional Facility Rules[2006]
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1959]
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47
VCLT	Vienna Convention on the Law of Treaties [1980] 1155 UNTS 331

Arbitral Decisions

Abbreviation	Citation
Aapl V. Sri Lanka	*Asian Agricultural Products Ltd. V. Republic Of Sri Lanka,Award,*(ICSID Case No. Arb/87/3)
Aes Summit	*Aes Summit Generation Limited And Aes-Tisza Erömü Kft V. The Republic Of Hungary,* ICSID Case No. Arb/07/22,Award
Alicia	*Alicia Grace and others v. United Mexican States* (ICSID Case No. UNCT/18/4).
Alex Genin	*Alex Genin, Eastern Credit Limited, Inc. And A.S. Baltoil V. The Republic Of Estonia,Award,* ICSID Case No. Arb/99/2
Apotext	*Apotex Holdings Inc. & Apotex Inc. v. United States of America,* Procedural Order on the Participation of the Applicant BNM as a Non-Disputing Party,

	ICSID Case No. ARB(AF)12/1 (4.3.2013) 8-24
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29
Bear	*Bear Creek Mining Corporation v. Republic of Peru*, Procedural Order 5, ICSID Case No. ARB/14/21 33-34
Bernhard	*Bernhard von Pezold and others v. Republic of Zimbabwe*, Procedural Order No. 2, ICSID Case No. ARB/10/15 (26.6.2012)
Biwater	*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22).
BUCG	Beijing Urban Construction Group Co. Ltd. v Republic of Yemen (ICSID Case No ARB/14/30), Decision on Jurisdiction, 31 May 2017
Cube	*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, Decision on the EU Commission's Application for Leave to Intervene as a Non-Disputing Party, ICSID Case No. ARB/15/20 (2.4.2020) 43
Ceskoslovenska	*Ceskoslovenska Obchodni the Respondent Banka (CSOB), AS v The Slovak Republic* (ICSID Case No ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999
CME	*CME v. Czech Republic*, Final award, (14,3,2003)
CME, S.O	*CME v. Czech Republic*, Separate Opinion of professor Brownlie, (14,3,2003)
CMS	*CMS Gas Transmission Company and The Republic of Argentina* Case No. ARB/01/8 Decision of the Tribunal on Objections to Jurisdiction,
Duke	*Duke Energy Electroquil Partners & Electroquil S.A. V. Republic Of Ecuador*, Award, ICSID Case No. Arb/04/19 (18.8.2008)
Eco Oro	*Eco Oro Minerals Corp. v. Republic of Colombia*, Procedural Order No. 6 (Decision on Non-Disputing Parties' Application), ICSID Case No. ARB/16/41 31

EDF	*Edf (Services) Limited V. Romania,* Award, ICSID Case No. Arb/05/13 (8.10.2009)
Hamester-1	*Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award
Hamester-2	*Gustav F W Hamester Gmbh & Co Kg V. Republic Of Ghana,* Award, ICSID Case No. Arb/07/24 (18.6.2010)
Ickale	*Ickale v. Turkmenistan*, Award, ICSID Case No. ARB/10/24, (08.3.2016).
Infinito	*Infinito Gold Ltd. v. Republic of Costa Rica,* Procedural Order No. 2, ICSID Case No. ARB/14/5 (1.6.2016)
Kft	*Hungary Vs Aes-Tisza Erőmű Kft,* Decision Of The Ad Hoc Committee On The Application For Annulment, ICSID Case No. Arb/07/19
Lemire	*Lemire V. Ukraine (Ii),* ICSID, Decision On Jurisdiction And Liability, 14 January 2010
Marvin	*Marvin Roy Feldman Karpa v. United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1, (16. 12, 2002).
Maffezini	*Emilio Agustín Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7
Middle East Cement	*Middle East Cement v. Egypt*, Award, ICSID Case No.ARB/99/6, (12,4,2002).
MTD	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7
Micula	*Ioan Micula, Viorel Micula And Others V. Romania,* ICSID Case No. Arb/05/20, Award (11 December 2013)
Mobil Investments	*Mobil Investments V. Canada*, ICSID, Arbitration Award Of May 22, 2014
Parkerings	*Parkerings-Compagniet As V. Republic Of Lithuania*, Award, ICSID Case No. Arb/05/8 (11.9.2007)
Plama	*Plama v. Bulgaria,* Decision on Jurisdiction, ICSID Case No. ARB/03/24, (08.02.2005).

Philip Morris-1	*Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay,* Procedural Order No. 3, ICSID Case No. ARB/10/7 (17.2.2015)
Philip Morris-2	*Philip Morris V. Uruguay,* ICSID, Award, 8 July 2016
Saluka	*Saluka Investments B.V. V. The Czech Republic,* Partial Award, UNCITRAL (17.3.2006)
Stadtwerke	*Stadtwerke München Gmbh, Rwe Innogy Gmbh, And Others V. Kingdom Of Spain,* Award, ICSID Case No. Arb/15/1 (2.12.2019)
Suez-1	*Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic,* Order in Response to a Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/17) 13 (17.3.2006)
Suez-2	*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19
Tecmed	*Técnicas Medioambientales Tecmed, SA v. United Mexican States,* Award, ICSID Case No.ARB(AF)/00/2, (29.5.2003).
Venezuela	*Venezuela holdings, B.V. and others v. The Bolivarian Republic of Venezuela,* Award, ICSID Case No.ARB/07/27, (09.10.2014).
Wintershall	*Wintershall v. Argentina,* Award, ICSID Case No. ARB/04/14, (08.12.2008).

Cases

Abbreviation	**Citation**
Antaris	*Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, Award, PCA Case No. 2014-01 (2.5.2018)
Anatolie	Article 39, ILC Draft Articles; Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan, SCC Case

	No. V116/2010, Award, 19 December 2013.
Eli	*Eli Lilly and Company v. The Government of Canada*, UNCITRAL, Procedural Order No. 4, ICSID Case No. UNCT/14/2

Rules/ Legislations

Abbreviation	Citation
FTC Statement	Statement of the Free Trade Commission on non-disputing party participation
ICSID Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, 2006
UNCITRAL	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014
UNCITRAL Rules	UNCITRAL Rules on Transparency in Investor –State Arbitration, 2014

Textbooks

Abbreviation	Citation
Sornarajah	M.Sornarajah, The International Law on Foreign investment (3rd edn, CUP 2010)
Tudor	Ioana Tudor, The Fair And Equitable Treatment Standard In The Law Of Foreign Investment (2008),
Yannaca-Small	K.Yannaca-Small, Fair And Equitable Treatment Standard: Recent Developments, In Standards Of Investment Protection (Oup 2008),
Kluwer	In Je Kalicki And M Abdel Raouf (Eds), Evolution And Adaptation: The Future Of International Arbitration (Kluwer Law International 2019
Kantor	Kantor & Mark, Valuation in International Arbitration (2015)
S.Ripinsky	Sergey Ripinsky & Kevin Williams, Damages in International Investment law, (2008) British Institute of international and Comparative law
J.Crawford	J. Crawford & J.Watkins, 'International Responsibility' in S. Besson and J. Tassioulas (eds),The Philosophy of International Law (Oxford: OUP, 2010)
Yearbook	Yearbook of the ILC, 2001, vol. II, Part Two, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries

Miscalleneous

Abbreviation	Citation
Aron Broches	Aron Broches, Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law (Martinus Nijhoff Publishers 1995)
Arko	A.Arko, 'Denial Of Justice' Https://Jusmundi.Com/En/Document/Wiki/En-Denial-Of-Justice-In-Fet Assessed 20.8.2021
Investment Treaty News	The Interpretation Of Fair And Equitable Treatment Under Customary International Law By Investment Tribunals, Investment Treaty News, <Https://Www.Iisd.Org/Itn/En/2013/03/22/A-Distinction-Without-A-Difference-The-Interpretation-Of-Fair-And-Equitable-Treatment-Under-Customary-International-Law-By-Investment-Tribunals/>
Jaroslavsky	P.Jaroslavsky, & J.P.Blasco, 'Amici Curiae in Investment Arbitration' <https://jusmundi.com/en/document/wiki/en-amici-curiae-in-investment-arbitration> accessed 2.8.2021
Levashova	Y.Levashova, 'The Role Of Investor's Due Diligence In International Investment Law: Legitimate Expectations Of Investors' <Http://Arbitrationblog.Kluwerarbitration.Com/2020/04/22/The-Role-Of-Investors-Due-Diligence-In-International-Investment-Law-Legitimate-Expectations-Of-Investors/> Assessed 20.8.2021
Matthew Coleman	Matthew Coleman, Thomas Innes, "Investor-State Arbitration And "Fair And Equitable" Treatment, Investor-State Arbitration Series, May 19, 2015, Link: Https://Www.Steptoe.Com/En/News-Publications/Investor-State-Arbitration-And-Fair-And-Equitable-Treatment.Html,
Nationals	Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 ICSID Reports 28; also available online at www.worldbank.org/icsid.
Oxford Dict.	Oxford American Dictionary, Second Edition,
Overview	Overview of Arbitration under the ICSID Additional Facility, https://icsid.worldbank.org/services/arbitration/additional-

	facility/process/overview
Report On Panel 3	Report On Panel 3: How To Strike A Balance Between The Protection Of Investments And The Host Country's Right To Regulate,
Kidane	The Legal Framework for the Protection of Foreign Direct Investment in Ethiopia, L.Kidane Legal Framework for the Protection of Foreign Direct Investment in Ethiopia - Oxford Handbooks
Professors Newcombe And Paradell	To Use The Terms Of Professors Newcombe And Paradell, Supra
Pablo	Pablo Nilo Donoso Discrimination in FET . https://jusmundi.com/en/document/wiki/en-discrimination-in-fet
Perspective	Perspectives Paper: Challenges to Market Value 1915 (ivsc.org)
Limits Of State	The Limits Of State Regulatory Powers: 34th Public Conference Summary, 9/17/2020, Accessed: 9/17/21
Puter	S.Puter, 'Amsterdam Court Of Appeals Rules On Enforcement Of Award Set Aside By Russian Courts' Https://Content.Next.Westlaw.Com/7-521-6671?__Lrts=20201012062443134&Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True
Schreuer	Christoph H. Schreuer, The ICSID Convention: A Commentary (2001).
UNCTAD Series	UNCTAD, 'Fair And Equitable Treatment, UNCTAD Series On Issues In International Investment Agreements Ii' New York And Geneva <Https://Unctad.Org/System/Files/Officialdocument/Unctaddiaeia2011d5_En.Pdf> Assessed 8.19.2021
Volterra Fietta	ICSID tribunal throws new light on the Status of State-owned Enterprises under the ICSID Convention, Volterra Fietta**,** https://www.lexology.com/library/detail.aspx?g=977d28de-187c-4be9-abaf-cb75d776695a
Webcache	https://webcache.googleusercontent.com/search?q=cache:tJUJQv8NUtkJ:https://www.cewd.org/documents/strategic-planning/documents/Structure%26SupportBuildingSustainability.docx+&cd=

	17&hl=en&ct=clnk&gl=mn
Wrongful act	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001

Articles

Abbreviation	Citation
Laryea	E. Laryea, 'Legitimate Expectations In Investment Treaty Law: Concept And Scope Of The Application' [2020] *Handbook Of International Investment Law And Policy*
Ursula Kriebaum	Ursula Kriebaum, 'Fet And Expropriation In The (Invisible) Eu Model Bit' (2014) 15 The Journal Of World Investment & Trade,
Juan Pablo Hernández Páez,	Juan Pablo Hernández Páez, Missing The Forest For The Trees: Creeping Fet Violations In Investment Arbitration, The Treaty Examiner, Vol. 2, Issue 1, 2021, Https://Treatyexaminer.Com/Creeping-Fet-Violations/

TABLE OF ABBREVIATIONS

Abbreviation	Term
CBFI	Consortium of Bonoori Foreign Investors
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CRPU	Committee on Reform of Public Utilities
ICSID	International Centre for Settlement of Investment Dispute
EU	European Union
EC	European Commission
WHO	World Health Organization
LLC	Lapras Legal Capital
FCTC Secretariat	Secretariat of Framework Convention on Tobacco Control

STATEMENTS OF FACT

[1] **1964,** the Constitutional Court of Bonooru found that Article 70 bestows positive obligations upon the State to assist and ensure provision of essential transportation to the population living in the remote areas.

[2] **2009,** under the Article 2(a) of the Monopoly and Restrictive Trade Practice Act (as Amended), the CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share than 50 percent.

[3] **2010**, Bonoori government launched the Caspian Project, and planned to spend 100 Billion BAK between 2010 to 2030 to build infrastructure in Narnian States.

[4] **2011** (5 January), Vemma acquired 85 percent stake in Caeli Airways. Mekar maintained 15 percent ownership through Mekar Airservices Ltd. The Horizon 2020 scheme as part of the Caspian project was revealed.

[5] **2014,** Mekar and Bonnooru signed the Comprehensive Economic Partnership and Trade Agreement (hereinafter referred to as the 'CEPTA'"). In June, oil prices around the globe crashed to a five-year low. Caeli Airways benefitted from this and turned a net profit over the whole year for the first time.

[6] **2015,** the average time taken from commencing an action to receiving a final decision in Mekari courts rose from 9 months in 1980 to 22 months in 2015.

[7] **2016** : Rapid expansion drew the attention of the Competition Commission of Mekar (hereinafter referred to as "CCM"), which launched a suo moto investigation into its activities ('The First Investigation'). second investigation into Caeli's business activities focusing specifically on price undercutting on certain routes to and from Phenac International ('The Second Investigation').

[8] **2017**: A currency crisis ensued in Mekar. Simultaneously, increasing inflation led to a surge in costs of everyday items and reduced consumer spending power.

[9] **2018:** CCM concluded the first investigation and found a breach of Mekar's antitrust legislation

in the form of predatory pricing resulting from low airfares and loyalty programs. With a view to stabilize its currency, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON; this nullified the short-lived exemption granted to airlines.

[10] **2019**: The hearing on CCM's first investigation scheduled, after that the Caeli requested for appeal on CCM's second investigation to be joined. Mekar's court denied request, on the basis of its internal law to wait for Respondent's investigation for response. In February, the IMF report predicted four consecutive quarters of negative growth for Mekar, an 8 per cent fall in GDP, and a 2600 per cent average inflation rate in 2020.

[11] **2020:** Vemma sold its stake in Caeli to Mekar Airservices for 400 million USD.

[12] **2021:** Bonooru increased its shareholding in Vemma to 55 percent. Legal team was equipped with lawyers from Bonooru's Justice Department to assist in its arbitration against Mekar. In March, External Advisors to the Commitee on Reform of Public Utilities (CRPU) submitted an amicus , then in April the Consortium of Bonoori Foreign investors (CBFI) submitted the same as well.

i. THE CLAIMANT HAS NO STANDING TO BRING THIS CLAIM UNDER THE CEPTA AND ICSID ADDITIONAL FACILITY RULE

[1] The Settlement of Disputes is defined under the Article 9.16 (Submission of a Claim to Arbitration) of CEPTA. It states that if a dispute was not resolved through a mutual agreement, "*a claim may be submitted under this Section by an investor of a Party on its own behalf; or an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly*".[1]

[2] Vemma Holding Incorporated (hereinafter referred to as "Vemma") filed a Notice of Arbitration against Mekar on 15 November 2020. The claim should be submitted by the Claimant if the requirements of the Chapter 9 of the CEPTA and the Article 2 of the ICSID Additional Facilities Rules. However, the Claimant is not qualified as an investor under the CEPTA and ICSID AFR. Thereby, the Tribunal should find that there is no jurisdiction over the current dispute on ratione personae.

I. The Claimant Is Not Qualified as an Investor Under The CEPTA (Ratione Personae)

[3] In order for the ICSID Tribunal to have jurisdiction over the dispute, a jurisdictional element of an 'Investor' shall be met (ratione personae). The tribunal's *ratione personae* jurisdiction extends to a Claimant with control over the investment at the time of the alleged breach.

[4] The Respondent argues that the Claimant failed to be an investor in the jurisdictional matter which is sufficient to dismiss the claim. It should be emphasized that the contracting parties to the Comprehensive Economic Partnership and Trade Agreement (here referred as CEPTA) agreed that an *Investor* under the treaty shall meet the below-specified criteria:

> "*Investor means a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an*

[1] Record, p.79

investment in the territory of the other Party"[2]

[5] The Respondent concludes that the Tribunal does not have jurisdiction to hear the Claimant's case, given that the present dispute constitutes *State-to-State arbitration.*[3] More specifically, Mekar did not consent to a State-to-State arbitration with Bonooru under Chapter 9 of the CEPTA.

[6] The Respondent objects to the jurisdictional element due to the fact that Vemma operated governmental-functions and acted as a State Agent of Bonooru. Thereby, it is arguable to rely on the *'ownership' concept*, although the CEPTA and ICSID rule that it would not matter whether the investor is a state-owned or a private-owned enterprise.

[7] To support this point, the Respondent cited the nature of activities of Vemma under the following arguments: (A) the Claimant acted as an agent of its state and (B) Vemma satisfies all requirements of state control and ownership. Given these points, this arbitration would in effect be between the states Bonooru and Mekar.

A. The Claimant Acted as an Agent of Its State

[8] The ICSID Convention, therefore, prevents Tribunals from arbitrating State-to-State disputes *or* disputes between private parties. If a State-Owned Enterprise (SOE) exerced essentially governmental-function or acted as an agent of the State, it is uncontroversial to claim that it would be excluded from an investment treaty protection.[4]

[9] The present dispute arose as to the status of state-owned enterprise.[5] Thus the Respondent cited the *'Broches Test'* in order to accommodate this question. Broches concluded that :

[10] "*a mixed economy company or government-owned corporation should not be disqualified as a national of another Contracting State unless it is acting as an agent for the government or is*

[2] Record, p.73
[3] Record, p.6
[4] *Volterra Fietta*
[5] Record, p.6

discharging an essentially governmental-function".[6]

[11] A Functional Test was applied by many ICSID Tribunals to determine whether a disputing party is a SOE or a state agent. The Test holds that a SOE must not be excluded as a *national* in all of our contracting systems, unless they perform functions of the government that are essentially of a governmental nature.

[12] The Respondent proves that Vemma acted as a State Agent (Bonooru) under the three specific events in which the Claimant pursued Governmental-functions.

1. As a Part of the Horizon 2020 Scheme Under the Caspian Project, The Claimant received subsidy from the Government

[13] The CCM concluded its First Investigation. The report noted that the subsidies received by Vemma under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs.[7]

[14] The first objection is related to the fact that Vemma participated in the Horizon 2020 Scheme.[8] Under the project, Vemma received a subsidy from the Bonoori government. It is stated that *"...in its application, Vemma has credibly outlined how its investment in Caeli Airways would draw more travellers from Mekar and the Greater Narnian region to Bonooru's emerging tourism markets.*"

[15] As a consequence, the Tribunal could conclude that Vemma facilitated the government's ability to exercise this plan of Caspian project. In addition to this, under the Horizon Project 2020, Vemma received significant subsidies from the Ministry of Transport and Tourism of Bonooru.[9]

[16] In accordance with the statement of the Secretary of the Transport and Tourism in a Cabinet

[6] Aron Broches
[7] Record, p.36
[8] Record, p.32
[9] Record, p.55

reshuffle in Bonooru, *"Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal."*[10]

[17] The Competition Commission of Mekar (CCM) started investigation on Vemma`s activity. More specifically, the results of the first investigation by the CCM concluded that the participation of the Claimant under the Horizon 2020 Scheme enables them to come to participate in anti competitive behavior.[11]

[18] Given these points, Vemma was one of Bonooru's government's tools to have an expanded economic impact through its state agent onto Mekar.

2. The Claimant Enabled the Mobility Right of Bonoori Citizens which should be granted by government and Discharged Governmental-functions

[19] In the second objection, the Respondent refers to the activity of Vemma as governmental. The governmental-functions are defined as a sort of activities normally reserved for governmental entities. The Commonwealth of Bonooru has a unique archipelagic geography[12], which brings the transportation services to center stage.[13] As a result, to enable the mobility rights of its citizens upon routes that are enshrined in Article 70 of Bonooru's Constitution, Vemma Holding INC was operating routes between Mekar and Bonooru.[14]

[20] [20] Apart from this, the Respondent would like the Tribunal to note that the provision of the mobility rights of the citizens of Bonooru was predominantly performed by the state of Bonooru until the privatization case in relation to Constitutional Court of Bonooru on Privatisation of BA Holdings.[15] This role was primarily performed by and reserved for the State of Bonooru.

[10] Record, p.32
[11] Record, p.7
[12] Record, p.28
[13] Record, p.41
[14] Record, p. 41
[15] Record, p. 43

[21] In the case of *The People's Council of the Island of Kyoshi versus Bonooru 2017,*[16] the Constitutional Court found that the government of Bonooru had a positive obligation to ensure that the people of Bonooru are able to realize their mobility rights under *Article 70 of the Constitution of Bonooru*. Therefore, the Claimant's role in enabling the mobility rights of the citizens could be viewed as discharging an essentially governmental-function.

3. The Claimant Operated Flights to The Routes Even at A Significant Loss

[22] In the third objection, one of the pillars of Caeli Airways' business model during this period was catering to customers travelling from Mekar to Bonooru.[17] The Respondent observed the fact that *"its fall-winter losses, Caeli Airways, were particularly concentrated in the high-traffic routes between Bonooru and Mekar".*[18] More specifically, under the control of Vemma, Caeli Airways proceeded with its initial business model even when it became unprofitable.

[23] In addition to this, the Prime Minister of Bonooru stated that *"Our government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability.'*

[24] A Podcast revealed that Vemma had to maintain its initial unprofitable business model due to the governmental-control over the entity. In podcast conversation that even though this business model was unprofitable for Vemma holdings[19],[20]

[25] Also The Royal Narnian was chosen as a flag carrier of Bonooru, owned and operated by Vemma.[21]

[26] In conclusion, after reviewing below-specified three objections, the Claimant acted as an agent of the state of Bonooru considering its behavior and function.

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[16] Record, p.43
[17] Record, p.32
[18] Record, p.33
[19] Record, Annex VII
[20] Record, p.55
[21] Record, p.29

B. Vemma Satisfies All Requirements of State Control and Ownership

1. The Claimant Satisfies the Requirements of State Ownership and Control

[27] In the current dispute, the structure of Vemma as for both ownership and control was under authority of Bonooru. According to the Memorandum of Association of Vemma Holding Inc, the Ministry of Transport and Tourism of Bonooru is a Non-Executive Director of eight Board of Directors of Vemma. The Non-Executive Director is an independent Director who does not hold any other position in the Company other than a Director's position.[22]

[28] In 2021, Vemma underwent a large-scale restructuring.

[29] > *"Its board of directors was replaced with government-functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar".*[23]

[30] The fact below is a proving point that as for control, Bonooru replaces its important position in Vemma. Bonooru added a lawyer to the Board of Directors which could be viewed as an increased focus. Moreover, until March of 2020, Bonooru retained minority shareholding in Vemma, which ranged between 31 to 38 percent.[24] By March of 2021, Bonooru increased its interest in Vemma to a controlling 55 percent stake.[25]

2. The Commonwealth of Bonooru Is a Real Party of Interest in The Present Dispute

[31] To support this argument, the Respondent applied the reflective of the Customary International Law. In the present case, the Respondent cited the Article 5 "*Conduct of persons or entities*

[22] Record, p. 46
[23] Record,p. 40
[24] Record, p.29
[25] Record, p.40

exercising elements of governmental authority" of the ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts. The Article 5 establishes that:

[32] *"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 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."*

[33] The Respondent refers to this article as it takes into account the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of state organs, as well as situations where former State corporations were privatized but still retain certain public or regulatory functions of the government.[26]

[34] A generic term "entity" reflects a wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. *"They may include …., in special cases, private companies"*[27] and private or a state-owned airline may have delegated certain powers to them.[28]

[35] Furthermore, Article 8 of ILC specifies the following:

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

[37] Vemma is considered to be a state agent in accordance with international law, based on two facts. Firstly, Vemma exercised governmental-functions enabling the Constitutional mobility right of the citizens of Bonooru, although it is not a state organ. Secondly, Bonooru is a 55 percent shareholder of Vemma. Given these facts, Vemma acted as a state agent in the host country.

[26] Wrongful Acts,42, para 1.
[27] Ibid, page 43, para 2
[28] Ibid

[38] The Respondent brings the Functional Test in a persuasive manner. The Respondent refers to the Tribunal's decision on the *Maffezini*[29] case to prove its objection to the jurisdiction.

[39] Furthermore, *CSOB*[30] and *BUCG*[31] cases could be referenced which appear similar in nature to that of the present case.

[40] In the case of *Maffezini*, the state entity was concluded to be performing essentially governmental-functions by promoting regional development which appears consistent to Vemma's functions in the current case.

[41] To conclude, the Commonwealth of Bonooru is a real party in interest in the present disputes. Under this argument, Bonooru created Vemma and funded it through significant subsidies. Bonooru has fulfilled its obligations. Also, the initial purpose to establish Vemma was to furnish the constitutional obligations and support a regional development**.**

II. The Claimant Does Not Qualify as an *Investor* Under the ICSID Additional Facility Rule

[42] The application of the ICSID Additional Facility Rules and its scope is reviewed in the current section. The Administrative Council of the Centre adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention.

[43] Additionally, ICSID Additional Facility Rule is not explained by ICSID Convention. These kinds of disputes are not covered by the ICSID Convention (see Article 25(1) of the ICSID Convention) and none of the provisions of the ICSID Convention is applicable to Additional Facility proceedings (Article 3 of the Additional Facility Rules).[32]

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[29] *Maffezini*
[30] *Ceskoslovenska,*
[31] *Beijing Urban*
[32] *Overview*

[44] In the present case, Bonooru signed and ratified the ICSID Convention, Mekar has not.[33] Therefore, the current case is included in the scope of ICSID Additional Facility Rule.

[45] Article 2 of the ICSID Convention provides:

[46] *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"*

[47] The Respondent tested these arguments below.

A. <u>The Dispute Does Not Arise Directly Out of an Investment</u>

[48] The dispute should arise directly out of an investment. "Directly" could also be "translated" as meaning "specifically" and that since none of the measures complained were directed specifically at the Claimants' investments, but rather were measures of general applicability, it cannot be concluded that the dispute in the present case arises "directly" out of the Claimants' investment.

[49] The Respondent also finds support for its objection that the dispute in the current case is directly related to an investment in the ICSID case of *CMS v. Argentina*[34] which also addressed the question of whether the dispute in question arose directly out of an investment.

[50] In that case, the Claimant, which had invested in the context of Argentina's privatization program in a gas distribution system, brought a claim in ICSID arbitration under the *Argentina-U.S. Bilateral Investment Treaty* on the grounds that various economic measures taken by the government violated its rights under that BIT.

[51] In that case, as in the present dispute, Argentina challenged the jurisdiction of the Tribunal and ICSID on grounds, inter alia, that the dispute did not arise directly out of an investment and that the Respondent requested the tribunal to judge the validity of general economic measures.

[33] Record, p.2
[34] *CMS*

[52] The tribunal rejected the objection to jurisdiction of CMS *v. Argentina*, based on the following rationale:

[53] > *"Tribunal* had jurisdiction *"...to examine whether specific measures affecting Claimant's investments or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments given to the investor in treaties, legislation or contracts"*.[35]

[54] In the present case, the dispute did not directly arise out of an investment. The dispute arises out of the measures of the state organs.

B. <u>The Dispute is Not a Legal Dispute</u>

[55] Article 25 of the ICSID Convention not only requires a dispute to arise directly out of an investment dispute, but it also requires that the dispute be a *'legal'* dispute. The Respondent objects to the jurisdiction of ICSID and the Tribunal, on the grounds that the claim submitted by the Vemma Holdings Inc. to the arbitration is not 'legal' in nature.

[56] A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations.[36] Although the ICSID Convention itself does not define the meaning of a 'legal dispute', the accompanying *Report of the Executive Directors of the World Bank* gives some clarification, as follows:

> *"The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation"*.[37]

[57] In his commentary on the ICSID Convention, Professor Schreuer characterizes legal disputes as

[35] *CMS*,42.
[36] *Suez*-2,19.
[37] *Nationals*,28.

follows: *"The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed. Consequently, it is largely in the hands of the Respondent to present the dispute in legal terms."*[38]

[58] According to the Respondents, there are no legal disputes between the parties-Vemma and Mekar. The dispute or disputes submitted to it are of a legal nature as they involve a disagreement on legal rights or obligations.

[59] In the present case, the Respondent asserts that the dispute between the Claimant and the Respondent is of a business or commercial matter rather than a "legal" dispute required to establish ICSID jurisdiction.

[60] It is apparent that the average time taken from commencing an action to receiving a final decision in Mekari courts rose 22 months in 2015. This was even higher in commercial matters (approx. 27 months).

[61] At that point, it is arguable that Vemma was unaware of the long term loading of the judicial system before the investment. In other words, investors should have researched the investment condition of the host state. It is the investor's responsibility to inquire and research the host state's investment environment prior to making any business commitments.

[62] Under this provision, each State is required to take all steps necessary to protect investments, regardless of whether its domestic law requires or provides mechanisms for it to do so, and regardless of whether the threat to the investment arises from the State's own actions or from the actions of private individuals or others.

[63] To conclude, in the present dispute which arose State-to-State arbitration, the tribunal does not have jurisdiction under above arguments. As the Respondent Mekar did not consent to state-to-state arbitration under the Article 9 of CEPTA. Finally, the Claimant is an agent of its state and implements governmental-function.

[38]Schreuer,105.

ii. TRIBUNAL SHOULD GRANT THE CRPU AMICUS CURIAE SUBMISSION AND DENY CBFI

I. The proposed submission of the CRPU should be admitted because the amicus curiae requirements are met

[64] The CRPU applies for leave to file a non-disputing party submission under Article 41(3) of the ICSID Rules and Article 9.19 of the CEPTA. Under these articles, the CBFI should fulfill the following requirements:

A. To assist the Tribunal in the determination of legal or factual issues;
B. To address matter within the scope of the dispute;
C. Significant interest;
D. No undue burden or unfairly prejudice to one of the parties.

A. The CRPU would assist the Tribunal in the determination of legal and factual issues relating to the Arbitration

[65] According to the Article 9.19(3)(A) of the CEPTA and Article 41(3)(A) of the ICSID Rules , the petitioners are required to submit matters within the scope of the dispute.

[66] Amicus petitioners must, therefore, as a first requirement, adduce a new, special legal or factual perspective in order to fulfill the role ascribed to them. In the present case, the CRPU provided only factual perspective that the rights received by Vemma were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee.

[67] The *Aguas Provinciales* tribunal held that :

[68] > *"the traditional role of an amicus curiae in an adversary proceeding is to help the decision maker arrive at its decision, by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide*."[39]

[39] Suez-2,pp 10-11

[69] In the present case, the disputing parties argued regarding jurisdiction that the present dispute constitutes a State-to-State arbitration. The CRPU intended to provide a different factual perspective relating to the jurisdiction. The parties have not competently and comprehensively argued all issues regarding the jurisdiction.

[70] Tribunal concluded that:

[71] *"in view of the fact that the parties have competently and comprehensively argued all issues regarding jurisdiction."*[40]

[72] None of the disputing parties informed on the *ratione legis jurisdiction*. The parties have not competently and comprehensively argued all issues regarding the jurisdiction.

B. The CRPU's submission addresses matter within the scope of the dispute

[73] Article 9.19(3)(A) of the CEPTA and Article 41(3)(A) of the ICSID Rules establish a requirement that an amicus curiae's submission should assist the Tribunal to determine issues related to the proceeding.

[74] Some tribunals have expressly required arguments on jurisdiction, or simply accepted them.[41] In the jurisdictional phase, an amicus submission may contribute to tribunal's decisions under two aspects. More specifically, the *legitimacy and legality* of the overall conduct of investors needs to be reviewed [42]

[75] The *Apotex* Tribunal concludes on the matter as follows:

[76] *"It is "perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, … to provide assistance*

[40] *Suez-2,10-11*
[41] Schliemann,375.
[42] *Savarese,116.*

> *and perspective or insights beyond those of the disputing parties".*[43]

In *Infinito*, provided that 'The case before this tribunal involves strong *public interest* concerns regarding the protection of the environment in Costa Rica and the manner in which governmental processes were apparently corrupted to the detriment of the environment.'[44]

[77] Thus, the Tribunal concluded that APPREFLOFAS meets the test and allows it to make a written submission.

[78] Additionally , while neither Party made any allegations of corruption, the CRPU's submission is related to the Respondent's argument on the jurisdiction. In the Response to the Notice of Arbitration, the Respondent provided that the tribunal does not have jurisdiction to hear the Claimant's case, given that the present dispute constitutes State-to-State arbitration. Therefore, the CRPU's submission is related to the procedural legal question of a "*jurisdiction"*.

[79] There are four jurisdictional requirements for establishment of the existence of the tribunal's adjudicative power such as as a) ratione voluntatis, b) ratione personae, c) ratione materiae, and d) ratione temporis requirement. [45]

[80] The CRPU's submission is related to the *ratione materae* requirement as the CRPU informed that the rights received by Vemma Holdings were procured by means of bribes paid to Mr. Dorian Umbridge. The Respondent's contention is within the *ratione personae* requirement because the Respondent provided that the Claimant is not an *investor*.

[81] The *ratione personae* requirement is related to the notion of the legal and protected investment in the sense that if there is no legal and protected investment.[46] Therefore, the CRPU's submission is directly related to the Respondent's contention.

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[43] Schliemann,375.
[44] *Infinito*, 4.
[45] Novaković,pp.23-24.
[46] Ibid, p.40.

[82] The *Electrabel* tribunal also engaged in *jurisdictional objections* raised by the EC (but, not by the Respondent) , addressed the principle of the competence de la competence.[47] Therefore, in the present case, Amici's submission is consistent with the "*within the scope of the dispute"* requirement.

[83] Finally, in *United Utilities,* EC's submission concerning the Tribunal's jurisdiction was granted.[48] The Tribunal deemed that it could potentially assist the Tribunal in the determination of a jurisdictional issue.

[84] The *Suez* tribunal considered that petitioners would not assist the tribunal in its task of assessing jurisdiction because the parties have *competently and comprehensively argued all issues regarding jurisdiction*.[49]

[85] The *Infinito* tribunal reiterated that in a case where party made any allegations against corruption, a BIT definition of an investment could be applicable. It defines an investment as *"any kind of asset owned or controlled … in accordance with the latter's laws"*. Consequently, in this context, the Tribunal cannot rule out at this early stage and without having heard the Parties that these matters may play more role during the assessment of this dispute.[50]

[86] Although the disputing parties did not provide any allegation of bribe, provisions of CEPTA should be examined.

[87] In CEPTA, the definition of an *investment* does not include '*in accordance with the laws and regulations*' of the host state qualification. However, there is a following view:

[88] *"Even in the absence of such a qualification in the treaty, the treaty applies only to investments that are made in accordance with the laws of the state party..."*[51]

[47]Brabandere, p.21.
[48] *United Utilities,*12.

[49] *Suez-2,*27.
[50] *Infinito Gold,*
[51]Sornarajah, p.317.

[89] The *Inceysa* tribunal applied this concept. Also, In *Plama*, the Tribunal determined that existence of "in accordance with the host-state law" clause is not a precondition for the tribunal to be able to deny protection to an illegal investment.[52]

[90] The *Plama* tribunal also stated that "investment was against the principle of a good faith, or a principle that no one shall benefit from his own wrongdoing and shall respect the law as the principle of international public policy domestic public policies of investor's state and host State".[53]

[91] Additionally, the *Phoenix* tribunal determined that *"the conformity of the establishment of the investment with the national laws - is implicit even when not expressly stated in the relevant BIT."*[54] Thus, Vemma's investment shall be in accordance with the laws and regulations of the Mekar.

[92] Secondly, treaties must be interpreted according to the customary rules under VLCT.[55]

[93] Article 31 of the VLCT stipulates that "…in their context and in the light of its object and purpose."[56] Article 1.3(2) of the CEPTA stipulates that *"the Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law*."

[94] Article 1.3 (b) of the CEPTA specifies that one of the objectives of this agreement is to "*promote conditions of fair competition in the free trade area*".[57] Also, the preamble of the CEPTA clearly calls to 'promote transparency, good governance, and the rule of law, and *eliminate bribery* and corruption in trade and investment.'[58]

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[52] *Plama*.101.
[53] Novakovic,18-19.
[54] *Phoenix*,101.
[55] *Daimler*.46,*Saluka*,77.

[56] Vienna,331.
[57] Record,72.
[58] Record,71.

[95] Some tribunals have treated the requirement to comply with local laws as *implicit* even where not expressly stated in the relevant BIT.[59] Therefore, legality requirement is implicit even if the CEPTA does not stipulate this requirement in its definition section.

C. The CRPU has a significant and public interest in the Arbitration

[96] Anyone who is directly or indirectly affected by the decision of an arbitral tribunal thus deemed to have a significant personal interest in the case.

[97] The *Apotex* tribunal comes closest to a definition and supports the affected rights approach. It held that that *"how the rights or principles it may represent or defend might be directly or indirectly affected by [. . .] the outcome of the overall proceedings".*[60]

[98] Alternatively, Tribunals frequently require that the dispute be a matter of a public interest, although this is not provided neither in the ICSID Rule 37 (2) nor the UNCITRAL draft.[61]

[99] The *Biwater* tribunal required that "*the dispute be a matter of public interest which cited the words about public interest of the Arbitral Tribunal in the Methanex".*[62] The concept of the public interest issues can be formulated in two ways. The public interest can also implicate issues that encapsulate *the common interest of a mankind*, such as human rights or environmental concerns.[63]

[100] Promotion of fair business practices in Mekar is a matter of public interest because It is one of the common interest of mankind. The International investment law focuses on three main categories to protect the public interest: the environment, human rights and the *discouragement of certain illegalities* (e.g. corruption).[64]

[59] UNCTAD Series,38.
[60]Schliemann,371-372.
[61]Schliemann,373.
[62] *Biwate,*15.
[63] Choudhury,12.
[64] Aboubakr,124.

[101] Specifically, amicus submissions aim to protect important public interests such as environmental and health protection, human rights, workers' rights, sustainable development, cultural heritage, *the fight against corruption*, and governmental policies.[65]

[102] Alternatively, even If the Tribunal does not consider the CRPU's general interest in promoting fair business practices in Mekar a public interest, the public interest is not a necessary requirement of the amicus submission. It is sufficient to justify the significant interest in regards to the amicus participation.

[103] The idea that an amicus curiae represents a 'public interest' is not always necessary. This has led Tribunals to accept submissions by the European Commission (EC) of the European Union (EU) in several intra-EU investment disputes.[66] Therefore, it does not have to be necessarily a public interest. The significant interest is a sufficient justification for the participation of non-disputing parties in arbitral proceeding.

D. The CRPU's submission is consistent with the requirement of the independence.

[104] Amicus curiae should be independent from the Disputing parties. This is implicit in Rule 37(2)(a) reiterating that amicus shall "bring a perspective, particular knowledge or insight that is different from that of the parties".[67] This Article is exactly the same as in Article 41(3) of the ICSID Rules.

[105] The *Suez* tribunal stated that :

[106] > *"to judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationships, with the Claimant or the Respondent."*[68]

[107] The CRPU was selected for the role through a transparent and competitive process approved by the Cabinet of Ministers of Mekar and based on criteria of competence as identified in the Law

[65] Gomez,544
[66] *Brabandere*,11.
[67] *Pezold*,49
[68] *Suez-1*,12.

on Privatization. Thus, the CRPU is independent from the disputing parties.

[108] It is clear that prospective Amici should have an established area of work, with a clear focus on a legal, political or social matters.[69] The CRPU has an established area of work with a clear focus on an investment banking.

II. The proposed submission of the CBFI does not address matter within the scope of the dispute

A. CBFI did not bring new and special legal or factual perspective

[109] Article 9.16(2)(b) states that ICSID Rules applies to this arbitral proceeding. Art9(20)(6) states that the UNCITRAL Rules shall apply to this arbitral proceeding. Art41(3)(a) of the ICSID Rules, Art4(3)(b) of the UNCITRAL Rules require the petitioners to bring a perspective, particular knowledge or insight that is *different* from that of the disputing parties.

[110] In order to meet the requirement, the petitioners should have expertise, experience and independence to be of assistance in the case. The petitioner should demonstrate *"perspective, knowledge or insight" that differs from that which has or will be provided.*[70]

[111] The *von Pezold* Tribunal required that the NDP to bring a perspective, particular knowledge or insight that is *different* from that of the Parties.[71] Other Tribunals applying ICSID Convention required *a different or distinctive* perspective.[72] Art37(2) of the ICSID Convention is termed exactly the same as Art41(3) of the ICSID Additional Facility Rules.

[112] Firstly, the CBFI intended to submit information regarding the nature of activities of Bonoori enterprises which is related to the nature of the State-owned enterprise. The respondent has already provided an insight in this regard.

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[69] *Vivendi,*15.
[70] *Eco Oro,*31.
[71] *Pezold* ,49.
[72] *Banka,*55
*Morris,*24-25.

[113] Secondly, CBFI intended to submit the regulatory framework in Bonooru and Bonooru's business landscape which could be provided by the Claimant.

1. CBFI's perspective, knowledge or insight is not different from the disputing parties

[114] In the Response to the Notice of Arbitration, the Respondent provided that since its inception, Vemma was beholden to Bonooru as the State has historically maintained a sizable stake in the company.

[115] Thus, the Disputing parties argued that Vemma qualifies as a State-owned enterprise and It has been beholden to Bonooru. The context of the CBFI's submission regarding the regulatory framework in Bonooru and Bonooru's business landscape is not different from what the Disputing parties have provided.

2. CBFI's perspective, knowledge or insight is not different from that which will be provided by the Disputing parties.

[116] The *Aguas* tribunal held that:

[117] > "the traditional role of an amicus curiae in an adversary proceeding is to help the decision maker arrive at its decision, by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide".[73]

[118] The CBFI's perspective is not new and special because the Claimant may provide a context regarding business climate of Bonooru and existing corporate framework. Specifically, the CBFI informed that Bonooru's business landscape is primarily comprised of such entities competing based on free market principles.[74]

[119] The *Cube* Tribunal stated that European Commission *lacked a different expertise, experience or*

[73] *Suez-1*.
[74] Record,17.

perspective from that of the parties that could have assisted the tribunal.[75] In the present case, the CBFI provided regulatory framework in Bonooru and Bonoori's business landscape.

B. The CBFI's submission is not consistent with the requirement of being independent

[120] In *von Pezold*, the Claimant raised several contentions about the independence of the Petitioner. Then, the Tribunal considered that several contentions was a sufficient ground to deny the NDP application.[76] In this case, the Claimant would like to request the Tribunal's attention to the several perspectives.

1. The CBFI is a friend of the Claimant not a friend of the court.

[121] The Claimant's first contention is based on the allegation that thirty-eight members of the CBFI hold investment rights in Mekar and two such members, SRB Infrastructure and Wiig Wealth Management Group, currently have ongoing claims against the Federal Republic of Mekar under the Chapter 9 of CEPTA. It indicates that whether CBFI is not a friend of the court, it is truly a friend of the Claimant.

[122] First of all, the participation of these two entities directly raises a conflict of interest. This situation gives rise to the fact that the CBFI is not independent. The *von Pezold* tribunal denied submission as Mr. Sacco, Director of the NULC, had strong connections with the land resettlement policies of Zimbabwe the Respondent.[77]

[123] According to the CBFI's 'Amicus Brief Submission Guidelines', members of the CBFI's Executive Committee cannot participate in discussions or votes if the Executive Committee member *"is a party to the case or has a direct financial interest in the outcome of the case."* [78]

[124] The Executive Committee has a conflict of interest under its Amicus Brief Submission Guidelines since Vemma is the Claimant in the proceeding and It has a direct financial interest in the outcome of the case.

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[75] Jaroslavsky,
[76] *Pezold*,56.
[77] Ibid, 56.
[78] Record, p.87.

[125] The *Philip Morris* tribunal rejected applications from two other NGOs, the briefs is not publicly available. It held that the NGOs lacked independence *due to its close connection* with the Claimant.[79]

[126] Secondly, Lapras Legal Capital and CBFI has close connection with the Claimant. The *Cube* tribunal did not consider that *European Commission is independent because of the critical and extensive role of the Commission in the EU legal architecture*.[80]

[127] More specifically, The Executive Committee/Steering Committee serves a vital role in Consortium governance by providing strategic direction for the Consortium, determining the Consortium's strategic areas of focus and setting policy on Consortium operations.[81]

[128] LLC, SRB Infrastructure, Wiig Wealth Management group and other thirty-five investors, holding investment rights in Mekar, pay membership fees to the CBFI. It is not a minor financial relationship.

[129] Article 4(2)(c)(ii) of the UNCITRAL Rules states that *"substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually)"*[82] First established in 2010, the CBFI has its headquarters in Hoenn in , Bonooru. CBFI members enjoy the benefits of services such as training and capacity building activities, networking opportunities, and a collective advocacy.[83]

C. <u>The CBFI does not have a public interest</u>

[130] CBFI does not file its amicus application in pursuit if any '*public interest*' or an advancement any novel arguments. Tribunals also frequently requires that *the dispute be a matter of a public*

[79] Harrison,83
[80] *Cube,43.*
[81] Webcache
[82] UNCITRAL,Art.4.2
[83] Procedural Order No. 3.

interest, although this is not provided in ICSID Rule 37(2), nor the UNCITRAL draft.[84] For instance: *Apotex,*[85] *Bear Creek*[86]*, Eli Lilly* [87]*, Philip Morris*[88].

[131] According to Article 9.20(6) of the CEPTA, the Tribunal should apply the UNCITRAL Rules. The UNCITRAL Rules shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty") concluded on or after April 1st of *2014* unless the Parties to the treaty have agreed otherwise.[89]

[132] The CEPTA entered into force on 15 October 2014. Thus, the UNCITRAL Rules shall apply to this arbitral proceeding. Article 1(4)(a) of the UNCITRAL Rules stipulates that the arbitral tribunal shall take into account "the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and". The rules expressly dictate that a tribunal shall take into account, firstly, the public interest—both in investor-State arbitration generally and in the particular dispute.[90]

[133] Article 4(3)(a) of the UNCITRAL Rules on states that '…*among other things*…'. The Tribunal is free to address other things. Thus, the Tribunal should assess public interest requirement in this arbitral proceeding.

[134] The FTC Statement requires that there is a public interest in the subject-matter of the arbitration. The recommendation of the North American Free Trade Commission on non-disputing party participation of 7th of October 2003, one of the requirements of amicus curiae is '*there is a public interest in the subject-matter of the arbitration*'.[91]

[135] In *Apotex*, Article 41(3) of ICSID Rules does not contain an exhaustive list of criteria, as it

[84] Schliemann,373.
[85] Apotex,18.
[86] *Bear Creek,33-34*
[87] *Eli,2.*
[88] *Philip,26.*
[89] UNCITRAL Rules,Art(1)1
[90] Transparency
[91] Free Trade Commission,2.

provides that the Tribunal shall consider those stated "*among other things*". Therefore, this Tribunal is free to address "other things" for the purpose of arriving at its decision.[92]

[136] Moreover, Article 37(2) of ICSID Rule stipulates that "*the Tribunal shall consider among other things*".[93] Therefore, the Tribunal has a discretion to consider other matters whether or not to allow the CBFI to make a submission. Thus, the Tribunal shall apply the FTA statement to determine whether to grant or deny amicus curiae submission.

[137] The *Biwater*[94] tribunal required that the dispute be a matter of a public interest which cited the words regarding the public interest of the *Methanex* tribunal.[95]

[138] Also, the Tribunal cited another ICSID case, *Aguas Argentinas*, *Suez* relating to a water concession covering the city of Buenos Aires and the metropolitan area of greater Buenos Aires. In those cases , the Tribunal of the ICSID case also emphasized the *public interest dimension* of the dispute.[96]

[139] Also, the *Apotex* tribunal held that:

[140] > *"the subject-matter of an arbitration proceeding is to be considered of public interest when the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the Disputing Parties."*[97]

[141] In the present case, the outcome of the arbitral proceeding are likely to impact individuals and entities beyond the disputing parties. But mere proof of a private legal interest does not suffice amicus curiae status.

[142] The *Apotex* tribunal convincingly clarified that a '*particular and professional interest*' is not a

[92] *Apotex,18.*
[93] ICSID,37(2).
[94] *Biwater,*
[95] *Biwater,*15.
[96] *Biwater,*16.
[97] *Apotex,*11.

"public interest".[98] The interest on the interpretation of CEPTA's investor-State dispute settlement provisions is a particular professional legal interest.

[143] The public interest can also implicate issues that encapsulate the common interest of mankind, such as human right and environmental concerns.[99] International investment law focuses on the public interest which is a discouragement of *certain illegalities* (e.g. corruption).[100] Specifically, Amicus submissions aims to protect important public interests such as anti-corruption effort.[101]

[144] The *Apotex* tribunal held that BNM's application was not clear which public interest identified in the arbitration's subject-matter.[102] In the present case, the CBFI also did not identify any public interest. The *Apotex* tribunal stated that " *developing new financial alternative services in order to build a more ethical legal framework for the global pharmaceutical market*" is a mere general interest.[103]

[145] The general interest is not sufficient to be considered as both the significant interest and the public interest. Following this point of view, '*developing marketplace that rewards investments in innovation and creation, and foster economic growth, new jobs and greater economic prosperity'* is a simply a general interest. One of the reasons why Tribunals have rejected petitions is "*the petitioner failed to explain the public interest it was seeking to address".*[104] Consequently, the CBFI has failed to explain the public interest it was seeking to address.

[98] *Alicia Grace*,22.
[99] Choudhury,12.
[100] Aboubakr,124
[101] Gomez,544.
[102] *Apotex*,36.
[103] *Apotex*,22-23.
[104] Jaroslavsky,86.

iii. THE RESPONDENT DID NOT UNFAIRLY AND INEQUITABLE TREAT THE CLAIMANT IN VIOLATION OF ARTICLE 9.9 OF CEPTA

[146] The FET of this dispute is linked with customary international law(**I**). Tribunals should consider that threshold of breach of FET is high (**II**). The acts cannot be cumulatively considered as breach of FET (**III**)

I. The FET of this dispute is linked with customary international law

[147] The FET can be interpreted varies depending on its formulation.[105] The Respondent submits that the FET of CEPTA is linked to "customary international law" (A), and the interpretation of FET of this dispute should consider this formulation (B) Claimant has burden of proving that Art.9.9 of CEPTA has been violated (C) Tribunal shall apply in standard in finding breach of FET (D)

A. FET formulation in CEPTA

[148] The exact content of the FET obligation depends on the formulation of the applicable treaty. In order to determine what treatments amount to standard is depends on formulation of FET in the treaty or argument.[106] The CEPTA **stipulated FET under minimum standard of treatment t**hus, the fair and equitable treatments standard is the linked FET[107].

[149] Some tribunals stated, "no refence in article of FET does not means it is autonomous FET nor linked FET."[108] In CEPTA it clearly used FET under Minimum standard of treatment. It means the treaty has been concluded to link FET to customary international law. Thus, there must be a high level of shock, arbitrariness, unfairness or discrimination before the host state will be held to have breached the standard.

[105] UNCTAD , pp. 17-35
[106] Matthew Coleman, 3
[107] Ibid, 2.1

[108] Investment treaty news

[150] VCLT, Art. 31(3)(c) requires that a treaty be interpreted in the light of 'any relevant rules of international law applicable to the relations between the parties.' The scope and content of FET under Art.9.9 must therefore be determined by reference to the rules of international law, customary international law being part of such rules.

[151] In relation to the argument made by the Claimants about the breach of FET, the fair and equitable treatment provision has been interpreted in relation to customary international law on multiple occasions depending on the context and specific treaty in which it is found, in order to determine if it is a standard that goes beyond customary international law or, if it is part of it. [109]

[152] Some tribunals have found that FET is only violated if State's action caused harm to the investor, although few of them have discussed the issue thoroughly.

B. Interpretation of FET in customary law and CEPTA

[153] As stated above, the Tribunal must look ordinary meaning of treaty language. In pure English, "fair" and "equitable" express meaning of unbiased, legitimate, just. The Article 9.9, **Minimum Standard of Treatment** clearly stated:

[154] *"Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security".*

[155] The threshold conducts to this treatment obligation will be mentioned afterwards.

C. Claimant has burden of proving that Art.9.9 of CEPTA has been violated

[156] According to Art.9.9 of CEPTA, elements of FET are:

[157] "denial of justice in criminal, civil or administrative proceedings; **fundamental** breach of due process, including a **fundamental**

[109] *MTD*,188–190.

> breach of transparency, in judicial and administrative proceedings; arbitrary or discriminatory conduct; abusive treatment of investors, such as coercion, duress, and harassment; a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22".

[158] The Respondent argues that in balancing the interests of the investor and the host state, the Tribunal shall consider the countervailing factors, where the breach of the FET cannot be found. These factors include: objective basis; absence of disproportionate impact; caveat investor, etc.

[159] Most tribunals interpret the FET as a standard of treatment that should be equated with the customary international law minimum standard[110]. Fair and equitable treatment requires a balanced interpretation, which does not exaggerate protection granted to investors.[111]

[160] In this dispute, the Claimant's extravagant, misguided strategy lead to present downturn. The investor's expectations must always be balanced against the need for governmental action in times of crisis. [112]

[161] Instead of a strict definition, tribunals generally identify a number of elements that constitute the standard,[113] none of which was violated in this case.

[162] The Claimant has the burden of "proof that the Claimant did not receive treatment amounting to FET."[114] Even though, the Respondents will also point out there was fair and equitable treatment to investor in section B and C.

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[110] *AAPL*
[111] *Saluka,*300.
[112] *EDF,*1005.
[113] *Yannaca,*118.
[114] *Tudor*, p.138

II. Legitimate expectation

[163] The Legitimate expectation is important component of FET. Article 9.9(3) of the CEPTA stipulates the legitimate expectation of the investors.

[164] "*…a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation".*[115]

[165] The Claimant argued that 'Mekar required Caeli Airways to price its services in MON despite the constantly fluctuating price of the currency.'[116] However, the Respondent did not frustrate the Claimant's legitimate expectation. The *Duke Energy* tribunal explained the legitimate expectation as follows:

[166] "To be protected, the investor's expectations must be **legitimate** and **reasonable** at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances,… but also the political, socioeconomic, cultural and historical conditions prevailing in the host State".[117]

[167] From this point of view, the Claimant's expectation must be *legitimate* and *reasonable* at the time when It made an investment. The Respondent did not frustrate the legitimate expectation of the Claimant because [1] the Claimant's expectations were illegitimate; [2] the Claimant's expectation were unreasonable.

[115] Record, p.76.
[116] Record, p.4.
[117] *Duke,* 340.

A. The Claimant's expectation were illegitimate

[168] The Claimant argued that the Respondent dramatically shifted its economic policy and required Caeli Airways to price its services in MON.[118] When the Claimant made its investment in the territory of the Mekar, airlines' service was sold in MON in Mekar.

[169] In an investor may derive *legitimate expectations* either from (a) specific commitments addressed to it personally, or (b) rules which are put in place with *a specific aim* to induce foreign investments and on which the foreign investor relied in making his investment.[119]

[170] Respondent did not create legitimate expectation as airlines operating in Mekar, were required to denominate their airfare in MON. Moreover, the Claimant itself requested the Respondent to offer its service in MON till the crisis abated. Therefore, the Respondent did not pass a decree with a specific aim to induce foreign investments on which the foreign investor relied in making his investment.

[171] Further, some Tribunals held that 'expectations to be taken into account are those existing *at the time when the investor made the decision to invest*.'[120] When the Claimant made the decision to invest, It was aware that airlines offer their services in MON and Mekar's economic situation is unstable.

[172] Further, the *Parkerings* tribunal deemed that '*in the transition period of Lithuania, the change in legislation was possible in this situation and any expectation based on stability of regulations was illegitimate*'.[121] Akin to this, during the economic crisis, the change in regulation was possible and any expectation based on stability of economic regulations was illegitimate.

[173] The Claimant may argue that the nullifying the short-lived exemption granted to airlines frustrated the Claimant's expectation. However, the Claimant expected that the exemption was nullified

[118] Record, p.4.
[119] UNCTAD, p.88.
[120] *Hamester*, 244-246.
[121] *Parkerings*, 335-336.

since this was short-lived exemption.

[174] The threshold for the violation of the legitimate expectations is whether the state's contested regulatory changes were not *foreseeable* by a prudent investor.[122] As mentioned above, the regulatory change relating to MON was foreseeable to all companies operating in the territory of the Mekar.

[175] As a result, the Claimant had no grounds for legitimate expectations.

B. The Claimant's expectations were unreasonable

[176] In this section, the Respondent would like to request the Tribunal's attention to the reasonableness of the Claimant's expectation. The Claimant's expectation were unreasonable because (1.) the Respondent required all companies operating in the country to offer goods and services exclusively in MON; (2.) The Respondent implemented its right to reduce foreign reliance on foreign currencies; (3.) The Claimant's expectation did not arise from a rigorous due diligence process.

1. The Respondent required all companies operating in the country to offer goods and services exclusively in MON

[177] The first argument is based solely on the fact that a decree of the Mekar's government did not require only Caeli Airways to denominate its airfare in MON. The Respondent did not targeted Caeli Airways as It required all companies operating in the territory to offer goods and services denominated exclusively in MON on 30th January 2018.

[178] If the Respondent passed a decree requiring only Caeli Airways to sell its service in MON, the expectations of the Claimant would be reasonable. However, the Respondent passed the decree to regulate all companies' goods and service.

[122] Levashova.

2. The Respondent implemented its sovereign right to reduce foreign reliance on foreign currencies

[179] The respondent implemented its legitimate right to reduce reliance on foreign currencies, in order to mitigate against capital outflows and secure its macroeconomic situation.[123] The sovereign host-state was available to it political, legislative and regulatory power to enact laws and regulations over investments within its jurisdiction.[124]

[180] FET obligation does not prevent host States from acting *in public interest* even if such acts *adversely affect investments*.[125] In this present case, the Respondent acted in public interest to mitigate against capital outflows and secure its macroeconomic situation.

[181] The *Saluka* tribunal stated that to assess whether the Host state violates the investor's legitimate expectation '*the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well*.'[126] , The Respondent exercised its sovereign legislative power to regulate domestic matters in the public interest.

[182] In sum, the *EDF* tribunal stated:

[183] 'Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its *economic life in the public interest*.'[127]

[184] The IMF emphasized 'the need to establish credibility in the [local] currency to avoid a debilitating economic situation.[128] In order to establish credibility in the currency, the Respondent required all companies operating in the territory to offer goods and services denominated exclusively in MON. in other words, the Respondent implement its power to regulate its economic life in the public interest.

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[123] Record, p.8.
[124] Laryea, p.13.
[125] UNCTAD, p.73.
[126] *Saluka*, 305.
[127] *EDF*,219.
[128] Record,35.

[185] Alternatively, the *Vivendi* tribunal accepted that a newly elected government with a policy perspective different from its predecessor was entitled to reverse course.[129] The LPM was elected back to an overwhelming parliamentary majority in November 2017. Therefore, the newly elected government with a policy perspective different from its predecessor was entitled to reverse course.

3.The Claimant's expectation did not arise from a rigorous due diligence process.

[186] Arbitral tribunals held that '*investors carry an obligation to perform their due diligence and not to rely solely on representations and assurances of the host government*'.[130] An investor's expectation to be reasonable, *it must also arise from a rigorous due diligence process carried out by the investor*.[131] More specifically, the *Antaris* tribunal denied the investor's claim for the protection of legitimate expectations, as there was '*no evidence of any real due diligence*.[132]

[187] There was no evidence of any real due diligence of the Claimant. If the Claimant performed a due diligence investigation concerning a regulatory framework and economic situation of the Mekar, It wouldn't expect that 'a monetary policy of the Mekar should be stable.

[188] Therefore, the expectations of the Claimant is unreasonable as It failed to perform its due diligence investigation.

III. Tribunal shall apply high in standard in finding breach of FET

[189] According to afore mentioned Art.9.9 the Tribunal may review some of all of the elements outlined from A through C current section.

[129] UNCTAD,75.
[130] UNCTAD,70.
[131] *Stadtwerke*,264.
[132] *Antaris*,432.

A. The Challenged Measure was non-discriminatory, or arbitrary

[190] Discrimination exists when there is unequal treatment of equal or like circumstances. Discriminatory measures:

[191] > *"inflict damage on the investor without serving any apparent legitimate purpose and are not based in legal standards but on discretion, prejudice or personal preference; are applied for reasons different from those put forward by the decision maker; or are in willful disregard of due process and proper procedure"*.[133]

Subsidy

[192] The Respondent objects to discriminatory treatment based on following facts. First, the Claimant argued that the Mekari Government excluded Vemma from subsidies, which was discriminatory. However, there were other airlines, such as Laurie airline, which were not provided with a subsidy. It was reasonable for us to deny the kinds of airlines.

[193] Vemma benefited from a short-lived exemption by the Mekari government, at the same time, Vemma received subsidies under the Horizon 2020 scheme. The main purpose of the subsidy was to mitigate the impact of the financial crisis on the companies and businesses. Mekar had no obligation under the CEPTA or the International Law to disburse its taxpayers' money to the Claimant. In any case, the Claimant enjoyed a benefit that several of its competitors in Mekar did not – continuous influx of funds from its home State under the Horizon 2020 Scheme.

[194] The subsidized companies composed only 5 percent of the market, yet Caeli made up an entire 43 percent of the industry. From this claim the Respondent objects to any discriminatory treatment by the Mekari Government to the Claimant.

Investigation

[133] Pablo,1.

[195] The Monopoly and Restrictive Trade Practice Act, as Amended in 2009:

> *"The CCM has the sole competence to initiate an investigation concerning potentially anti-competitive behavior."*

The CCM may open an investigation into behavior it deems anti-competitive, *suo moto* if the following is aspects are found:

> *Corporation poses **a unique threat to the competition in a particular market;** and*
> *There is evidence the corporation's actions have, or are likely to in the near future, **push competitors out of the market**".*[134]

[196] According to the Monopoly and Restrictive Trade Practice Act, CCM's investigation was due to the rapid business expansion of Vemma in its territory.

[197] Caeli launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalizing on its undercutting policies and the privileges it enjoyed at Phenac International Airport. According to these companies, Caeli's actions made it nearly impossible for them to penetrate the market linked to Phenac International, which effectively became a "fortress hub" for Caeli.[135]

[198] The Respondent while approving the Ministry of Civil Aviation's request to infuse capital into Caeli, the CCM noted that :

[199] > *"under the State's control, Caeli is expected to undertake activities of public importance such as search and rescue operations, emergency medical evacuations, and distributing humanitarian aid. As it is Mekar's only State-owned airline, its public functions and its financial health are of paramount significance".*

[200] In *Hungary vs AES-TISZA ERŐMŰ KFT,* the Tribunal stated the fact that the Hungarian Government dealt with the situation in which the lack of either competitions or a regulation allowed excessive profits to the claimants was reasonable and valid.[136] Since the same calculation

[134] Record p.47.
[135] Record p.35.
[136] *KFT*, p.23

criteria was applied to all electrical power companies, the tribunal denied the claim stating that the measures do not constitute as discrimination.

[201] The delay in scheduling hearing and enforcement of award did not amount to the denial of justice or the, transparency

B. Denial of Justice

[202] A prohibition of denial of justice does not equate a right to be heard without restriction under the Mekar law. Limitations are acceptable as long as they are reasonable and do not impair the essence of the right. The Respondent did nothing more than exercised dismissal under its law.

[203] This type of legal regime would only replicate at the level of the sovereign borrower the same protection enjoyed by corporate borrowers in many countries.

[204] It is generally accepted that tribunals will not act as courts of appeal when deciding on claims for denial of justice and that the standard of review is limited.

[205] Mere error in law, disagreement with the reasoning of a judicial decision or contradictory rulings would not suffice to find a violation; rather, the relevant question is whether the court decision is itself inconsistent with the treaty, 'inexcusable', 'malicious or clearly wrong', 'so lacking in seriousness as to indicate bias' or constitutive of 'a breach of municipal law [that] is discriminatory against the foreign litigant'.

[206] Even gross misconduct by a lower court or manifest unfairness in its procedure is not necessarily sufficient to amount to a denial of justice, unless the available judicial remedies do not correct those deficiencies.

1. The Respondent's action did not constitute a denial of justice

[207] UNCITRAL Model Law Article 36(1)(a)(v) states that 'the award has not yet become binding on

the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or'. The Respondent has an opportunity to refuse or grant the award since Article V of the New York Convention states 'may be'.

[208] On 28 April 2009, the Amsterdam Court of Appeals rendered its well-known judgment allowing Yukos Capital to enforce a number of ICAC arbitral awards against Rosneft in the Netherlands, despite the awards having been set aside in Russia. The Court of Appeals held that Article V(1)(e) of the New York Convention does not require the setting aside to have res judicata effect.

[209] According to the New York Convention, although the Claimant may argue that the Respondent is not obliged to refuse the award, the Respondent's recognition and enforcement of the award which is tainted with its own corruption, constitutes denial of justice.

The Claimant were not denied access to the Mekar's courts

[210] Mere procedural errors, irregularity or an incompetent judicial procedure would not suffice to find a violation. Tribunals regularly find that the local courts' conduct does not meet the high threshold for a denial of justice.

[211] The Respondent never denied the Claimant access to the Mekari's courts. 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 in Mekari courts rose from 9 months to 22 months. The courts even managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters (which is nearly 27 months).

Transparency

[212] The second element in this section is transparency. The Respondent submits that it acted with transparency. To acknowledge whether there was transparency or not, let us refer to the interpretation of this term. As indicated in UNCTAD :

[213] *"Transparency obligations in IIAs have traditionally centered on*

> *the provision of adequate information to foreign investors to enable informed investment decisions and to enhance the predictability and stability of the on-going investment relationship between the host State and the investor".*[137]

[214] Further, the CEPTA indicated that 'there must be a *fundamental breach of due process, including a* ***fundamental*** *breach of transparency.'* The fundamental means basic, elementary; even that there was no breach of the transparency. There is no claim under this element.

C. Respondent Has Acted in Good Faith and Without Harassment or Coercion

[215] The Respondent purchased stake with good faith and without any harassment. State have wide latitude to interrogate in economy, due to sour economy[138] The Claimant argued that there was a favorable bid from the Hawthorne Group, and accused the Respondents for failing to sell its stake priced favorably.

[216] Due to the economic crisis, the Mekar had to provide security for its consumers. The Hawthorne's membership in Moon alliance[139] and aviation to Vemma was doubtful for future investment.

[217] Furthermore, the Respondents has a right to choose which third party is bona fide regarding its current circumstance. As stated in Shareholder's Agreement relation to Caeli Airways stated that:

[218]
> *"1. (a) If, …, Vemma Holdings receives a bona fide written offer for a Third-Party arm's length Transaction that Mekar Airservices* ***desires to accept****"*[140]
>
> *"1.(b) …Mekar Airservices* ***may accept*** *the Right of First Refusal Offer…".*

[137] UNCTAD,5.
[138] *Lemire*,285.
[139] Record,39.
[140] Record,52.

[219] Mekar Airservice not obligated to accept every proposed Third party. Thus, disapproval of third party cannot be considered a 'mandatory' or 'coercive' purchase of stake. Since it does not affect the vendor's rights. Investment treaties do not grant foreign investors immunity from the exercise of bona fide police powers.[141]

IV. The acts cannot be cumulatively considered as breach of FET

[220] The FET is not a laundry list of potential acts of misconduct.[142] Thus, the Claimant have to prove that the whole element of FET has been violated. Traditionally, this treatment only applied to extreme cases of mistreatment.

[221] In Art.9.9(6) of the CEPTA:

> *"In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1"*

[222] "Inconsistently" means not in keeping with.[143] The Respondents has not acted inconsistently in any measures, conducts.

[223] Also, It is clear that the developing countries have unstable political situation, and the rapid population growth causes slow judicial system. If States act, which did not amount to violation of FET, cumulatively considered as violation of FET, there would be no state sovereignty to rule.

[224] Also, in *Mobil v. Canada*, states that the FET "standard does not require a State to maintain stable legal and business environment for investments".[144] Thus, in any case application of FET is limited, it should not be used for benefit of extravagant approach of the investor.

[225] The CEPTA did not constitute that the acts, omissions cumulatively amount to breach of FET. Therefore, a tribunal must first look to the FET provision in the treaty, evaluating its language in

[141] *Philip Morris*,293.
[142] *Micula*,517,
[143] Oxford dict,414.
[144] *Mobil Investments*,473.

its context and in light of the treaty's object and purpose.[145]

E. Even creeping violation of FET were applicable, the measures cannot amount to it

[226] Cumulative effect of the measures did not constitute substantive damage to investor. The FET standard should not penalize "sheer bad governance"[146] on the part of the State. It should also not eliminate the power of the State to regulate in accordance with public policy objectives.

[227] Parallel to creeping expropriation, the combined effect of the measures must be **tantamount** to FET violation. The standard should be further raised when each of the measures composing the alleged violation is taken strictly in pursuance of a public policy objective, especially due to economic problems.[147] There must be substantial damage, which caused from the violation of FET. In current case, there is no direct link between the acts and damage. Therefore, the measures do not amount to creeping violation of FET.

FET cannot prohibit Mekar's right to regulate

[228] The Mekar's government acted in accordance to its privilege, it power frame. Art.9.8 of the CEPTA stated:

> *"(b). For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its* ***expectations of profits****, does not amount to a breach of an obligation under this Section".*

[229] *Joshua Dean v Mexico*, suggests tribunals will afford a high degree of deference to state regulatory authority. States have a constitutional obligation to safeguard public interest. Ensuring stable conditions to the investment does not remove states' rights to maintain reasonable regulatory flexibility.[148]

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[145] VCLT,31(7)
[146] *Paradell*,279
[147] Pablo,issue1.
[148] *AES*,93.

[230] It is important to balance state measures with the affected rights and interests, to avoid freezing of all regulation and granting unconditional protection of investments. [149] Ultimately, preambular language serves as interpretative context that may influence how other treaty obligations are construed.[150] In preamble of CEPTA, it recognized:

> *"the provisions of this Agreement* ***preserve the right of the Parties to regulate*** *within their territories and the* ***Parties' flexibility to achieve legitimate policy objectives****"*

[231] That's why FET in CEPTA concluded as Minimum standard of treatment. Even FET clause held for investor protection, there should be certain limitation for it. The CEPTA also contains an increasing number of references to sustainable development issues, such provisions are largely focused on preserving domestic regulatory autonomy.[151]

[232] Investment treaties should be interpreted as preserving this aspect of regulatory autonomy.[152] The Art.9.8 of CEPTA suggested States' autonomy to determine the level at which to pursue permissible regulatory aims.[153]

[233] Some FET tribunals[154] have underlined that an investor bears the responsibility of appraising the reality and the context of the state, in which the investment is/will be made, by performing a due diligence investigation and conducting risk assessments.

[234] The investor has to be aware and to consider the relevant regulations, policies and decisions concerning its investment in order to anticipate the possible risks.

[235] The Respondent's measures did not constitute breach of FET, whether isolated or cumulatively. Due to economic crisis state only exercised measure under its domestic law, and treated investor best effort with good faith.

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[149] Limits of State
[150] Titi (n 102) 169. Martini (n 97) 563–7.
[151] *Kidane*,297, 303.

[154] *Charanne*

[236] Finally, the measures cannot constitute creeping violation of FET. Comparing creeping expropriation to creeping violation as in El Paso dispute, composite acts must have led to substantial damage. But in current case there is no allegation regarding damage.

IV. IN CASE THE TRIBUNAL FINDS MEKAR VIOLATED ARTICLE 9.9 OF THE CEPTA, THE APPROPRIATE COMPENSATION STANDARD SHOULD BE OF MARKET VALUE.

[237] The Respondent argues that the compensation standard should be of market value as expressly stipulated under Article 9.21 of the CEPTA (A). The Claimant cannot use the MFN clause in Article 9.7 of the CEPTA to import the 'fair market value" (hereinafter FMV) standard from the ARRAKIS-MEKAR BIT (B). Furthermore, additional compensation is not required (C) since the Respondent bought the Claimant's investment at the market value of 400 mil USD. Lastly, even if the Tribunal finds the Respondent to compensate the Claimant, the compensation amount shall be reduced (D) taking into account Vemma's contributory fault and an ongoing economic crisis in Mekar.

I. The market value is expressly prescribed as the compensation standard in Article 9.21 of the CEPTA.

[238] The CEPTA contains two provisions that pertain generally to standard for compensation. First, Article 9.12 of the CEPTA provides a compensation standard of "fair market value" for expropriatory violations of the treaty. Second, Article 9.21 of the CEPTA provides for a "market value" standard for non-expropriatory violations.

[239] Under the principle indicates that each term of a treaty provision should be given meaning and effect. Thus, diverting from an expressly prescribed provision would be a clear violation of the treaty-based obligation which the Parties have both agreed upon.

[240] According to the above-mentioned principle, the Parties' intention was to differentiate expropriatory breach from a non-expropriatory breach, thereby, contract out of 'fair market value'

regarding non-expropriatory violations. This interpretation is in line with some Tribunal's decisions.[155]

[241] Since the Respondent's measure does not constitute an expropriation, but constitute a non-expropriatory violation of the CEPTA, a market value becomes the appropriate compensation standard instead of fair market value as expressly stipulated under Article 9.21 of the CEPTA.

II. MFN clause in Article 9.7 of the CEPTA cannot be used to import the 'FMV" standard from the ARRAKIS-MEKAR BIT

[242] The Claimant cannot import the fair market value standard under Article 13 of the 2006 ARRAKIS-MEKAR BIT into CEPTA and expect this arbitration to use that clause for the following reasons:

A. <u>The "fair market value" under Arrakis Mekar BIT cannot be considered 'treatment'.</u>

[243] As a matter of general international law, a treaty obligation assumed towards a third State may constitute treatment for the purpose of the MFN clause. **[194]** As such, Article 9.7.1 of the CEPTA provides for the 'treatment' for the purpose of the MFN clause.

[244] As there is an express provision, there is no lack of particular understanding held by the Contracting parties of the term 'treatment'. The standard of compensation is thus, not a 'treatment' accorded in CEPTA as it does not fall within any of the stated terms.

[245] Article 9.7.1 of the CEPTA further stipulates that *"MFN treatment is to be provided only to those investors or investments that are 'in like circumstances' to investors or investments with which a comparison is being made"*.[156]

[246] Above-mentioned particular wording of the MFN clause became the basis of the ruling in the case

[155] *Marvin*,194–198.
[156] Record, p.76.

of İçkale v. Turkmenistan. The Tribunal held that:

[247] > "...it was not enough that standards of protection included in third-party investment treaties **might create** legal rights under those treaties because mere differences between applicable legal standards could not be said to amount to **'treatment accorded in similar situations'**."[157]

[248] On a similar note, in the use of the MFN clause, the CEPTA's specific wording 'like circumstances' requires a comparison of the factual situation of a home-state investor and a third-state investor. Since there is no factual situation where the State of Mekar accorded more favourable treatment to a third-state investor, the Claimant cannot invoke the MFN clause to import FMV stipulated under the Arrakis-Mekar BIT.

B. Article 9.21 of the CEPTA is stipulated under the general section of 'Settlement of disputes'.

[249] Some tribunals held that using MFN clause to import standards of treatment is permissible, but importing dispute resolution provisions is different in nature, thus, **impermissible**.[158] In Wintershall, the Tribunal concluded that the MFN did not apply to the resolution of disputes, "unless of course the MFN clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted".[159]

[250] In the present dispute, the parties to the CEPTA ensured that procedural matters will not come within the coverage of the MFN clause.[160]

[251] Since Article 9.21 of the CEPTA is stipulated under the general section of 'Settlement of Disputes', it could be presumed that the Parties' intention was to consider compensation as a

[157] *Ickale*, 329.
[158] *Plama*, 209, *Telenor*, 92.
[159] *Wintershall*, 167.
[160] CEPTA, Art.9.7

matter of arbitral proceedings. Thus, the compensation standard accorded in Article 9.21 is not within the scope of the MFN treatment as it is a procedural matter.

III. The Respondent has already offered "market value" compensation when it purchased the Claimant's investment at the price of 400 million USD, therefore no further compensation is required.

[252] For the Claimant, to argue that no further compensation is required, it is essential to differentiate between the 'fair market value' and the 'market value' standard.

[253] There are three valuation options to determine a fair market value,[161] beginning from the hypothetical bargain option. This option establishes value from the amount that the hypothetical seller and the hypothetical buyer would agree to in an arm's length transaction.[162] The second option is to apply an income capitalisation valuation method. And the third option is an asset-based approach.

[254] A Market Value is defined as the estimated amount for which an asset or liability should exchange on the *valuation date* between a willing buyer and a willing seller in an arm's length transaction.[163] Consequently valuation date becomes the key factor in determining the market value.

[255] The valuation date was defined as "*the specific point in time as of which the valuator's opinion of value applies"*.[164] In other words, the valuation date should be the date of the sale purchase agreement entered between the Claimant and the Respondent for the sale of the shares in Caeli Airways. And on that date, whatever the value was of the investment, should be taken as the compensation standard.

[256] In the present dispute, the USD 400 million purchase becomes the 'market value' of the Claimant's investment. Therefore, the Respondent is not owed any further compensation with respect to the market value standard.

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[161] Kantor, p.7.
[162] *Venezuela,*385.
[163] Perspective, p.9.
[164] S.Ripinsky, p.319.

IV. Even if the Tribunal finds Respondent to compensate the Claimant, the compensation amount shall be reduced considering Vemma's contributory fault and the ongoing economic crisis in Mekar.

A. Duty to mitigate loss

[257] The principle of mitigation refers to situations where the injured party reasonably can, but fails to take measures to reduce the damage.[165] The duty to mitigate damages is not mentioned in the text of the *ILC Articles on State Responsibility*. However, the arbitral tribunals accepted it as a general principle of the case law.

[258] > "In Middle East Cement v Egypt, the Tribunal held that although the duty to mitigate damage was not expressly mentioned in the BIT, this duty could 'be considered to be part of General Principles of Law which, in turn, are part of the rules of international law which are applicable in the dispute"[166]

[259] In *CME v. Czech Republic*, the Tribunal held that the duty of the party to mitigate its losses is one of the established general principles in arbitral case law.[167]

[260] In the present dispute, the Claimant was obliged to mitigate losses. Related to any losses suffered from the Respondent's measures, the Claimant was immediately under a duty to mitigate any consequent injury. However, it continued to operate on routes at loss, and accordingly to increase its 'share' of the exposure to any losses arising from the injury occurred to the Claimant at the time.

[261] Since the Claimant failed to mitigate damages, the Respondent requests the Tribunal to reduce the compensation corresponding to its failure of duty.[168]

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[165] S.Ripinsky, p.319.
[166] *Middle East Cement*, 167.
[167] *CME*, 303.
[168] Yearbook, Commentary to Article 31, 11.

B. Contributory fault

[262] The Respondent argues that the Claimant is responsible for its exorbitant approach and risky business choices[169] which eventually led the company into a brink of bankruptcy. This argument raises the concept of *'contributory fault'* often used in the investment treaty arbitration. It is a concept developed to address the significance of an intentional wrongful act committed by the conduct of the injured party as a ground to reduce the liability of the respondent state.

[263] The ILC Articles on State responsibility recognise the relevance of *contributory fault* in the determination of reparation.[170] Article 39 provides as follows:

[264]

> "Contribution to the injury 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".

[265] Within this article, there are two legal elements: the investor's material contribution to its injury and the wilfulness or negligence of that contribution.[171]

Wilful and negligent action

[266] A **victim's** conduct must involve "a ***lack of due care*** on the part of the victim of the breach for his or her own property or rights" in order to be taken into account as wilful *and negligent.*[172]

[267] The Claimant's continued improper business decision during the course of its investment shall be considered as a *lack of due care*.

[169] Record, p.9.
[170] S.Ripinsky, p.315.
[171] Yearbook, Commentary to Article 39, 1.
[172] Yearbook, Commentary to Article 39, 5.

[268] (As mentioned above) When Caeli Airways started turning net profit, the representatives from Mekar Airservices advised that Caeli shall inject those profits into outstanding debt and improve the financial health of the company. However, Vemma's representatives did not heed this advice and continued making business decisions.

[269] The Claimant also failed to operate its investment on a good long-term model. Over the course of the investment, Caeli Airways' profitability was directly related to the low price of fuel.[173] Despite the risk of price fluctuation, the Claimant had no strategy planned on how to operate in case the oil price was to rise again.

[270] Aforementioned ill-business decisions made by the Claimant throughout its investment is due to an inadequate assessment of the risks involved.

[271] Considering above-specified aspects, it is reasonable to argue that the Claimant increased its own risk associated with the investment. Accordingly, the business decisions made by the Claimant can be considered wilful and negligent.

Material Contribution

[272] In relation to the wilful and negligent act, the decisions taken by the Claimant have materialized and contributed to the deterioration of its investment.

[273] Losses suffered by the Caeli Airways were particularly concentrated around the high traffic routes between Bonooru and Mekar.[174] Despite the loss of profit, the Claimant continued to operate on these unprofitable routes.[175] The CCM's investigations concluded that Caeli Airways had also violated Mekar's anti-trust legislation, which resulted in imposing large-amount of fines.[176] In addition to the Claimant's long-standing debt and large fines payable to the CCM, increase of the

[173] Record, p.34.
[174] Record, p.33.
[175] Ibid.
[176] Record, p.36.

oil price further expanded its financial distress.[177]

[274] Considering these facts, the Respondent argues that the Claimant's investment would not have deteriorated extensively, if the Claimant practiced proper business decisions (i.e., reducing debt) and did not violate the Monopoly and Restrictive Trade Practice Act of Mekar.

C. Economic Crisis

[275] When awarding compensation, the Tribunal should consider the Respondent's ability to pay and the possible effect it could have on the people of Mekar. The Tribunal should not treat the economic crisis facing Mekar legally irrelevant and conclude that the burdens resulting from the award would be trivial when set against the total resources of the State as the current situation is not so.

[276] The Claimant would like to request the Tribunal to consider a key fact where a 2019 report of the IMF predicted four consecutive quarters of negative growth for Mekar, 8 percent fall in GDP, and a 2600 percent average inflation rate in 2020. It also noted that the Respondent State was facing a potential third debt default for several decades.[178]

[277] Furthermore, in order to pay the compensation which the Claimant demands, the Respondent would have to transfer approximately twice of its consolidated annual public spending to the Claimant.[179] This would have significant adverse implication on Mekar's public spending and the welfare of its citizens.

[278] On a similar note, in arbitral practice, Brownlie stressed the significance of taking into account the public nature of the State and its obligations to its own citizens in a Separate Opinion in *CME v. Czech Republic*. He emphasized that:

[279] *"The first element is the significance of the fact that the*

[177] Record, p.37.
[178] Record, p.86.
[179] Ibid.

> *Respondent is a sovereign State, which is responsible for the well-being of its people. The Czech Republic is not a commercial entity. The acceptance of a bilateral investment treaty should not take the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population."*[180]

[280] If the Tribunal were to award the compensation, without considering the above-mentioned circumstances, It would significantly compromise the State's ability to meet its people's basic needs.

[281] Therefore, the Respondent requests the Tribunal to consider the Claimant's *contributory fault* and the ongoing economic crisis in Mekar and reduce the amount of the compensation, if found any.

PRAYER FOR RELIEF

[282] The Respondent respectfully requests the Tribunal to adjudicate and declare that:

1. Decline to exersice jurisdiction due to the Claimant's status as a State-owned enterprise;
2. Tribunal should grant the CRPU amicus curiae submission and deny CBFI
3. Find that Mekar did not violate Article 9.9 of CEPTA;and
4. Tribunal should conclude that the award must be "market value", and there is no compensation to pay.

On behalf of the Respondent
Team Higgins

[180] *CME*, S.O, 72-79.