TEAM JENNINGS G

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

VEMMA HOLDINGS INC.

CLAIMANT

v.

THE FEDERAL REPUBLIC OF MEKAR

RESPONDENT

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Cited as	Full Citation
¶/¶¶	Paragraph/Paragraphs
1994 BIT	1994 Bonooru - Mekar BIT
Amicus Submission	Applications for Leave to File *Amici* Submissions
CBFI	Consortium of Bonoori Foreign Investors
CBFI' s Application	Application for Leave to File a Non-disputing party *Amicus* Curiae Submission by CBFI
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
CRPU	Mekar's Committee on Reform of Public Utilities
External Advisors	External Advisors to the CRPU
External Advisors' Application	Application for Leave to File a Non-disputing party *Amicus* Curiae Submission by the external advisors to the CRPU
Facts	Statement of Uncontested Facts
i.e.	That is to say
Ibid.	Ibidem
ICSID center	The International Center for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
LLC	Lapras Legal Capital
Mekar	The Federal Republic of Mekar
Mekar Airservices	Mekar Airservices Ltd.
PO1/2/3/4	Procedural Order 1/2/3/4

Response	Response to the Notice of Arbitration
SOE	State-owned enterprise
UNCTAD	United Nations Conference on Trade and Development
Vemma	Vemma Holdings Inc.

LIST OF AUTHORITIES

INDEX OF ARBITRAL DECISIONS

Cited as	Full Citation
AAPL	Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID, Award, 27 June 1990
ADC	ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006
ADM	Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007
Amco	Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on the Application by Parties for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Respondent for Annulment of the Supplemental Award of October 17, 1990, 17 December 1992
Apotex (PO2)	Apotex Inc. v. United States, ICSID Case No. UNCT/10/2, Procedural Order No. 2, 11 October 2011
Apotex Holding (PO4)	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party, 4 March 2013
Apotex Holding (PO5)	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013

Banro	Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7, 1 September 2000
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005
Biwater	Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5 on *amicus* curiae, 2 February 2007
BUCG	Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017
Charanne	Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Award, 21 January 2016
Crystallex	Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016
CSOB	Ceskoslovenska obchodní banka, a.s. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999
ECE	ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic, PCA Case No. 2010-5, Award, 19 September 2013
Eco Oro Mineral	Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 6 Decision on Non-Disputing Parties Application, 18 February 2019
EDF	EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009
El Paso	El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011

Feldman Karpa	Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002
GAMI	GAMI Investments, Inc. v. Government of the United Mexican States, UNCITRAL, Final Award, 15 November 2004
Gavrilovic	Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, 26 July 2018
Gemplus	Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010
Global Telecom	Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, 27 March 2020
Goetz	Antoine Goetz and others v. Republic of Burundi II, ICSID Case No. ARB/01/2, Award, 21 June 2012
Infinito	Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Procedural Order No. 2, 1 June 2016
Krederi	Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Excerpts of Award, 2 July 2018
Lemire	Joseph Charles Lemire v. Ukraine II, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010
Lion Mexico	Lion Mexico Consolidated L.P. v. United Mexican States, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018
Maffezini	Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000
Mamidoil	Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015
Masdar	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018

Metalclad	Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000
Methanex	Methanex Corporation v. United States of America, UNCITRAL, Decision of *amici* participation, 7 August 2002
Micula	Ioan Micula and others v. Romania I, ICSID Case No. ARB/05/20, Award, 11 December 2013
Middle East Cement	Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No.ARB/99/6, Award, 12 April 2002
Mobil Exploration	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013
Nelson	Joshua Dean Nelson v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020
Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012
Pac Rim	Pac Rim Cayman LLC. v. Republic of El Salvador, ICSID Case No. ARB/09/12, PO8, 14 October 2016
Philip Morris	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 4, 24 March 2015
Photovoltaik	Photovoltaik Knopf BetriebsGmbH v. Czech Republic, PCA Case No. 201421, Award, 15 May 2019
Quiborax	Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, 16 September 2015

RFP	Resolute Forest Products Inc. v. Canada, PCA Case No. 2016-13, Procedural Order No. 6 on the Participation of Prof. Robert Howse and Mr. Barry Appleton as *Amici* Curiae, 29 June 2017
Rompetrol	The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013
Rumeli	Rumeli Telekom A.S., Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. The Republic of Kazakhstan (ICSID Case No. ARB/05/16), Award, July 29, 2008
RWE	RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No.ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019
Salini	Salini Costruttori S.P.A and Italstrade S.P.A. v. Kingdom of Morocco, Decision on jurisdiction, ICSID Case No. ARB/00/4
Saluka	Saluka Investments BV (The Netherlands) v. Czech Republic, PCA Case No. 2001-04, Partial Award, 17 March 2006
Santa Elena	Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, 17 February 2000
Suez	Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010
Sunlodges	Sunlodges Ltd (BVI) and Sunlodges (T) Limited v. United Republic of Tanzania, PCA Case No. 201809, Award, 20 December 2019
Tecmed	Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003
TECO	TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award, 19 December 2013
Telenor	Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006

Total	Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010
Toto	Toto Costruzioni Generali S.p.A. v. Lebanese Republic, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009
Tulip	Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014
Unión Fenosa Gas	Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018
UPS	United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici* Curiae, 17 October 2001
Urbaser	Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, Award, 8 December 2016
Von Pezold	EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009
White Industries	White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award, 30 November 2011
Wintershall	Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008
Wirtgen	Jurgen Wirtgen and others v. Czech Republic, PCA Case No. 2014-03, Final Award, 11 October 2017
World Duty Free	World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/07, Award, 4 October 2006
Zürich	Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award, 18 November 2014

INDEX OF OTHER JURISPRUDENCE

Cited as	Full Citation
Ambatielos	Ambatielos (Greece v. United Kingdom), International Court of Justice, Dissenting opinion of Judge Hsu Mo, 1 July 1952
ELSI	Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), international Court of Justice, Judgment, 20 July 1989
Eritrea-Ethiopia war	Reports of International Arbitral Awards, Eritrea-Ethiopia Claims Commission, Final Award, Ethiopia's Damages Claims, 17 August 2009
Gabčíkovo-Nagymaros Project	Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] I.C.J. Rep.
Hulley	Hulley Enterprises Limited (Cyprus) v. Russia, PCA Case No. 200503/AA226, Judgment of Paris Court of Appeal, 27 June 2017
Ireland	Ireland v. the United Kingdom, Application no. 5310/71, Council of Europe: European Court of Human Rights, Judgement, 13 December 1977
Portugal	Portuguese Republic v Commission of the European Communities, Case C-163/99 ECR I-2613, Judgment of the Court (Sixth Chamber), 29 March 2001
Valiant	Roerig v. Valiant Trawlers Ltd., England and Wales Court of Appeal (Civil Division), 28 January 2002

INDEX OF SCHOLAR OPINIONS

Cited as	Full Citation
Blyschak	Paul Blyschak, *State-Owned Enterprises and International Investment Treaties-When are State-Owned Entities and their Investments Protected?*, Journal of International Law & International Relations, 1-27 (2011)
Born & Forrest	Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration, ICSID Review, Foreign Investment Law Journal*, Volume 34, Issue 3, 626-665 (2019)
Broches	Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 135 Hague Rec. d. Cours 331, at 354–5 (1972)
Buckley & Blyschak	Ross P. Buckley & Paul Blyschak, *Guarding the Open Door: Nonparty Participation Before The International Centre for Settlement of Investment Disputes*, Banking and Finance Law Review, 353-376 (2007)
Crawford (I)	James Crawford, *Second report on State responsibility*, State Responsbility, Document A/CN.4/498 and Add.1–4 (1999)
Feldman	Mark Feldman, *State-owned enterprises as claimants in international investment arbitration*, ICSID Review-Foreign Investment Law Journal (2016)
Kriebaum	Ursula Kriebaum, *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, ICSID Review, Vol. 33, No. 1, pp. 14–28 (2018)
Martins Paparinskis	Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*,

	The Modern Law Review, Volume 83, Issue 6, 1246-1286 (2020)
Shaw	Malcolm N. Shaw, *International Law*, 6th ed., New York: Cambridge University Press (2008)
Talmon	Stefan Talmon, *Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished*, Leiden Journal of International Law, Volume 25, Issue 4, 979-1002 (2012)
Vesel	Scott Vesel, *A 'Creeping' Violation of the Fair and Equitable Treatment Standard?*, Arbitration International, Volume 30, Issue 3, 553–564 (2014)
Zachariasiewicz	Maciej Zachariasiewicz, *Amicus Curiae in International Investment arbitration*, Journal of International Arbitration-Can It Enhance the Transparency of Investment Dispute Resolution?, Volume 29, Issue 2, 205-224 (2012)

INDEX OF BOOKS

Cited as	Full Citation
Campbell McLachlan et al.	Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn. OUP 2017)
Cosar	Utku Cosar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions* (Kluwer Law International 2015)
Crawford (II)	James Crawford, *State Responsibility The General Part* (CUP 2013)
Dolzer & Schreuer	Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn. OUP 2012)
Garner	Bryan A. Garner, *Black's Law Dictionary* (9th edn. West 2009)
Kawharu	Amokura Kawharu, *The Backlash against Investment Arbitration Part III Chapter 11: Participation of Non, governmental Organizations in Investment Arbitration as Amici Curiae* (Kluwer Law International 2020)
Neeraj	Neeraj, *Introduction to Law* (Neeraj Publications 2019)
Paulsson	Jan Paulsson, *Denial of Justice in International Law* (CUP 2005)
Schreuer& Malintoppi	Schreuer, C. and Malintoppi, L., *The ICSID Convention: A Commentary* (Cambridge University Press 2013)
Schultz & Ortino	Thomas Schultz & Federico Ortino, *The Oxford Handbook of International Arbitration* (OUP 2020)
Sovereignty Education and Defense Ministry	Sovereignty Education and Defense Ministry, *Administrative Equity* (SEDM 2016)

UNCTAD WIR 2011	*World Investment Report 2011: Non-Equity Modes of International Production and Development*, United Nations Publications
United Nations	United Nations, *Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II, United Nations* (United Nations 2012)
US Department of Justice	U.S. Department of Justice, *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act* (2008)
Vattel	Emerich de Vattel, *The Law of Nations* (CUP 1758)
Yearbook of the ILC 1996	*Yearbook of the International Law Commission 1996, ILC Volume II, Part Two* (United Nations Publication 1998)

INDEX OF LEGAL AUTHORITIES

Cited as	Full Citation
Commentary on ILC Article	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001
ICSID AF Rules	ICSID Additional Facility Arbitration Rules
ICSID Convention	ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States
ILC Articles	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001
VCLT	Vienna Convention on the Law of Treaties 1969
VCLT commentaries	Draft Articles on the Law of Treaties with commentaries, 1966

INDEX OF OTHER AUTHORITIES

Cited as	Full Citation
OECD Guidelines	OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition
GAPP	International Working Group of Sovereign Wealth Funds, Generally Accepted Principles and Practices (October 2008).
UN Convention against Corruption	UN Convention against Corruption, United Nations New York, 2004

INDEX OF MISCELLANEOUS

Cited as	Full Citation
open markets institute	Available at:<https://www.openmarketsinstitute.org/learn/airlines-monopoly>
"Compensate", merriam-webster	"Compensate", merriam-webster, available at: <https://www.merriam-webster.com/dictionary/compensate>
"Disposal", merriam-webster	"Disposal", merriam-webster, available at: <https://www.merriam-webster.com/dictionary/disposal>
"Sale", merriam-webster	"Sale", merriam-webster, available at: <https://www.merriam-webster.com/dictionary/sale>
The Wall Street Journal	Available at:<https://www.wsj.com/articles/american-jetblue-alliance-draws-increased-scrutiny-from-justice-department-11618423182>
Cai	Jane Cai, Why China's subsidised state-owned enterprises anger US, Europe – and its own private companies (2019), available at: <https://www.scmp.com/news/china/diplomacy/article/2184707/why-chinas-subsidised-state-owned-enterprises-anger-us-europe>

STATEMENT OF FACTS

Parties to the dispute

1. Vemma Holdings Inc. **("Vemma")** is a Bonoori State-owned airline company. The State of Bonnoru, as the single biggest shareholder, owned 31-38% of the shares in Vemma from its date of incorporation until March 2020. Further, in March 2021, Bonooru increased its interest in Vemma to a controlling 55% stake.

2. The Federal Republic of Mekar **("Mekar")** is a State undergoing an economic transformation. Under the influence of Mekar's Common Man's Party **("CMP")**, the Mekari economy underwent large-scale privatizations with the aspiration to attract foreign investors.

3. In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement **("CEPTA")**. The agreement entered into force on 15 October 2014.

Vemma is selected as Caeli's purchaser

4. In 2010, Vemma participated in the bid to purchase shares in Caeli Airways **("Caeli")**. The Chairperson of Mekar's Committee on Reform of Public Utilities **("CRPU")** considered Vemma's link to the government an asset. Ultimately, Vemma was selected as Caeli's purchaser and acquired an 85% stake in Caeli. Mekar maintained a 15% ownership through Mekar Airservices Ltd. **("Mekar Airservices")**

Vemma operates for the benefit of its home-State

5. Vemma owned and operated the flag-carrier of Bonooru, the Royal Narnian. As confirmed by Bonooru's constitutional court, the Royal Narnian operates flights to remote areas regardless of profitability.

6. Despite the persistent objection of Mekar Airservices, Vemma insisted on the operation of unprofitable routes between Mekar and Bonooru. These routes are part of the Bonooru Caspian Project which has a long-term goal of redefining trade patterns.

Vemma's extravagant approach

7. Although Claimant inherited huge debt liabilities associated with Caeli, it funneled funds towards rapid expansion instead of tending to long-term financial health.

8. In December 2016, a consortium of small regional airlines complained that Caeli's adopted undercutting policies with the sole purpose of pushing them out of the market.

CCM's investigations and subsequent measures

9. The rapid expansion of Caeli and complaints from its competitors drew the attention of the Competition Commission of Mekar **("CCM")**, an agency of Mekar.

10. Under Mekari domestic antitrust law, namely the Monopoly Restrictive Trade Practice Act ("Monopoly Act"), CCM conducted two investigations towards Caeli, and consequently, imposed fines. The CCM also placed interim caps on Caeli's airfare to prevent it from earning supra-competitive profits. In 2019, CCM completed its investigations and affirmed Caeli's anti-competitive behaviors, including predatory pricing, abuse of dominant position and unfair subsidization.

The currency crisis in Mekar and the Mekari government's response

11. Starting in late 2016, the Mekari currency **("MON")** began to nosedive. By March 2017, a currency crisis ensued in Mekar, resulting in increased inflation, and decreased trust in the MON. Accordingly, the IMF emphasized "the need to establish credibility in the local currency to avoid a debilitating economic situation." On 30 January 2018, 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.

12. In order to help the corporations most in need overcome the crisis, Mekar decided to exercise its discretion by using its limited funds to provide subsidies under Executive Order 9-2018. As a State-owned enterprise ("SOE"), Caeli enjoyed a continuous influx of funds from its home State. Consequently, Mekar refrained from providing subsidies for Caeli.

13. During the crisis, a Mekari court rendered an award on the appropriateness of Caeli's interim airfare caps in 15 months, in contrast with the 27 months it usually took Mekari courts to render decisions in commercial matters.

Vemma's active termination of its investment in Caeli

14. In November 2019, Vemma announced its intention to sell its stake in Caeli given its burgeoning liabilities. During this period, Caeli's market share in Mekar ranged from 30-40%.

15. Later, Vemma acquired an offer from a third party, the Hawthorne Group LLP, to buy Vemma's stake in Caeli. Pursuant to the Shareholder's Agreement of Caeli, Respondent legally exercised its right of first refusal by noting that the Hawthorne Group's offer to purchase Vemma's shares in Caeli could not be considered as one received from a "*bona fide* third party" due to the Group's affiliation with Vemma via aviation alliance. This was later confirmed by a subsequent award with the seat of the arbitration in Sinnoh.

16. Claimant failed to yield another buyer for its shares within nine months. Ultimately, Respondent became the only willing buyer. On 8 October 2020, Claimant sold its stake in Caeli to Mekar Airservices for 400 million USD.

The initiation of the current proceeding and two parties' applications to participate as *Amicus*

17. On 15 November 2020, Claimant filed the Request for Arbitration alleging a breach of treaty obligations and claiming an exorbitant amount of compensation.

18. On 25 March 2021, the Tribunal issued Procedural Order One **("PO1")**, announcing its capacity to admit *Amicus* submissions under the ICSID Additional Facility Rules **("ICSID AF Rules")**.

19. On 19 April 2021, the Consortium of Bonoori Foreign Investors **("CBFI")** applied for leave to file an *Amicus* submission. The CBFI represents Bonoori investors. Their submission focuses on Claimant's status as an eligible investor and is aligned with Claimant's position. One of the members of the CBFI, Lapras Legal Capital **("LLC")**, is currently advising Vemma in respect of funding strategies in the arbitration.

20. On 28 May 2021, the external advisors to Mekar's Committee on Reform of Public Utilities **("CRPU")** applied for leave to file an *Amicus* submission. They assisted CRPU leading up to Vemma's acquisition of its investment. Their submission wishes to present new evidence of corruption during Claimant's acquisition of the investment, which may lead to the inadmissibility of the claim.

SUMMARY OF ARGUMENTS

21. **JURISDICTION:** Claimant does not have standing in the dispute because: first, the CEPTA maintains a negative attitude towards SOEs' standing; second, Vemma is not an eligible investor under the ICSID AF Rules.

22. ***AMICI* ADMISSIBILITY**: The Tribunal should grant leave for the external advisors to the CRPU file an *Amicus* submission because they address a matter within the scope of the dispute, have significant interest in this arbitral proceeding, and can assist the Tribunal by bringing a different point of view to this proceeding. Additionally, the Tribunal should not grant leave for the CBFI to file an *Amicus* submission because it has no significant interest in this arbitral proceeding, cannot assist the Tribunal by bringing a different point of view from the disputing parties to this proceeding, and lacks independence to participate as an *Amicus*.

23. **MERITS: FET.** Respondent did not breach the fair and equitable treatment **("FET")** standard because Respondent's measures did not constitute denial of justice; did not violate due process, including a breach of transparency; were not arbitrary or discriminatory; and did not frustrate Claimant's legitimate expectations. Not only did Respondent's measures not violate the FET standard individually, but they also did not breach the FET standard cumulatively. In any event, any possible violation by Respondent can be justified by its right to regulate under Article 9.8 of CEPTA.

24. **REMEDY: COMPENSATION.** Even if the Tribunal finds that Respondent should compensate Claimant, the compensation standard should be market value **("MV")** because most-favored-nation **("MFN")** treatment is not applicable. Furthermore, the MV standard has been affirmed by treaty provisions under the *lex specialis* rule. In any event, the Tribunal should mitigate any possible compensation due to Claimant's contributory negligence and the dire economic situation in Mekar.

ARGUMENTS

PART ONE: JURISDICTION AND *AMICI* ADMISSIBILITY

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS.

25. Respondent submits that the Tribunal does not have jurisdiction over the claims because Vemma is not an eligible investor, and the present dispute constitutes State-to-State arbitration.

26. In general, both the applicable investment treaty and arbitration rules will be considered in deciding the jurisdiction of an ICSID tribunal.[1] Accordingly, Respondent submits that **(A)** the CEPTA conveys a negative attitude towards SOEs' standing as investors, and **(B)** Vemma is not an eligible investor under the ICSID Additional Facility Rules **("ICSID AF Rules")**.

A. The CEPTA conveys a negative attitude towards SOEs' standing as investors.

27. Respondent contends that Vemma was an SOE during its investment and that the CEPTA conveys a negative attitude towards SOE's arbitral standing.

28. The United Nations Conference on Trade and Development **("UNCTAD")** defines SOEs as "*enterprises [...] in which the government has a controlling interest.*"[2] "A controlling interest" herein refers to "*a stake of 10 per cent or more of the voting power, or where the government is the largest single shareholder*."[3] During Vemma's investment, Bonooru was Vemma's only governmental shareholder and held a 31-38% stake, while no other shareholder held more than 7%. Hence, Vemma was an SOE of Bonooru.

---

[1] *Lemire*, ¶93
[2] UNCTAD, WIR 2011, 28
[3] *Ibid.*

29. The CEPTA displays a negative attitude towards SOEs' arbitral standing. First, 1994 Bonooru - Mekar BIT **("1994 BIT")** Article 1 affirmatively included SOEs in its definition of "investors,"[4] while the CEPTA remains silent in this regard.[5] This textual change conveys the Contracting Parties' negative attitude towards SOEs' standing. As was noted by Feldman, the world has seen an increasing trend where States have started to apply special rules to SOEs as foreign investors.[6] The CEPTA's change in the definition of "investors" reflects a similar initiative.

30. Second, the 1994 BIT was dubbed as "the worst BIT in history" by Mekari politicians due to the unbalanced jural relations between the two States.[7] Owing to increasing economic interdependence, the BIT was renegotiated to re-balance the Parties' rights.[8] Among the amended provisions was the change in the definition of "investors." Though the CEPTA does not explicitly deny SOEs' investor status, the change of wording no doubt displays a negative attitude, which should not be overlooked.

B. Vemma is not an eligible investor under the ICSID Additional Facility Rules.

31. Respondent contends that Vemma does not have arbitral standing under the ICSID AF Rules. Article 2 stipulates that the jurisdiction of tribunals constituted under the ICSID AF Rules extends to proceedings "*between a State [...] and a national of another State.*"[9]

32. Similar wording exists in Article 25(1) of the ICSID Convention, which states that its jurisdiction extends to disputes "*between a Contracting State [...] and a national of another Contracting State.*"[10]

---

[4] 1994 BIT, Article 1
[5] CEPTA, Article 9.1
[6] Feldman, 3
[7] PO3, ¶14
[8] *Ibid.*
[9] ICSID AF Rules, Article 2
[10] ICSID Convention, Article 25(1)

33. In this specific provision, the ICSID Convention shares identical elements with the ICSID AF Rules, both of which address State-to-national disputes. According to *Lion Mexico*, tribunals may rely on the jurisprudence of the ICSID Convention to interpret ICSID AF Rules when the two provisions contain "effectively the same language."[11] Accordingly, Respondent shall refer to relevant criteria developed under the ICSID Convention to assist the Tribunal in clarifying this issue.

34. The ICSID Convention's Preamble speaks of the role of private international investment, which indicates that the investor must be a private individual or corporation.[12] When it comes to the standing of SOEs, the most pronounced guideline is the test formulated in 1972 by Aron Broches, the first Secretary-General of ICSID and one of the principal drafters of the ICSID Convention. He framed the test as follows:

> "*[A] mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.*"[13]

35. The Broches test has been adopted in many cases. For example, in *Flughafen Zürich*, *Rumeli* and *Masdar*, such a standard was followed.[14]

36. In fact, the "agent test" and "function test" Broches put forward are the mirror images of the attribution rules respectively codified in Articles 8 and 5 of the International Law Commission **("ILC")**'s Articles on Responsibility of States for Internationally Wrongful Acts **("ILC Articles")**.[15] As customary international law, the two ILC Articles can supplement the Broches test and offer important guidance.[16] For instance, the *EDF* and *Bayinder* tribunals imported them into the circumstances of investor-State dispute

---

[11] *Lion Mexico*, ¶56
[12] Schreuer & Malintoppi, 161
[13] Broches, ¶¶354-355
[14] *Zürich*, ¶274; *Rumeli*, ¶211; *Masdar*, ¶170
[15] *BUCG*, ¶34
[16] *Bayindir*, ¶19; *Tulip*, ¶281; *Unión Fenosa Gas*, ¶9.90

settlement **("ISDS")** in determining SOEs' standing.

37. Pursuant to the Broches test and the ILC Articles, Respondent raises two arguments: **(1)** Vemma was acting as an agent of the Bonoori government, and **(2)** Vemma was discharging a governmental function. Thus, Vemma is not an eligible investor under the ICSID AF Rules.

(1) Vemma was acting as an agent of the Bonoori government.

38. As mentioned above, the first standard Broches put forward is the "agent test." As was held in *BUCG*, ILC Article 8 serves as a helpful source in understanding what it means to act as a State agent, providing that:

> "*[T]he 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*."

39. Given this standard, Respondent contends that Claimant was acting under Bonooru's control during the investment process, because **(a)** Bonooru possessed significant ownership in Vemma; **(b)** Bonooru dominated Vemma's decision-making process; **(c)** Bonooru supported Vemma with great financial assistance; and **(d)** Bonooru guaranteed the success of Vemma's investment through political force.

(a) Bonooru possessed significant ownership in Vemma.

40. Above all, Bonooru exercised general control over Vemma through its ownership. According to *Salini*, when considering the degree of State control, tribunals should first focus on a company's structure, which, in particular, relates to its shareholders.[17] Also, as

[17] *Salini*, ¶31

was held in *Maffezini*, a finding that an entity is owned by the State gives rise to a presumption that it is a State entity.[18]

41. History indicates that Bonooru had a tradition of planned economy and nationalized industries.[19] This enabled the State, through its holdings, to exert a consistent and powerful control over domestic enterprises, including the aviation industry. The influence of such State control persists today.

42. After Vemma's privatization, Bonooru continued to maintain a sizable stake in the company, ranging between 31% to 38%.[20] As mentioned above, other shareholders were private and institutional shareholders, and none of them held more than a 7% stake in Vemma.[21] Compared to the government, other shareholders exerted much weaker influence over the company's regulation.

43. In fact, such ownership structure was desired by the government after Vemma's privatization. In 1980, Vemma's privatization scheme contemplated excluding domestic carrier competitors as potential bidders.[22] The Bonoori government intended to maintain its control through such efforts.

44. Summarily, significant State ownership constituted the fundamental basis of State control. This factor alone, as well as cumulatively with other factors analyzed below,[23] led to a *de facto* control.

(b) Bonooru dominated Vemma's decision-making process.

[18] *Maffezini*, ¶77
[19] Facts, ¶3
[20] Facts, ¶10
[21] PO4, ¶2
[22] Facts, ¶7
[23] *Maffezini*, ¶81

45. Utilizing Vemma's corporate structure, Bonooru indeed exerted a powerful influence over Vemma's decision-making process. According to Feldman, the level of ownership does not always indicate the level of control in SOEs, because the voting leverage mechanisms can be used to provide State shareholders with a disproportionate amount of decision-making power.[24] Therefore, even a minority stake can be highly influential.[25]

46. Feldman's statement applies perfectly to Vemma, whose board passed decisions by a majority vote. Evidence showed that Bonooru's representatives were present for every board meeting. As a result, for some meetings, Bonooru's representatives formed a majority of members present and voting since not all other shareholders attended.[26] Thus, these State representatives dominated Vemma's board, controlling the results of the voting mechanism.

47. Moreover, an influencial position of non-executive director was placed especially on Vemma's board. Bonooru's Ministry of Transport and Tourism had the power to nominate one of its officials to this position.[27] This setting enabled the State to further monitor and control Vemma's decision-making process.

(c) Bonooru supported Vemma with great financial assistance.

48. Vemma heavily relied on Bonooru's financial support, which demonstrated the State's economic control. It was confirmed by *Wena Hotels* that an enterprise's financial composition is an important element in identifying its judicial standing.[28] Enterprises with no financial independence have no economic basis for making decisions independently.

---

[24] Feldman, 7
[25] Schreuer & Malintoppi, 324
[26] PO3, ¶3
[27] Annex IV, Articles of Association of Vemma, Article 152.2, 152.4
[28] *Wena Hotels*, ¶69

49. Bonooru continuously provided great financial assistance to Vemma. The subsidies Vemma enjoyed under Bonoori law were guaranteed by the Bonoori Constitutional Court during Vemma's privatization.[29] Vemma enjoyed an influx of funds from its home State through subsidies under the "Horizon 2020" Scheme, which helped Caeli drastically reduce its airfare below average avoidable costs.[30] In fact, this project was launched by Ms. Blue, the Bonoori Secretary of Transport and Tourism, who used to be the head of Vemma's board.[31] Such a close tie between Vemma and a State ministry further indicated Bonooru's influence over Vemma's business operation.

50. Meanwhile, Vemma was able to refinance its debt liability from BPB at more favorable rates than that available on the market.[32] As a nationalized bank in Bonooru with 58.96% State-owned shares, BPB's preferential policies represented the government's attitude.

51. Summarily, Vemma relied heavily on Bonooru's financial support and thus Bonooru controlled Vemma through the enterprise's economic sources.

(d) Bonooru guaranteed the success of Vemma's investment through political force.

52. In addition, Bonooru utilized political force to guarantee Vemma's investment, which further constituted State control. Bnooru's behavior went against the ICSID Center's goal of depoliticizing investment disputes.[33] In *Banro*, the tribunal declined jurisdiction to the claimant who had been espoused by the State.[34]

53. During the investment, Vemma had near assurances that Bonooru would step in if anything wrong happened to Vemma.[35] Bonoori officials often exerted pressure on

[29] Annex III, ¶59
[30] Facts, ¶45
[31] Facts, ¶22, 28
[32] Facts, ¶23
[33] Kriebaum, 19
[34] *Banro*, ¶21, 24
[35] Annex IX, lines 1948-1949

Mekar to treat Claimant favorably. They even threatened to hold back funds promised to rebuild Phenac's port for this reason.[36] In fact, Bonooru imposed such a punishment on Mekar in 2019, directly after the CCM's Second Investigation, leaving many projects incomplete to date.[37] Thus, it was Bonooru who stood powerfully behind Vemma.

54. More evidently, when Vemma turned back to the domestic market after suffering losses, Bonooru implemented a bail-in program in 2021, increasing its shareholding in Vemma to 55%.[38] Meanwhile, Vemma underwent large-scale restructuring: its board was replaced with government functionaries, and its legal team was equipped with lawyers from Bonooru's justice department.[39] It directly demonstrated how Bonooru made sure Vemma was under its control and anything that went beyond the government's expectations would be corrected.

55. After the restructuring, the present Vemma has become the pure embodiment of Bonooru's will and power. Allowing Claimant to initiate the arbitration as a "national" with no regard of the State behind would be unreasonable and unjustified in ISDS proceedings.

56. To conclude, under the "*agent test*", Bonooru effectively controlled Vemma in multiple ways, including the State ownership, decision-making dominance, financial support and political force, which undoubtedly made Vemma a State agent. Therefore, Vemma does not have arbitral standing before the Tribunal.

(2) Vemma was discharging a governmental function.

57. The second test, "function test," parallels with ILC Article 5. Respondent submits that

[36] *Ibid.*, lines 1952-1954
[37] PO4, ¶1
[38] Facts, ¶65
[39] *Ibid.*

Vemma was discharging a governmental function throughout its activities, which disqualifies Claimant from the arbitration.

58. In examining whether Vemma discharged a governmental function, Respondent contends that both the nature and the purpose of Vemma's activities should be considered.[40] Claimant may refer to *CSOB* and allege that the function test only looks to the nature of activities instead of their purpose.[41]

59. However, the restriction that the *CSOB* tribunal put on the function test has been criticized for two reasons. First, contemporary concerns reveal that the relevance of an SOE's motivations is potentially quite high. They may adopt the appearance of a private enterprise in order to further otherwise political objectives.[42] Second, the *CSOB* decision on this point only produced 12 paragraphs and referenced one single source, which carries weak conviction. The decision's lack of explicitness makes it easy for later tribunals to depart from its approach.[43]

60. In light of the above, Respondent contends that the *CSOB* approach should not be followed. With the recent increase in SOEs' number and influence in international investment, tribunals have developed a new approach. For instance, both the *Maffezini* and *Salini* tribunals attached importance to the activities' purpose or objectives in the function test.[44]

61. Based on this new approach, Respondent raises two points: **(a)** Concerning its nature, Vemma guaranteed Bonoori people's mobility rights; and **(b)** concerning its purpose, Vemma's market strategies served the State's political scheme.

---

[40] Blyschak, 30; Shaw, 710-712
[41] *CSOB*, ¶20
[42] Blyschak, 31
[43] *Ibid.*, 32
[44] *Maffezini*, ¶77; *Salini*, ¶31

(a) Considering its nature, Vemma guaranteed Bonoori people's mobility rights.

62. With regard to its nature, Vemma was discharging a governmental function, because it guaranteed Bonoori people's mobility rights. "Nature" herein looks to what type of activities an enterprise engages in. A governmental nature manifests when an enterprise directly engages in legislative activity, administrative action, or public policy development.[45] Vemma engaged in such activities, especially in administrative actions.

63. Governmental functions, including administrative actions, are defined by the specific traditions of a particular society.[46] In Bonooru, Article 70 of the Constitution affirmatively prescribed that "Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands,"[47] which imposed positive obligations on the State to enable citizens' mobility rights.[48] Thus, protecting mobility rights was within the government's administrative function, and Claimant undertook such function.

64. First, Vemma's Memorandum of Association explains why the company was established. Among the reasons were to "establish and continue business as a national airline and air transport undertaking" and to "assist in developing the aviation industry in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act."[49] As Vemma's founding document expressly connected the enterprise's function with the State's constitutional obligation, it appears that Vemma was established to discharge such a governmental function.

65. Second, the Bonooru Constitutional Court's Decision further confirmed Vemma's governmental function. The court approved the constitutionality of Vemma's privatization, precisely because the government had "ensured" that the Royal Narnian,

---

[45] *CSOB*, ¶23
[46] Commentary on ILC Article 5, ¶6
[47] Annex I, Article 70
[48] Annex II, ¶25
[49] Annex IV, Memorandum of Association of Vemma, Article 3.a), 3.h)

under Vemma's operation, would continue to operate routes to remote areas for public benefit and to protect people's access to mobility.[50] The then Prime Minister also officially reported to people that the new national airway would be directed to "ensure" that it operated certain routes.[51] The recurring word "ensure" indicated that Bonooru had always been clear that Vemma, as well as its subsidiaries, were exercising a governmental function.

66. Additionally, in 2016, Ms. Blue publicly lauded Vemma's contribution to the mobility rights of Bonoori people. She even stated that Vemma certainly lived up to the standards set by its predecessor in this regard.[52] It shows that Vemma indeed fulfilled its function well, meeting the State's expectations.

67. To sum up, in terms of its nature, Vemma's governmental function of guaranteeing Bonoori people's mobility rights was officially confirmed in legal documents, and was indeed well exercised by the enterprise.

(b) Considering its purpose, Vemma's market strategies served the State's political scheme.

68. When further examining the purpose behind Vemma's activities, Vemma's seemingly commercial market strategies should be viewed appropriately in connection with Bonooru's political scheme in the Greater Narnian region.

69. According to *EDF*, governmental intentions require an enterprise "to achieve a particular result," which means to adopt measures that go against the most shareholders' legitimate interests.[53] In the present case, such measures correspond to Vemma's extravagant expansion and unprofitable operation, which served for Bonooru's regional integration

[50] Annex III, ¶59
[51] Facts, ¶8
[52] PO4, ¶6
[53] *EDF*, ¶210

and economic monopoly objective under the Caspian Project.

70. Firstly, during its operation of Caeli, Vemma took an "extravagant approach" to its investment activities,[54] which brought harm to its commercial profits. Although Vemma acquired Caeli with associated debt liabilities,[55] it constantly infused funds towards rapid expansion and ill-strategized business plans instead of tending to long-term financial health.[56] Secondly, regarding Caeli's flight patterns, significant resources were put into flights between Mekar and Bonooru,[57] which were actually not profitable for Caeli.[58] However, under Vemma's control, Caeli insisted on operating these routes.[59] In short, the above strategies were clearly against the warnings of the Mekari representatives on Caeli's board[60] and the suggestions of aviation experts,[61] which ultimately led Vemma to financial difficulties.

71. It seems strange that, as a leading aviation company, Vemma made such unreasonable decisions. However, as was pointed out sharply by a podcast on Phenac Business Today, people "need to contextualize Vemma's investment in the context of Bonooru's Caspian Project and the Horizon 2020 Scheme."[62]

72. Viewed from the big picture, Caeli's quick and reckless expansion was not a sound and reasonable business decision but served as an indispensable part of Bonooru's political, economic, and diplomatic strategy. Vemma implemented predatory pricing strategies and abused its dominant position on the back of the State finance, pushing its competitors off certain routes.[63] The underlying goal of Bonooru was to enhance its economic monopoly and political power in Mekar, and ultimately gain more integration and control in Greater

[54] Facts, ¶29
[55] Facts, ¶35
[56] Facts, ¶29, 31, 35
[57] Annex VII, lines 1862-1863
[58] *Ibid.*, lines 1867-1868
[59] Facts, ¶33
[60] Facts, ¶29, 31
[61] Annex IX, lines 1956-1959
[62] Annex VII, lines 1868-1869
[63] Facts, ¶45, 49

Narnian.[64] This conclusion is further confirmed by the podcast mentioned above, which noted that such unprofitable routes brought more benefit to Bonooru than to Caeli or Mekar.[65]

73. For the above reasons, Vemma's performance revealed the political intentions of the Bonoori government. Given that Vemma served for the State's political purpose, it was discharging a governmental function.

74. Summarily, with regard to its nature, Vemma guaranteed Bonoori people's mobility rights; with regard to its purpose, Vemma's market strategies served for the State's political scheme. Hence, Vemma was discharging a governmental function both in the nature and purpose of its activities.

75. In conclusion, Vemma was an agent of the Bonoori government, and discharged a governmental function. Consequently, Vemma is not an eligible "national" before an ICSID tribunal, and thus the Tribunal does not have jurisdiction to hear the present claims.

[64] Facts, ¶4
[65] *Ibid.*, lines 1870-1871

II. THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT FOR FILING *AMICI* SUBMISSIONS TO THE EXTERNAL ADVISORS TO THE CRPU AND REFUSE THE APPLICATION SUBMITTED BY THE CBFI.

76. Investor-State disputes raise public interest issues. Appearing before ISDS tribunals, *amici* naturally represent the rights of the interested public to help boost political legitimacy and transparency in arbitral proceedings. [66]Accordingly, CEPTA Article 9.19(3) has vested the Tribunal with the power to accept and consider written *amicus curiae* submissions.

77. In PO1, the Tribunal has agreed to exercise its power to consider the admissibility of *amici* submissions under Article 41(3) of the ICSID AF Rules and ordered the potential petitioners to explain their eligibilities according to CEPTA Article 9.19(3) and the ICSID AF Rules.[67]

78. Respondent observes that both rules require that *the amicus* must (1) *be able to address a matter within the scope of the dispute*; (2) *have a significant interest in the present dispute* and (3) *have the ability to assist the tribunal with a different point of view from disputing parties*.[68] As a non-exhaustive list, the ICSID AF Rules also leave space for arbitral tribunals' discretion to consider other factors when determining whether to allow an *amicus* submission.[69]

79. Hence, Respondent submits that the Tribunal should: **(A)** grant the leave sought for filing an *amicus* submission to the External Advisors and **(B)** refuse the application submitted by the CBFI.

---

[66] Zachariasiewicz, 205
[67] PO1, ¶19, 21(g)
[68] ICSID AF Rules, Article 41(3); CEPTA, Article 9.19(3)
[69] *Von Pezold*, ¶44

A. The Tribunal should accept the *amicus* submission by the external advisors to the CRPU.

80. The external advisors to the CRPU **("External Advisors")** are members of Mekari civil society whose professional focus is investment banking.[70] In light of Claimant's allegations, Respondent submits that the External Advisors should be accepted as an eligible non-disputing party to file an *amicus* submission because: **(1)** they address a matter within the scope of this dispute; **(2)** they have significant interest in this arbitral proceeding and **(3)** they can assist they can assist the Tribunal by bringing a different point of view to this proceeding.

(1) The external advisors to the CRPU address a matter within the scope of the dispute.

81. The scope of this dispute forms the cornerstone of arbitral jurisdiction. *Amici* must assist the tribunal in resolving the dispute submitted by the parties.[71] This requirement *is intended to avoid the unnatural broadening of the scope which will make amici submissions irrelevant and overly burdensome.*"[72]

82. Specifically, *amici* may make submissions on jurisdictional issues raised by the disputing parties.[73] Such input may assist investment tribunals to "*better understand certain factual and legal aspects which may impact jurisdiction.*"[74] Similarly, the *Apotex v. USA* tribunal held that:

> "*[I]ssues of jurisdiction might raise matters of public interest, on which non-disputing parties might be well-placed to provide assistance.*"[75]

---

[70] External Advisors' Application, lines 616-619
[71] *UPS v. Canada (Decision on Amici Curiae)*, ¶60
[72] *Apotex Holding (PO5)*, ¶27
[73] *Pacific Rim Cayman v El Salvador (PO8)*, ¶¶ii-iii
[74] *Infinito Gold*, ¶31
[75] *Apotex (PO2)*, ¶33

83. The External Advisors seek to submit evidence of bribery in the process of Vemma's acquisition of its investment, alleging that it is crucial to the determination of the Tribunal's competence-competence.[76] Respondent submits that this issue falls in the scope of the jurisdictional issue since corruption is a nonnegligible factor that will severely influence the Tribunal's power to hear the case.

84. Jurisprudence observes that in light of the equitable international principle of "*nobody can benefit from his own wrong*", it is unreasonable and unjustifiable to grant the same protections to an investment made on the basis of illegality as other legal investments. The legal consequences of such illegality would be lack of jurisdiction.[77]

85. Though the CEPTA does not have wording like "in accordance with law" nor provisions explicitly regulating the legality of investments, corruption can still lead the Tribunal to deem Claimant's claims as inadmissible and dismiss them on the basis of transnational public policy. The *World Duty Free v. Kenya* tribunal holds:

> "*[B]ribery is contrary to […] transnational public policy. […] Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*"[78]

86. Transnational public policies are international consensuses and universal standards that have been embodied in international conventions, comparative law and arbitral awards.[79] Respondent submits that an anti-corruption transnational public policy exists between Mekar and Bonooru. It should be noted that the Superior Court of Mekar has long-standing jurisprudence on the matter of corruption[80] and the Constitutional Court of Bonooru has already taken *suo moto* cognizance of the corruption allegations against CPRU's chairperson.[81] Besides, the preamble of the CEPTA sets out the Contracting Parties' aim

---

[76] External Advisors' Application, lines 635-656
[77] Cosar, 3, 12
[78] *World Duty Free v. Kenya (Award)*, ¶157
[79] *Ibid.*, ¶139, 141
[80] High Commercial Court of Mekar ruling on 23 August 2020, ¶9
[81] PO3, ¶13

to eliminate bribery and corruption in investment. All the above circumstances confirm that a transnational public policy regarding anti-corruption has been recognized and accepted by both Mekar and Bonooru.

87. Furthermore, Claimant may attempt to justify its illegal act in the name of "a friendly custom of doing business in Mekar."[82] However, such corruption is still inexcusable. As the *World Duty Free* tribunal held:

> "*It is unnecessary for the Tribunal to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy […]*"[83]

88. In conclusion, the issue of corruption is closely linked to the jurisdictional issue in this arbitration because it may invalidate Claimant's investment. Thus, the issue of corruption is within the scope of this dispute, and the Tribunal should hear from the External Advisors to determine whether the investment was valid in the first place.

(2) The external advisors to the CRPU have significant interest in this arbitral proceeding.

89. Concluded in the *Apotex* and the *Eco Oro Mineral* cases, "significant interest" should be interpreted as "*the specific public interest that the petitioner represents or defends which might be directly or indirectly affected by the specific jurisdictional issue on which it intends to make submissions or the outcome of this arbitration.*"[84] Specifically, there are two elements involved: **(a)** whether there exists a public interest that plays an important role in the dispute, and **(b)** whether the petitioner in question seeks to vindicate that interest by its participation in the dispute.[85]

---

[82] *Ibid*.
[83] *World Duty Free,* ¶172
[84] *Apotex Holding (PO5)*, ¶32; *Eco Oro Mineral*, ¶34
[85] Zachariasiewicz, 214

(a) A public interest exists in the present dispute.

90. In the leading cases *Suez v. Argentina* and *Biwater v. Tanzania*, the investment tribunals held that a public interest exists when decisions have the potential to affect persons beyond those immediately involved as parties in the case.[86]

91. Respondent argues that a public interest exists in the present dispute because corruption will inevitably influence the Mekari society. The Mekari business climate has been tainted by corruption, especially after the privatization of state assets. Synonymous to privatization, corruption has caused 238 million lost in MON since the enactment of the Emergency Recovery Act 2009.[87] Considering that Mekar scoring relatively low on its corruption perceptions index,[88] in the long run, Mekar's state-owned assets and public welfare will suffer heavy losses due to corruption. In addition, corruption negatively impacts the Mekari society by undermining democracy and the rule of law, damaging the government's ability to provide basic services, distorting markets and discouraging foreign investment in the Greater Narnian region.[89]

(b) The external advisors to the CRPU seek to vindicate such public interest.

92. In order to prove "significant interest", *amici* need to establish a satisfactory nexus between their object and the dispute.[90] The External Advisors have an aim of promoting fair business practices in Mekar. In light of this purpose, the External Advisors have regularly acted as interveners in judicial proceedings concerning approval for privatization projects in domestic courts.[91] Corruption, however, would undermine their efforts. Conniving to protect such illegal investment will inevitably damage the rights and confidence of other investors, feed inequality and injustice, and will finally disrupt the regular work of the

[86] *Suez*, ¶19; *Biwater v. Tanzania (PO5)*, ¶52
[87] PO3, ¶13
[88] Facts, ¶12
[89] UN Convention against Corruption, Foreword
[90] Buckley & Blyschak, 16
[91] External Advisors' Application, lines 631-636

External Advisors to advise potential investors prospecting opportunities in Mekar.[92]

93. Therefore, considering the influence of corruption on the Mekari society and the External Advisors' aim to promote fair business practices in Mekar, Respondent contends that the External Advisors have significant interest and should be involved in this arbitration.

(3) The external advisors to the CRPU can assist the Tribunal by bringing a different point of view to this proceeding.

94. According to Article 41(3) of the ICSID AF Rules, an *amicus* must have the ability to provide a new perspective, knowledge, or insight to the tribunal in the determination of a factual or legal issue. To reduce redundance, an *amicus* submission must be sufficiently different from any submissions of the disputing parties or other *amici*[93] in both content and perspective.

95. In order to be accepted, the petitioner must exhibit the expertise and experience necessary to assist the tribunal.[94] The *Philip Morris v. Uruguay* tribunal remarked that the expert knowledge and expertise of an *amicus* would be beneficial to its decision-making process.[95]

96. The External Advisors hope to assist the tribunal in solving the jurisdiction issue by providing factual evidence of corruption.[96] Such evidence may not be obtainable from either disputing party, since Claimant would naturally choose to conceal such a scandal while the Mekari government might be ignorant of the private association between Vemma and CRPU's chairperson. However, as independent advisors involved in the entirety of Caeli's privatization process, the External Advisors are in a unique position which enables them to objectively assess the whole acquisition proceeding. With a professional focus in

---

[92] *Ibid*, ¶6
[93] *Philip Morris*, ¶26; *Apotex Holding (PO4)*, ¶34
[94] *Suez*, ¶¶24-25
[95] *Philip Morris*, ¶30
[96] External Advisors' Application, lines 635-640

investment banking, the External Advisors can keenly perceive abnormality and can adduce unbiased facts of alleged corruption before the Tribunal.[97]

97. Furthermore, because the External Advisors have rich experience acting as interveners before the Mekari courts in relation to judicial proceedings concerning approval for privatization projects,[98] they can arrange information in an effective way to assist the Tribunal better understand the whole picture of corruption.

B. The Tribunal should refuse the application submitted by the CBFI.

98. The CBFI is a Bonoori non-profit industry association.[99] As mentioned above, Respondent submits that the tribunal should take Article 41(3) of the ICSID AF Rules into consideration determining whether to allow an *amicus* submission.

99. The criteria of *amicus* participation should be regarded as presumptive requirements; if one or more of these factors are not present, then *amici* participation should be denied.[100] Accordingly, the CBFI should not be granted a leave to file an *amicus* submission because it **(1)** has no significant interest in this arbitral proceeding; **(2)** cannot assist the tribunal by bringing a different point of view from the disputing parties to this proceeding and **(3)** lacks independence to participate as an *amicus*.

(1) The CBFI has no significant interest in this arbitral proceeding.

100. If an applicant lacks a significant interest in the outcome of a dispute, the application should generally be denied.[101] The CBFI has no significant interest because it **(a)** has no concrete interest in this arbitration and **(b)** only possesses a private interest instead of public interest.

---

[97] CBFI' s Application, ¶4
[98] External Advisors' Application, lines 641-646
[99] *Ibid*., ¶2
[100] Born & Forrest, 13
[101] *Ibid.*,13

(a) The CBFI has no concrete interest in this arbitration.

101. In order to establish a significant interest, the *amici* must demonstrate that they have a "concrete interest" in the proceeding instead of a "general" one or merely a "general aspiration."[102] This requires the *amicus* to not only explain which interest it represents is influenced by the outcome of the arbitration, but also to explain specifically how it is influenced and how the *amicus* vindicates such interest.[103]

102. However, the CBFI failed to establish a concrete link between the alleged public interest and the result of the proceeding dispute; besides, they failed to show how it may be affected. Though the CBFI argues that the impact of the interpretation of ISDS provisions holds significant interest for all Bonoori businesses,[104] it does not further explain how these investors will be influenced and the specific result of such impact. This makes it difficult for the Tribunal to determine the existence of public interest and accordingly decide the admissibility of the CBFI's submission.

103. Besides, Respondent argues that the interpretation of provisions in the CEPTA cannot be a basis for the CBFI's significant interest. The *Apotex* tribunal held that the interpretation of provisions and its potential influence cannot base significant interest, because the *amici*'s interpretation could be contrary to the intention of contracting parties and could lead to absurd results.[105]

104. Respondent further argues that international investment disputes are resolved on a *case-to-case* basis and each enterprise has a unique structure and function that should be analyzed individually. In consequence, the Tribunal's decision on Vemma's standing will not necessarily affect the standing of other Bonoori investors.

---

[102] *Apotex Holding (PO4)*, ¶38, *RFP*, ¶4.6, *Apotex Holding (PO5)*, ¶¶32-33
[103] *Ibid*.
[104] CBFI' s Application, ¶ 9
[105] *Apotex Holding (PO4)*, ¶40

(b) The CBFI only possesses a private interest instead of a public interest.

105. Respondent argues that the interest the CBFI defends is a private interest rather than a public one, because it is merely trying to help its members acquire commercial benefits. With a close relationship with Vemma, the CBFI is an organization whose members, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against Mekar under Chapter 9 of the CEPTA for similar reasons as Vemma.[106] Recent jurisprudence suggests that such private financial interest should be disregarded when contemplating the existence of "significant interest."[107]

106. Furthermore, only CBFI members can enjoy the benefits of services the organization provides.[108] With no specific description of how the CBFI advocated public policies or how they helped to foster a stronger economic environment in the Greater Narnian region, the CBFI's application is unpersuasive in demonstrating that it genuinely represents public interest.

(2) The CBFI cannot assist the tribunal by bringing a different point of view from the disputing parties to this proceeding.

107. The main purpose of *amicus* submissions is to effectively assist the tribunal in explaining issues. To achieve this goal, an *amicus* should avoid unnecessary repetitions of the arguments raised by disputing parties.[109] An eligible *amicus* must have the ability to assist the Tribunal in legal or factual issues by raising a different point of view from the disputing parties.[110]

108. The CBFI seeks to justify Claimant's standing as an eligible investor under the CEPTA. It

---

[106] CBFI's Application, ¶¶ 6-7
[107] Kawharu, 288
[108] PO3, ¶40
[109] Zachariasiewicz, 217
[110] Born & Forrest, 13

strives to assist the Tribunal in such a legal issue by providing information related to the regulatory framework of Bonooru, for instance, its free-market principles and business climate.[111] However, this information is quite similar to the Uncontested Facts which offers background information about Bonooru and states that Bonooru operates as a market-based mixed economy.[112]

109. The *Methanex* tribunal stated that it is assumed that disputing parties will provide all the necessary assistance and materials required by the tribunal to arbitrate their dispute.[113] As a matter that was specifically brought up in the Response,[114] it is clear that Vemma's identity will be thoroughly discussed in the oral hearing to decide whether the Tribunal has jurisdiction. In light of this, Vemma itself will certainly focus on such a legal issue and explain its eligibility from the perspective of SOE investors.

110. Moreover, the CBFI is an organization that is constituted by investors like Vemma. With no evidence to show its expertise and experience to successfully assist the tribunal, it is questionable whether the CBFI has the ability to bring a substantially different point of view to this proceeding.

(3) The CBFI lacks independence to participate as an *amicus*.

111. Independence should be taken into consideration when deciding the admissibility of an *amicus* submission. In terms of its original meaning, an "*amicus curiae*" should be a friend of the court instead of the friend of a specific disputing party. Independence is closely linked to the rule that an *amicus* submission shall not prejudice or unduly burden any disputing party.[115]

[111] CBFI's Application, ¶ 10-11
[112] Facts, ¶ 3
[113] *Methanex*, ¶48
[114] Response, ¶ 2-6
[115] Born & Forrest, 12

112. Moreover, though there is no direct requirement, Article 41(3) of the ICSID AF Rules leaves space for investment tribunals to consider other factors by exercising theoretical discretion.[116] The *Von Pezold v. Zimbabwe* tribunal decided to consider the factor of independence, explaining that it is an implicit standard for *amicus* participation.[117]

113. Respondent argues that the CBFI lacks structural independence to participate as an *amicus*.[118] Vemma is a member of the CBFI who provides membership fees to the latter.[119] Although Vemma is excluded from the decision-making procedure of the CBFI's *amicus* submission making process, it still exerts influence on other CBFI members who have the right to vote as well as the CBFI itself.

114. Further, as the CBFI itself disclosed, two members of the CBFI are currently pursuing claims against Mekar for similar reasons as Vemma.[120] All of these circumstances make the CBFI inherently inclined towards Claimant, and thus allowing it to participate as an *amicus* would be contrary to the independent purpose of *amicus* participation.[121]

115. In addition, Lapras Legal Capital ("**LLC**"), a member of the CBFI, has been advising Claimant on funding strategies in this arbitral proceeding.[122] As such, it is innately prejudicial towards Respondent, because it may gain fame and potential business opportunities if Claimant wins the case.

116. However, according to the CBFI's *Amicus* Submission Guidelines, LLC will not be excluded from CBFI's *amicus* submission making procedure, because the CBFI unanimously resolved that LLC is not a party to the case nor has a direct financial interest in the outcome of the case.[123] This shows that the CBFI's *Amicus* Submission Guidelines

---

116 *Apotex (PO4)*, ¶26
117 *Von Pezold*, ¶49
118 *Ibid.*, ¶¶49-56
119 PO3, ¶11
120 CBFI's Application, ¶¶ 6-7
121 *Suez,* ¶23
122 CBFI's Application, ¶ 7
123 PO3, ¶12

has a serious defect as it does not exclude a member with conflict of interest.

117. Consequently, the inherent inclination and say of a member who has a conflict of interest set the CBFI in a position to side with Claimant. To avoid prejudice and unfairness, Respondent argues that the CBFI should not be granted leave to file an *amicus* submission.

118. In conclusion, the CBFI has not met the requirements in Article 41(3) of the ICSID AF Rules and should not be allowed to file an *amicus* submission.

PART TWO: MERITS

III. RESPONDENT VIOLATED ARTICLE 9.9 OF THE CEPTA.

119. Respondent did not violate CEPTA Article 9.9 because **(A)** Mekar's measures did not violate the fair and equitable treatment **("FET")** standard. Additionally, **(B)** the cumulative effect of Respondent's acts did not result in a breach of FET. Alternatively, **(C)** the violation can be justified by Respondent's right to regulate under CEPTA Article 9.8.

A. Respondent's measures did not violate the FET standard.

120. CEPTA Article 9.9 expressly stipulates the circumstances where a Party breaches the obligation of FET. Respondent hereby submits that Mekar did not violate CEPTA Article 9.9 as its measure or measures did not constitute: **(1)** denial of justice in criminal, civil or administrative proceedings; **(2)** fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; **(3)** arbitrary or **(4)** discriminatory conduct; **(5)** frustration of legitimate expectations; **(6)** abusive treatment.[124]

(1) Respondent's measures did not constitute a denial of justice.

121. The test for denial of justice sets a high threshold. Only egregious conduct that shocks, or at least surprises, a sense of judicial propriety would constitute a denial of justice.[125] To illustrate further, only when a State has not remedied this denial domestically can the entire judiciary be accused of the extreme injustice and partiality necessary to meet this threshold.[126]

---

[124] CEPTA, Article 9.9.2,3
[125] *ELSI*, ¶128; *White Industries*, ¶10.4.23
[126] Vattel, ¶350; Paulsson, 100; *Toto*, ¶164

122. Claimant may argue that Respondent's enforcement of the award that had been set aside, the summary judgement of the interim measures and the delay of the hearing constituted denials of justice. However, Claimant was not denied justice, because **(a)** Respondent had the discretion to enforce the award that had been set aside; **(b)** the summary judgement of the interim measures was reasonable and **(c)** no undue delay was present.

(a) Respondent had the discretion to enforce the award that had been set aside.

123. Claimant may argue that Respondent's enforcement of a bribed award that had been set aside constituted denial of justice. However, Respondent submits that **(i)** the bribery was not proved and **(ii)** Respondent was entitled to enforce an award that had been set aside.

i. The bribery was not proved.

124. Sinnograd's Supreme Arbitrazh Court found no conclusive act of bribery.[127] Materially, said court found only limited circumstantial evidence which was not substantive enough to justify a charge of bribery.[128] Besides, Mekari Ministry of Home Affairs has recognized CILS as an entity funded by foreign donations that interferes in Mekar's domestic affairs,[129] which means that the CILS report lacked credence and reliance.[130] Summarily, because there was no clear evidential act of bribery and because the organization which provided the circumstantial evidence lacked reliance, it cannot be reasonably concluded that the arbitrator was bribed.

ii. Respondent was entitled to enforce an award that had been set aside.

125. Under the New York Convention Article V, (1), (e) and the Mekari Commercial Arbitration Law, the enforcement of an award may [but not must] be denied when an award is annulled in the country where it was issued.[131] According to the general rules of literal interpretation

[127] Annex XIII, ¶11
[128] Annex XIII, ¶13
[129] Annex XIV, ¶13
[130] *Ibid*.
[131] Annex XIV, ¶7; Annex XV, ¶6

and the word consistency of accepted international arbitration practice,[132] an enforcing court has the discretion to honor or to disregard the decision of the arbitration place about setting aside the award.[133]

126. In *Hulley,* the Paris Court of Appeal enforced the awards set aside by the Hague District Court, because, under French arbitration law, annulment of an award in its country of origin was not a reason to refuse the enforcement of that award rendered abroad.[134] Similarly, in our case, Mekari Commercial Arbitration Law Section 36 (1) also did not list annulment of the award as a reason for refusing to enforce that award.[135] As such, the Mekari court reasonably enforced said award and such a decision did not amount to a denial of justice.

(b) The summary judgement was reasonable.

127. Claimant may assert that the summary judgement violated its right to be heard, resulting in a denial of justice. However, as stated before, denial of justice occurs only when a State has not remedied an investor domestically.[136] Regarding the 2019 hearing, where the summary judgement took place, this was only one of the hearings about the airfare caps.[137] There was still a chance for Claimant to argue about the airfare caps in another hearing in May 2020. Alternatively, considering Mekar's overstretched judiciary, it is reasonable to apply summary judgments to expedite court proceedings and alleviate the backlog in Mekari courts.[138]

128. Because the summary judgement did not violate Claimant's right to be heard and in consideration of Mekar's overstretched judiciary, the summary judgment did not constitute a denial of justice.

---

[132] VCLT, Article 31
[133] Schultz & Ortino, 201
[134] *Hulley*, ¶22, 63
[135] Annex XIV, ¶7
[136] Vattel, ¶350; Paulsson, 100; *Toto*, ¶164
[137] Facts, ¶50
[138] PO3, ¶8

(c) No undue delay was present.

129. Claimant may contend that there was an undue delay of the hearing of the airfare caps. However, extenuating circumstances, especially the overstretched judiciary, should be considered when determining whether undue delay exists.[139]

130. In *Toto*, the tribunal took the respondent's political crisis into account and concluded that the six-year delay of the litigation was not a denial of justice.[140] Similarly, the extenuating circumstances in Mekar should also be considered. Mekar had an overstretched judiciary,[141] as there were an overwhelming number of cases due to the economic crisis.[142]

131. Moreover, criminal proceedings should be prioritized compared with commercial matters.[143] In the present case, the hearing on airfare caps was a commercial matter, while numerous criminal cases particularly needed urgent resolution.[144] Hence, it was reasonable for the Mekari court to arrange the hearing about 13 months after the registration of Caeli's claim.[145]

132. Summarily, because Respondent's delay for the hearing was reasonable based on extenuating circumstances, there was no denial of justice.

133. In conclusion, the enforcement of the award set aside and the summary judgement of the interim measures can be justified, and no undue delay was present. Thus, Claimant was not denied justice.

---

[139] *Toto*, ¶165; *White Industries*, ¶10.4.18
[140] *Toto*, ¶165
[141] Facts, ¶13
[142] Facts, ¶44
[143] *White Industries*, ¶10.4.14
[144] Facts, ¶13, 44
[145] Facts, ¶44

(2) Respondent did not fundamentally breach due process, including a fundamental breach of transparency.

134. Article 9.9.2 (b) of the CEPTA stipulates that a fundamental breach of transparency will constitute a breach of due process. To act with transparency, a State's legal framework for investors' operations should be readily apparent, and decisions affecting investors should be traced to that legal framework.[146]

135. Respondent did not fundamentally breach transparency because **(a)** Respondent's legal framework was readily apparent, and **(b)** Respondent's decisions can be traced to that legal framework.

(a) Respondent's legal framework was readily apparent.

136. Transparency includes the idea that all legal requirements for the purpose of initiating, completing and successfully operating investments should be readily known to all affected investors of another Party.[147] The *Monopoly Act* was one of the economic laws that investors should follow to operate investments in Mekar successfully, and Claimant was sufficiently notified that any anti-competitive behavior would be subject to the CCM.[148] Therefore, it was a relevant legal requirement and was apparent to Claimant.

137. Claimant may argue that some wording in the *Monopoly Act* is vague, leading to misunderstandings. Nevertheless, the *Monopoly Act* was readily apparent because the host State does not need to act free from ambiguity.[149] In *Global Telecom*, the claimant argued that Canada lacked transparency because Canada failed to clarify the meaning of a provision. However, the tribunal found that the provision was apparent, and Canada had no

[146] Dolzer & Schreuer, 188; *Metalclad*, ¶76; *Photovoltaik*, ¶536
[147] *Metalclad*, ¶76; *Nelson*, ¶360
[148] Facts, ¶25
[149] Campbell McLachlan et al., ¶7.207; *Urbaser*, ¶628; *RWE*, ¶660

duty to correct potential misunderstandings of the applicable rules.[150] Similarly, in our case, the *Monopoly Act* met the transparency standard, and Respondent did not have an obligation to correct potential misunderstandings.

(b) Respondent's decisions can be traced to the legal framework.

138. To act with transparency, a State's decisions affecting investors should be able to be traced to the legal framework for investors' operations.[151] Respondent meets this standard because its decisions can be traced to the *Monopoly Act,* specifically, **(i)** the first investigation and **(ii)** the second investigation.

i. <u>*The first investigation can be traced to the Monopoly Act.*</u>

139. In the present case, according to the *Monopoly Act*, the CCM may open an investigation if:

> *"(1) a corporation obtains a market share greater than 50%. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share […];*
>
> *(2) the corporation poses a unique threat […];*
>
> *(3) […] the corporation's actions […] are likely to push competitors out of the market.*" [152]

140. In the present case, first, in conjunction with the Royal Narnian, Claimant's market share exceeded 50%.[153] Before Claimant made its investment, Claimant undertook that it would not engage in a high-level cooperation on competition parameters.[154] However, Claimant failed to keep said undertaking. To be specific, there was evidence of preferential secondary slot trading between the Royal Narnian and Caeli.[155] Claimant benefited from its cooperation with the Royal Narnian with respect to terminals, code-sharing and other

---

[150] *Global Telecom*, ¶570
[151] Dolzer & Schreuer, 188
[152] Annex V, (2)
[153] Facts, ¶36
[154] Facts, ¶25
[155] Facts, ¶36

aspects.[156] Thus, it was appropriate to consider the composite market share.

141. Even if the composite market share cannot be considered, the CCM may exercise discretion to open an investigation in industries that require special attention.[157] The aviation industry needs special attention because aviation companies often engage in monopoly behavior. A report by the Open Markets Institute reveals that a series of mega-mergers have enabled the four largest US airlines to control about 80 percent of total domestic passenger traffic.[158] In 2021, the US Department of Justice stepped up its antitrust investigation into American Airlines Group's partnership with JetBlue Airways and was concerned that the deal could lead to anti-competitive coordination.[159] In any event, the first element was met.

142. Second, Claimant posed a unique threat. In antitrust law, "threat" means the ability to lessen or destroy competition in the market.[160] Claimant expanded its market rapidly,[161] and by 2016, it had become the only consistently profitable carrier on over half the routes.[162] Further, Claimant had been receiving subsidies under the Horizon 2020 Scheme from 2011 to 2016,[163] which enabled Claimant to interfere with market competition. According to the CCM report, said subsidies helped Caeli reduce its airfare below its average avoidable costs and thus enabled predatory pricing.[164] Through predatory methods, Claimant grabbed an advantageous position in the market and accordingly posed a unique threat.

143. Third, Claimant was likely to push competitors out of the market. To squeeze out concessions, Caeli threatened to shift its traffic from the Phenac Airport to other airports in the region.[165] According to a consortium of small regional airlines, Caeli capitalized on its undercutting policies and the privileges it enjoyed at Phenac Airport to push its competitors

---

156 Facts, ¶27
157 Annex V, Chapter III, (2)
158 open markets institute
159 The Wall Street Journal
160 U.S. Department of Justice, Chapter 1
161 Facts, ¶29, 31, 34
162 Facts, ¶35
163 PO4, ¶6
164 Facts, ¶45
165 PO3, ¶7

off of routes.[166] Claimant may assert that other competitors emerged in its regional routes. However, this occurred in 2014.[167] By 2016, Caeli was the only consistently profitable carrier on over half the routes.[168] Without evidence of other naturally occurring causes, this overwhelming change in the market within such a short period can only be the result of Claimant pushing out its competitors.

144. Since the requirements of the first investigation were met, Respondent' s decision of the first investigation can be traced back to its legal framework.

ii. <u>The second investigation can be traced to the Monopoly Act.</u>

145. CCM's reasons to open the second investigation can also be traced back to Article 3 of the *Monopoly Act,* which reads:

> "*The CCM shall open an investigation […] where:*
>
> *(a) a complaint is brought to the CCM by a direct competitor in the market;*
>
> *(b) the corporation has at least a 10% market share;*
>
> *(c) […] sufficient evidence is brought by the direct competitor.*"

146. First, Caeli's direct competitors, a consortium of small regional airlines in Greater Narnia, brought a complaint to the CCM.[169] Second, Caeli's market share was over 10%.[170] Third, as mentioned above, there was sufficient evidence that Caeli demonstrated anti-competitive behavior. All these above aspects show that the second investigation can be traced back to the *Monopoly Act*.

147. Summarily, because the legal framework was apparent and decisions affecting the investor can be traced to that legal framework, Respondent did not breach transparency.

---

[166] Facts, ¶38
[167] Facts, ¶33
[168] Facts, ¶35
[169] Facts, ¶38
[170] Facts, ¶36

(3) Respondent's measures were not arbitrary.

148. According to *ELSI*, a measure is arbitrary if "it […] shocks, or at least surprises, a sense of judicial propriety."[171] Further, a measure is not arbitrary when it is rationally connected to a legitimate public objective.[172]

149. First, Claimant may argue that the denomination measure in MON was arbitrary. However, this measure was rationally connected to Claimant's legitimate public objective, which was to recover from the economic crisis by stabilizing currency,[173] as recommended by the IMF.[174] The exact measure of exclusive domination in local currency was successfully exercised in *El Paso*. Before the Argentinean economic crisis, some services were valued in either Argentine Pesos or USD. However, after the crisis broke out, Argentina implemented mandatory Peso pricing.[175] The tribunal recognized that this measure was aimed at distributing the burden of the economic crisis among all those affected, which was consistent with the public objective pursued.[176] Similarly, the denomination measure in our case was reasonable and did not touch upon arbitrariness either.

150. Moreover, the interim airfare caps implemented upon Claimant were not arbitrary. As an interim measure following the *Monopoly Act*,[177] the airfare caps aimed to combat monopolies by preventing Caeli from earning supra-competitive profits. In addition, the caps were set reasonably above the rates Caeli Airways charged on set routes.[178] Thus, the imposition of airfare caps was rational. Further, the continuation of airfare caps after the crisis was also aimed at protecting fair competition. Caeli still enjoyed a considerable market share in Mekar due to predatory pricing,[179] which enabled it to raise prices to solve

---

171 *El Paso*, ¶ 319; *ELSI*, ¶ 128; *Mobil Exploration*, ¶873; *White Industries*, ¶10.4.23
172 *Crystallex*, ¶380; *El Paso*, ¶322
173 Fact, ¶42
174 Fact, ¶39
175 *El Paso*, ¶314
176 *El Paso*, ¶322
177 Monopoly Act, Chapter III, (4) (d)
178 Facts, ¶37
179 Facts, ¶49

its financial situation. Hence, the reservation of airfare caps until the market share of Caeli dropped below 40% was non-arbitrary as well.

151. To conclude, the measures challenged by Claimant were not arbitrary.

(4) Respondent's refusal to provide subsidies under the Executive Order 9-2018 to Claimant was not discriminatory.

152. Discrimination exists wherever the State accords different treatment to different persons in like circumstances without reasonable justification.[180] According to *GAMI*, differential treatment can be justified when the measure bears rationale to public interests.[181]

153. Here, Respondent's refusal to grant Claimant subsidies was not discriminatory because it could be reasonably justified by a public interest rationale: fair competition protection. The refusal was based on the following two reasons: **(a)** the advantages enjoyed by SOEs would threaten fair competition, and **(b)** Caeli's abuse of its dominant position was particularly detrimental to the public interest of promoting competition.

(a) The advantages enjoyed by SOEs would threaten fair competition.

154. As was held by *Portugal*, concerning airport charges for the landing and take-off of aircraft, an airport authority that holds State-granted exclusive rights enjoys a dominant position in the market for services linked to the access of airport facilities.[182] In addition, authorities worldwide such as the US and the EU have criticized the unfair support received by SOEs which could lead to market distortion.[183] In light of the above, SOEs enjoy inherent advantages over other competitors.

---

[180] *Saluka*, ¶313; *Lemire*, ¶261; *Goetz*, ¶121; *ECE*, ¶4.825
[181] *GAMI*, ¶114; *Feldman Karpa*, ¶170; *Saluka*, ¶313
[182] *Portugal*, ¶45
[183] Cai

155. In the present case, Claimant, as an SOE, took advantage of its unique privileges in Phenac Airport it received from the host State to outcompete other firms.[184] These advantages enabled Caeli's dominant position in Phenac Airport and also produced the loyalty effect of customers. Because of this, it is likely that other transport service providers who carried business passengers to Phenac Airport had been squeezed out of the market.

156. Hence, as an SOE, Claimant's government-related advantages enhanced its competitiveness and threatened the public objective of fair competition. It would be unfair to grant the SOE more subsidies despite all the advantages it already enjoyed.

(b) Caeli's abuse of its dominant position was especially detrimental to the public interest of promoting competition.

157. According to *GAMI*, differential treatment can be justified when there exists a public interest rationale.[185]

158. In the present case, such differentiation was due to the public interest of protecting free competition.[186] Caeli's abuse of its dominant position was especially detrimental to fair competition,[187] which resulted in the refusal of its application for subsidies.

159. Here, Mekar's *Monopoly Act* expressly stipulated the definition of "abuse of dominant position", which entailed the characteristic of having or being likely to have the effect of lessening competition substantially.[188] Moreover, according to the Executive Order 9-2018, the usage of subsidy funds had to be ensured that it "*would not skew market share in favor of one or more enterprises*."[189]

---

[184] Facts, ¶49.
[185] *GAMI*, ¶114; *Feldman Karpa*, ¶170; *Saluka*, ¶313
[186] CEPTA Article 1.3
[187] Facts, ¶49
[188] Monopoly Act, Chapter IV (c)
[189] Annex VIII, Section 3101 (c) (1) (B)

160. According to a former high-ranking employee within Bonooru's Ministry of Tourism,[190] Caeli's business model revolved around undercutting competition using low prices, focusing specifically on certain routes to and from Phenac Airport.[191] Indeed, multiple small airline companies complained that Caeli's actions made it nearly impossible for small companies to penetrate the market linked to the Phenac Airport.[192] Ultimately, Caeli became the only consistently profitable carrier on over half the routes to and from Phenac Airport.[193]

161. Summarily, Claimant had already abused its dominant position to create market entry barriers to other companies. If it received subsidies, market share would be skewed in favor of Claimant, which was against the object of the Executive Order 9-2018.

162. In conclusion, the differentiation regarding subsidies was aimed at the public interest of promoting competition and thus can be reasonably justified.

(5) Respondent did not engage in abusive treatment.

163. Abusive treatment of investors entails the manifest lack of lawful grounds for a State's conduct.[194] A high threshold is required for such a determination: for instance, threatening to initiate criminal proceedings against an investor would meet such a threshold.[195]

164. Claimant may contend that Respondent's refusal of the Hawthrone Group's offer constituted abusive treatment by alleging that Claimant had been pressured into selling Caeli. However, according to the *Shareholder's Agreement relating to Caeli*,[196] Respondent legally exercised its right of first refusal. This is because the Hawthorne

[190] Annex VII, lines 1890-1892
[191] Facts, ¶49
[192] Facts, ¶38
[193] Facts, ¶35
[194] United Nations, 83
[195] *Krederi*, ¶638
[196] Annex VI

Group's offer could not be considered as one received from a "*bona fide* third party" due to its affiliation with Vemma via the Moon Alliance.[197] Moreover, the peculiarity of the Hawthorne Group's 600 million USD offer[198] was also indicated by the fact that Claimant later failed to yield another offer higher than 400 million USD for 9 months.[199]

165. Thus, a claim of abusive treatment is untenable because Respondent's exercise of its right of first refusal was based on legal grounds.

(6) Respondent's measures did not frustrate Claimant's legitimate expectations.

166. Respondent contends that the CCM's initiation of investigations and its conclusion that Caeli violated Mekari antitrust law did not frustrate Claimant's legitimate expectations because **(a)** Respondent did not make any specific representations to Vemma. In any event, **(b)** Vemma did not rely on such statements to make its investment.

(a) Respondent did not make any specific representation to Vemma.

167. According to CEPTA Article 9.9.3, legitimate expectations must arise from a specific representation. Several factors should be considered when deciding whether a representation has legal effect,[200] including whether the representation was specifically addressed to the investor,[201] and the form and content of the representation.[202]

168. First, to create legitimate expectations, a representation should be specifically addressed to the individual investor.[203] However, in the present case, any statement made by Respondent did not specifically address Vemma. When Mekar Airservices marketed

[197] Facts, ¶57
[198] Annex X, Section 3.1
[199] Facts, ¶63
[200] *Mamidoil*, ¶643
[201] *Crystallex*, ¶547; *Charanne*, ¶490; *Total*, ¶119
[202] *Crystallex*, ¶547; W*irtgen*, ¶409; *Total*, ¶121; *El Paso*, ¶393, 395; *White Industries*, ¶10.3.17
[203] *Crystallex*, ¶547; *Charanne*, ¶490; *Total*, ¶119

Caeli's core assets to potential bidders,[204] this statement was addressed to all potential bidders, not Vemma alone. When the Chairman of CRPU stressed that Vemma's ties to Bonooru were an asset, his purpose was to attract Bonoori investors to invest in Mekar.[205] Therefore, the addressee of these statements was other investors, and Vemma served only as an example to attract investment. In addition, Mekar's business and legal framework was for all citizens and investors, not only for Vemma, so any possible specific representation could not have been embodied in general legislation or regulation.[206]

169. Second, the form of the statements was political. In *El Paso*, the Argentinian President publicly announced that a newly-passed decree would prevent lack of stability of the rules.[207] The tribunal found that declarations made by the President must be viewed as political statements, and thus they could not create reasonable expectations protected by the BIT.[208] Similarly, in the present case, the Chairperson of the CRPU noted that he hoped Vemma's success would encourage more Bonoori investors to invest in Mekar.[209] Considering the purpose of the Chairperson, it is evident that the statement was political, and could not create legitimate expectations.

170. Third, the content of the statement was vague and general. In *White Industries*, a statement made to the investor was that "it was safe for Claimant to invest in India."[210] The tribunal held that such a representation was vague and general and thus did not constitute a specific representation.[211] Similarly, in the present case, Respondent's statements were vague and general. The statement of Mekar Airservices only introduced Caeli Airways' core assets to bidders,[212] and the statement about Vemma's tie with Bonooru and Caeli's partnership with Moon Alliance members[213] only explained the reasons why Vemma won the bid, which

---

[204] Facts, ¶21
[205] Facts, ¶24
[206] *El Paso*, ¶394
[207] *Ibid.*, ¶393
[208] *Ibid.*, ¶395
[209] Facts, ¶24
[210] *White Industries*, ¶10.3.17
[211] *Ibid.*
[212] Facts, ¶21
[213] Facts, ¶24, 25

did not convey any real or precise guarantee. Therefore, Respondent's conduct did not constitute specific representations.

171. In conclusion, because none of the above statements met the threefold criteria of specific representations, Respondent did not make any specific representation.

(b) Vemma did not rely on such statements to make the investment.

172. According to CEPTA Article 9.9.3, in order to have a legitimate expectation, Claimant must have relied on a specific representation in deciding to make its investment.[214] This means that the statements that created legitimate expectations must be a determining factor in the investor's decision to invest.[215]

173. In the present case, first, the statements discussed above were made after Vemma had won the bid, which means that Vemma had already decided to invest in Mekar before such statements were made.[216] Therefore, Vemma did not rely on such statements to make its investment.

174. Second, according to the submission by the external advisors to the CRPU, the rights received by Vemma were procured through bribes to Mr. Dorian Umbridge, the Chairperson of the CRPU.[217] Considering this bribery, Vemma's investment decision was not based on the statements, because Vemma was well aware that the statements made by Mr. Dorian Umbridge were not entirely accurate or credible.

175. Summarily, Respondent's measures did not frustrate Claimant's legitimate expectation.

---

[214] CEPTA, Article 9.9.3
[215] *Micula*, ¶672
[216] Facts, ¶22
[217] External Advisors' Application, lines 635-637

B. The cumulative effect of Respondent's acts did not result in a breach of the FET standard.

176. Claimant may argue that even if Respondent's measures could not individually breach the FET standard, a combination of Respondent's acts could cumulatively constitute a breach. Such a cumulative breach was defined as a "creeping" FET violation by the *El Paso* tribunal.[218] In *El Paso*, the tribunal defined a collection of acts that led to the forced sale of the investor's Argentine shareholdings as a "composite *act*" in the sense of ILC Article 15.[219]

177. However, ILC Article 15 applies only to systematic obligations,[220] that is, primary norms that define acts as wrongful in terms of their inherently wrongful or systematic character.[221] Therefore, if one wants to contend that certain acts constituted a "composite act" within the meaning of ILC Article 15 and that their cumulative effect violates the FET standard, said acts need to be sufficiently numerous and interconnected to amount to not merely isolated incidents but to a pattern or system.[222] The *Rompetrol* tribunal also confirmed that the cumulative effect of a succession of actions could together amount to a breach of the FET standard, but this would only be so where the actions displayed some link of underlying pattern or purpose between them.[223]

178. In the present case, Respondent's measures were taken by different subjects for different purposes. Specifically, the CCM initiated investigations, imposed fines and placed airfare caps for an antitrust purpose. Mekar's government imposed mandatory pricing in MON for the aim of stabilizing currency.[224] In light of the above, there was no real connection between these measures, and they did not constitute a pattern or system.

---

[218] *El Paso*, ¶518
[219] *Ibid.*, ¶516
[220] Crawford (I), 36-37
[221] Crawford (I), 36; Crawford (II), 266
[222] *Ireland*, ¶159
[223] *Rompetrol*, ¶271
[224] Facts, ¶42

179. When the purpose and subjects of a series of State acts are different, it is difficult to conceive of an instance in which these acts that were individually consistent with the FET standard could, in the aggregate, amount to a FET violation.[225] In conclusion, the cumulative effect of Respondent's acts did not breach the FET standard.

C. Respondent's violation can be justified by its right to regulate under CEPTA Article 9.8.

180. As highlighted by the *ADC* tribunal**,** States possess an inherent right to regulate for the protection of public interests.[226] In the instant case, CEPTA Article 9.8 explicitly acknowledges Contracting Parties' right to regulate.[227]

181. Exercise of a State's regulatory right is not boundless.[228] Specifically, *investment protection obligations* the State undertakes therein, such as non-discrimination, non-arbitrariness and due process, must be honored in *bona fide.*[229]

182. Respondent submits that its conduct reasonably corresponded to its right to regulate. As illustrated above,[230] Mekar's measures were appropriate and met all necessary criteria, *i.e.*, its measures were non-discriminatory, unarbitrary and taken in due process, and also did not constitute a denial of justice or frustrate legitimate expectations.[231]

183. Therefore, Mekar's measures were exercised under its legitimate right to regulate.

---

[225] Vesel, 560
[226] *ADC*, ¶423
[227] CEPTA, Article 9.8
[228] *Suez*, ¶237
[229] CEPTA, Article 9.7
[230] Submission, III, A
[231] CEPTA, Article 9.7

PART THREE: REMEDY

IV. EVEN IF RESPONDENT HAS VIOLATED ARTICLE 9.9, IT IS OBLIGATED TO COMPENSATE VEMMA FOLLOWING THE "MARKET VALUE" STANDARD.

184. Even if Respondent is obligated to compensate Claimant for violating CEPTA Article 9.9, the compensation standard should be market value **("MV")**, because **(A)** the Article 9.7 MFN clause is not applicable here, and **(B)** the *lex specialis* principle of international law affirms the MV standard. Regardless, **(C)** any compensation paid to Claimant should be mitigated due to Claimant's contributory negligence and the dire economic situation in Mekar.

A. The CEPTA Article 9.7 MFN clause cannot be invoked.

185. According to CEPTA Article 9.7, MFN treatment is not applicable here since **(1)** Claimant's request for compensation does not fall within the scope of the MFN clause. In any event, **(2)** application of the MFN treatment clause is excluded by CEPTA Article 9.7.2. Thus, Claimant cannot invoke the MFN clause to import the "fair market value" **("FMV")** standard from Arrakis-Mekar BIT **("AMBIT")** Article 13 to support its claim.

(1) Claimant's request for compensation does not fall within the scope of MFN treatment.

186. According to Article 9.7 of the CEPTA, MFN treatment is applicable with respect to the "establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in [a Party's] territory."[232]

[232] CEPTA, Article 9.7.1

187. In the instant case, Claimant is requesting the same treatment as Arrakis in terms of compensation standard.[233] However, "compensation" refers to the counterbalancing payment to make up for losses,[234] which does not fall within any category of the MFN Treatment clause.

188. Claimant may contend that Mekar's purchase of its stake falls within the scope of "sale or disposal" under CEPTA Article 9.7. Pursuant to Article.31(1) of the VCLT, which both Mekar and Bonooru are parties to,[235] terms of a treaty shall be interpreted following their ordinary meaning. The term "sale or disposal" refers to the investment activity of distribution by selling and placement,[236] but compensation issue arose after Vemma selling its investment. Therefore, the term "sale or disposal" cannot match Claimant's request for compensation.

(2) The application of the MFN clause can be excluded by CEPTA Article 9.7.2.

189. CEPTA Article 9.7.2 expressly precludes the application of MFN treatment to procedural matters:

> *"For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes […]"*[237]

190. Respondent submits that because the standard of compensation is a procedure for dispute resolution, which falls outside the scope of treatment under the CEPTA's MFN clause, Claimant cannot use the MFN clause to invoke the compensation standard of the AMBIT.

191. Procedural law prescribes the procedures and methods of enforcing rights and duties in a suit,[238] which is distinguished from substantive law that creates, defines, or regulates

---

[233] Notice, ¶30
[234] "Compensate", merriam-webster
[235] Facts, ¶66
[236] "Sale", merriam-webster; "Disposal", merriam-webster
[237] CEPTA, Article 9.7.2
[238] Talmon, 982; Garner, 1567; Sovereignty Education and Defense Ministry, 44

rights.[239] In the context of judicial relief, procedural law defines the modes and conditions of the application of remedies to violated rights.[240]

192. CEPTA's compensation standard is stipulated in Article 9.21, within the section "Settlement of Disputes." The use of the word "may" in Article 9.21 indicates arbitrators' discretion to determine compensation amounts in awards.[241] This shows that Article 9.21 only regulates problems arising after established rights have been violated, but it does not create or define any rights itself. Accordingly, the compensation standard is not part of substantive law.

193. In the present case, Claimant's request for compensation is based on its allegation of a CEPTA Article 9.9 violation.[242] Claimant's right to compensation is a remedy for violated rights, while the standard of compensation is related to the quantification of damages.[243] Therefore, the compensation standard is a calculation mode used to formulate the remedy. As defined, the compensation standard is a procedure for dispute resolution.

194. In conclusion, the compensation standard is a matter of procedure, but the CEPTA MFN clause cannot expand its application scope to procedural matters. Consequently, compensation to Claimant should not correspond to FMV under the MFN clause of CEPTA Article 9.7.

B. Principles of international law cannot override the market value standard.

195. Claimant may contend that FMV is the appropriate standard according to principles of international law.[244] However, Respondent submits that even if principles of international law affirm the FMV, Claimant cannot deviate from the MV standard stipulated in the

[239] Garner, 1567; Sovereignty Education and Defense Ministry, 44
[240] Garner, 1567; Neeraj, 155
[241] CEPTA, Article 9.21
[242] Notice, ¶29
[243] *Valiant*, ¶23
[244] Notice, ¶30

CEPTA pursuant to the *lex specialis* principle and the VCLT.

196. First, the *lex specialis* principle, *i.e.*, the principle that a special rule prevails over a general rule, is widely recognized and applied as a principle of international law.[245] In this case, CEPTA Article 9.21 is a *lex specialis* of compensation since it stipulates explicitly the MV standard as the appropriate standard of compensation.[246] Hence, this special rule prevails over any principles of international law that Claimant asserts affirms the FMV standard.

197. Furthermore, both Bonooru and Mekar are parties to the VCLT.[247] Pursuant to the *pacta sunt servanda* principle, codified in Article 26 of the VCLT,[248] every treaty in force is binding upon the parties. It is stipulated in the CEPTA that the compensation standard between the parties is MV,[249] which should be applied.

198. Thereby, even if principles of international law affirm the FMV standard, it cannot override the MV standard according to the *lex specialis* principle and the VCLT. As such, MV is the appropriate compensation standard in our case.

C. Compensation should be mitigated because of Claimant's contributory negligence and Mekar's economic straits.

199. Even if Respondent is obligated to compensate Claimant, any compensation awarded to Claimant should be mitigated because **(1)** Claimant bore responsibility for its losses, and **(2)** Mekar's dire economic straits should be considered.

---

[245] Crawford (I), ¶17, 44; *AAPL*, ¶54; *Gabčíkovo-Nagymaros Project*, ¶132; *Ambatielos*, ¶87
[246] CEPTA, Article 9.21
[247] Facts, ¶66
[248] VCLT, 2; VCLT commentaries, 211
[249] CEPTA, Article 9.21

(1) Claimant bore responsibility for its losses.

200. As stated in *Gabčíkovo-Nagymaros Project*, a party injured by another contracting party must seek to mitigate the damage he has sustained.[250] Respondent contends that Claimant contributed to the injury and thus cannot seek full compensation from Respondent.[251]

201. In *Occidental*, the claimant did not obtain an authorization required by the respondent that was stipulated in a contract. The claimant knew the consequences but still breached the contract. Thus, the tribunal found that the claimant's negligence contributed to its injury.[252] Similarly, in our case, before Claimant's investment was made, Claimant was sufficiently notified that any anti-competitive behavior would be subject to the CCM.[253] Nevertheless, Claimant still adopted antitrust behavior,[254] which eventually led to the CCM's interim measures upon Claimant.[255]

202. Further, when Claimant made its investment, it inherited debt liabilities, but Claimant funneled funds towards rapid expansion instead of clearing its debts.[256] Claimant was advised several times that it should pay debt liabilities first and avoid rapid expansion,[257] but still did not change its business expansion model. Simultaneously, the CRPU noted that Vemma's proposal did not account for the severe volatility of fuel prices.[258] Only when oil prices around the globe crashed to a five-year low did Caeli Airways turn a net profit over the whole year for the first time since its acquisition.[259] The CEPO Secretary-General warned that these prices have already hit bottom and would rise in the future.[260] Nevertheless, up until 2019, Claimant continued to adopt risky business strategies.[261]

---

250 *Gabčíkovo-Nagymaros Project*, ¶80
251 ILC, Article 39; *Gemplus*, ¶11.12
252 *Occidental*, ¶¶670-687
253 Facts, ¶25
254 Submission III, A, (2)
255 Facts, ¶36
256 Facts, ¶24
257 Facts, ¶29; 31; 32
258 Facts, ¶24
259 Facts, ¶32
260 *Ibid.*
261 PO4, ¶5

Subsequently, rising oil prices left Claimant in a deeper state of financial distress than before.[262] Due to Claimant's extravagant approach that primarily focused on expansion without regard to the unpredictability of oil prices, Claimant ultimately suffered deep losses.[263]

203. In conclusion, because Claimant adopted antitrust behavior, focused on extravagant expansion and disregarded the volatility of fuel prices, Claimant contributed to its injury, and any possible compensation should be mitigated.

(2) Mekar's economic straits should be considered.

204. Respondent contends that Mekar's dire economic situation is also appropriate consideration for the Tribunal to lower compensation awarded, if any.

205. The first reading of the 2001 ILC Articles in 1996 stated that reparation must not result in depriving the population of a State of its own means of subsistence.[264] This explicitly implied the permissibility of mitigating compensation in order to ensure the livelihood of a State's population. In *A Case Against Crippling Compensation in International Law of State Responsibility*, Martins Paparinskis uses "crippling compensation" as an exception to the principle of full compensation, namely that compensation can be reduced if full compensation would deprive the population of a State of its own means of subsistence.[265]

206. In practice, the EECC in the Final Awards on Eritrea-Ethiopia war was concerned that massive damages could raise serious human rights issues. Accordingly, the EECC considered capping compensation to guarantee that the States could meet the basic needs of their people.[266]

---

[262] Facts, ¶48
[263] Facts, ¶55
[264] Yearbook of the ILC 1996, 63
[265] Martins Paparinskis, 6
[266] *Eritrea-Ethiopia war*, 633

207. In the present case, Respondent faced a dire economic crisis: bank loan defaults in Mekar had increased by 23% in the first three months of 2020 as opposed to the same period in 2019,[267] and a 2019 IMF report predicted four consecutive quarters of negative growth for Mekar, resulting in an 8 percent fall in GDP.[268] Payment of a 7 million USD award would lead to the transfer of about twice Mekar's consolidated annual public spending to Vemma,[269] which would affect Mekari people's means of subsistence. Therefore, due to the economic crisis in Mekar, compensation should be mitigated.

208. Summarily, because Claimant bears responsibility for its losses and Mekar is in economic straits, compensation should be reduced.

[267] PO3, ¶4
[268] *Ibid.*
[269] *Ibid.*

PART FOUR: PRAYER FOR RELIEF

209. For the foregoing reasons, Respondent respectfully requests this Tribunal to conclude that:

(1) The Tribunal has no jurisdiction over the present claims.

(2) The Tribunal should accept the *amicus* submission of the external advisors of CRPU and bar that of the CBFI.

(3) Respondent has not violated the FET standard in Article 9.9 of the CEPTA.

(4) Respondent's violation can be exempted by Article 9.8 of the CEPTA.

(5) Compensation should be awarded following the market value standard.

(6) Mitigating factors should be considered.

Respectfully submitted on September 23, 2021

By:

Team Jennings G

On behalf of Respondent

The Federal Republic of Mekar