FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

28 OCTOBER – 3 NOVEMBER 2021

VEMMA HOLDINGS INCORPORATED

(Claimant)

V

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

MEMORIAL FOR RESPONDENT

ABBREVIATIONS

Arrakis-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investment
BAK	Bakugo
BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
Bonooru-Mekar BIT	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments
BPB	Bonoorian People's Bank
CAA	The Civil Aviation Authority
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CIL	Customary International Law
CILS	Centre for Integrity in Legal Services
CMP	Common Man's Party
CRPU	Committee on Reform of Public Utilities
Hawthorne	Hawthorne Group LLP
IICRA	Investment Information and Credit Rating Agency
LPM	Labourers' Party of Mekar
ISDS	Investor-State Dispute Settlement

Lapras Legal	Lapras Legal Capital
Mekar	The Federal Republic of Mekar
Memorandum	Memorandum of Associationof Vemma Holdings Inc.
MRTP Act	Monopoly and Restrictive Trade Practice Act
MON	Mekari Mon
PO1	Procedural Order 1
PO2	Procedural Order 2
PO3	Procedural Order 3
PO4	Procedural Order 4
SCC	Sinnoh Chamber of Commerce
SOE	State Owned Enterprise
USD	US Dollar
Vemma	Vemma Holding Incorporated

¶ Paragraph

TABLE OF AUTHORITIES

TREATIES AND CONVENTIONS

ARSIWA	ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001)
ICSID	International Centre for Settlement of Investment Disputes (1966)
ICSID Additional Facility Rules	ICSID Additional Facility Rules (2006)
ICSID Rules	ICSID Arbitration Rules (2006)
ILC	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001)
New York Convention	New York Convention on Recognition and Enforcement of Arbitral Awards (1958)
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
VCLT	United Nations, Vienna Convention on the Law of Treaties (1969)

ARBITRAL AWARDS

Abaclat	Abaclat and Others v Argentine Republic, ICSID Case No. ARB/07/5, Consent Award, 29/12/2016

AES	AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary (II), ICSID Case No. ARB/07/22, Award, 23/09/2010
Aguas del Tunari	Aguas del Tunari S.A v Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondents Objections to Jurisdiction, 21/10/2005
Alex Genin	Alex Genini, Eastern Credit Limited Inc. and A.S Baltoil v The Republic of Estonia ICSID Case No. ARB/99/2, Award, 25/06/2001
Amco	Amco Asia Corporation and others v The Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 09/12/1983
Apotex	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, 04/03/2013
Aucoven	Autopista Concesionada de Venezuela, C.A(Aucoven) v Bolvarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27/09/2001.
Azurix	Azurix Corp v The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14/07/2000
Biwater	Biwater Gauff (Tanzania) Ltd v The United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29/09/2006
BUCG	Beijing Urban Construction Group Co Ltd v Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31/05/2017
Charanne	Charanne and Construction Investments v The Kingdom of Spain, SCC Case No V 062/2012, Award, 21/01/2016

CME	CME Czech Republic B.V v the Czech Republic, Final Award, 14/03/2003
CMS	CMS Gas Transmission Company v The Argentine Republic, ICSID Case No. ARB/01/8, Award, 12/05/2005
Continental	Continental Casualty Company v The Argentine Republic, ICSID Case No. ARB/03/9, Award, 05/09/2008
Crystallex	Crystallex International Cooperation v Bolivarian Republic of Venezuela ICSID Case No. (AF)/11/2, Award, 04/04/2016
CSOB	Ceskoslovenska Obchodni Banka, A.S v The Slovak Republic, ICSID Case No. ARB/97/4, Award, 29/12/2004
Duke Energy	Duke Energy Electroquil Partners & Electroquil S.A v The Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18/08/2008
EBO	Staur Endom A.S, Ebo Invest A.S and Rox Holding v Republic of Latvia ICSID Case No. ARB/16/38, Award, 28/02/2020
EDF	Eiser Infrastructure Limited and Energia Solar Luxemburg S.à.r.l v The Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 04/05/2017
EDF Ltd	EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Award, 8/10/2009
El Paso	El Paso Energy International Company v The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31/10/2011
Eli Lilly	Eli Lilly and Company v The Government of Canada, ICSID Case No. UNCT/14/2 Procedural Order 4, 23/02/16
Enron	Enron Creditors Recovery Corporation and Ponderosa Assets, L.P v The Argentine Republic, ICSID Case No. ARB/01/3, Award, 22/05/2007

Eskosol	Eskosol SpA in Liqidazione v Italian Republic, ICSID Case No. ARB/15/50 Decision on Respondents Application under Rule 41(5), 20/03/17
ESPF	ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic, ICSID Case No. ARB/16/5, Award,14/09/2020
Feldman	Marvin Roy Feldman Karpa v United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16/12/2002
Glamis Gold	Glamis Gold Ltd v The United States of America, UNCITRAL, Award, 08/06/2009
Hamester	Gustav FW Hamester GMBH & Co KG v Republic of Ghana ICSID Case No. ARB 07/23, Award, 18/06/2010
Jan de Nul	Jan de Nul N.V and Dredging International N.V v Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6/11/2008
Lemire	Joseph Charles Lemire v Ukraine, ICSID Case No. ARB/06/18, Award, 28/03/2011
Lesi Dipenta	Consortium Groupement L.E.S.I-DIPENTA v Republique Algerienne Democratique et Populaire, ICSID Case No. ARB/03/08 Award, 10/01/2005
Levy de Levi	Renee Rose Levy de Levi v Republic of Peru, ICSID Case No. ARB/10/17, Award, 26/02/2014
LG&E	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 03/10/2006
Lidercon	Lidercon S.L v Republic of Peru, ICSID Case No. ARB/17/9, Award, 06/03/2020

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Mamidoil	Mamidoil Jetoil Greek Petroleum Products Societe v Albania, ICSID Case No. ARB/11/24, Award, 30/03/2015
Metalclad	Metalclad Corporation v The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30/08/2000
Methanex	Methanex Corporation v The United States of America, UNCITRAL, Final Award, 03/08/2005
Micula	Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L v Romania, ICSID Case No. ARB/05/20, Final Award, 11/12/2013
Mondev	Mondev International Ltd v The United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11/10/2002
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A v Republic of Chile, ICSID Case No. ARB/01/7, Award, 25/05/2004
National Grid	National Grid plc v The Argentine Republic, UNCITRAL, Award, 3/11/2008
Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 05/10/2012
Parkerings	Parkerings-Compagniet AS v The Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11/09/2007
Phillip Morris	Philip Morris Brands v Uruguay, ICISD Case No. ARB/10/7, Award, 8/07/2016
Plama	Plama Consortium Limited v The Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction and Admissibility, 08/02/2005

Romak	Romak S.A (Switzerland) v The Republic of Uzbekistan, UNCITRAL PCA Case No. AA280, Award, 26/11/2009
Rumeli	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S v The Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29/07/2008
Rusoro	Rusoro Mining Ltd v Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, 22/08/2016
Salini	Salini Costruttori S.p.A. and other v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16/07/2001
Saluka	Saluka Investments B.V v The Czech Republic, UNCITRAL, Partial Award, 17/03/2006
Sempra	Sempra Energy International v The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28/09/2007
Talinn	United Utilities (Tallinn) v Estonia, ICSID Case No. ARB/14/24Decision on Application for Provisional Measures, 12/05/2016
Tecmed	Técnicas Medioambientales Tecmed v México, ICSID Case No. ARB/00/2, Award, 29/05/2003
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Thunderbird	International Thunderbird Gaming Corporation v The United Mexican States, UNCITRAL, Award, 26/01/2006
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STATEMENT OF FACTS

Parties to the Dispute

1. Vemma Holding Incorporated (Vemma) the claimant, is a Bonooru-based airline holding firm. Vemma owns and runs the Royal Narnian, Bonooru's national flag carrier. Vemma has had 100% ownership in the Royal Narnian from its inception and will continue to do so until May 2020.[1]

2. The Federal Republic of Mekar (Mekar) is a country of 10.8 million people. Following the merger of Caeli Airways and Aer Caeli in 2003, there was an attempt to privatise Caeli. However, this did not succeed because the Ministry of Civil Aviation was opposed to relinquishing government ownership of Caeli at the time. In 2009 there was a crippling economic crisis and the Ministry of Finance issued a policy statement outlining that Caeli Airways, Mekar lines and the State-owned railway were appropriate for privatisation.[2]

[1] Uncontested Facts ¶ 10
[2] Uncontested Facts ¶ 18

3. Mekar signed a BIT with Bonooru in 1994 (Bonooru - Mekar BIT). A few years thereafter (2014), Mekar signed another BIT with Bonooru (CEPTA) to replace the existing BIT. Mekar was careful not to compromise its right to regulate its internal affairs due to its past economic situation.[3]

Vemma acquires Caeli

4. Mekar Air Services Ltd marketed Caeli's assets to potential bidders in September 2010. Caeli's brand and logo, CA handling, a ground handling business, a well-equipped technical facility at Phenac, and valuable slots at two extremely congested international airports were among the incentives featured in the marketing campaign.[4]

5. Vemma was one of four firms that participated in the tender process, and after submitting its offer, it was discovered to be the top bidder, proposing the most financially appealing business strategy for Caeli. Vemma's offer for 800 million USD was accepted on January 5, 2011. After engaging into a share purchase agreement, Vemma eventually bought an 85 percent stake in Caeli Airways.[5]

Vemma's extravagant investment

6. Vemma's investment activities took an extravagant turn after acquiring Caeli.[6] It concentrated on expansion efforts rather than allocating funds to Caeli's financial health. Mekar representatives on the Caeli Airways board cautioned Vemma against dangerous investment decisions and recommended them to manage the expansion to minimize excessive costs associated with maintaining its fleet during low demand seasons. Vemma, on the other hand, ignored the advice.[7]

[3] Uncontested Facts ¶ 32
[4] Uncontested Facts ¶ 21
[5] Uncontested Facts ¶ 26
[6] Uncontested Facts ¶ 30
[7] Uncontested Facts ¶ 31

Mekar investigates Caeli

7. As a result of this ignorance, the Competition Commission for Mekar (CCM) launched a suo motu investigation on Caeli citing its predatory pricing strategies as the reason for the investigation.[8]

8. The CCM placed airfare caps on Caeli as an interim measure to stop it from earning any supra competitive profits. Furthermore, the claimant complied with these airfare caps as they were reasonably set above Caeli's set routes.[9]

Economic crisis ensues in Mekar

9. Starting late 2016, the Mekari mon (MON)—the Mekari currency—began to depreciate. By March 2017, there was a currency crisis in Mekar, and the IMF emphasized the need to establish credibility in the currency.[10]

10. Caeli was unable to secure a consistent source of revenue as a result of the economic crisis and, along with other enterprises, requested that Mekar's Secretary of Civil Aviation denominate fares in US dollars. The petitions were approved by the Mekari authorities, and the US dollar became the currency used by all airlines beginning in October 2017.[11] On January 30, 2018, Mekar's government issued a decree requiring all businesses to offer goods and services in MON in order to stabilize the country's currency.[12]

Caeli's request for removal of airfare caps is denied

[8] Uncontested Facts ¶ 36
[9] Uncontested Facts ¶ 37
[10] Uncontested Facts ¶ 39
[11] Uncontested Facts ¶ 40
[12] Uncontested Facts ¶ 42

11. Caeli requested for the removal of airfare caps due to the rising inflation caused by the economic crisis. The CCM denied Caeli's request noting that the airfare caps could not be removed until investigations were complete.[13]

12. Caeli thereafter sought judicial review against CCM on airfare caps. The hearing on interim measures was scheduled for April 2019. Despite requesting for an immediate hearing on the stay of imposition of airfare caps, the court registrar rejected this request due to the lack of resources and the prioritization of criminal matters over other matters.[14]

Mekar alleviates economic concern for the airline industry

13. The president issued Executive Order 9-2018 on September 25, 2018, granting subsidies to each Mekari citizen on board. Mekar justified its decision to refuse Caeli's subsidies by claiming that it had the authority to pick whether companies received or did not get subsidies.[15]

Vemma decides to sell

14. Vemma declared its intention to sell its investment in Caeli in November 2019 due to the losses it was incurring. Vemma was successful in obtaining an offer from Hawthorne LLP (Hawthorne) afterward Vemma communicated the details of Hawthorne's offer to Mekar Air Services representatives through a notice on December 9, 2019. However, Mekar Air Services rejected the offer in its statement on December 17, 2019, citing their affiliation with Vemma via the moon alliance as the cause.[16]

[13] Uncontested Facts ¶ 43
[14] Uncontested Facts ¶ 44
[15] Uncontested Facts ¶ 46
[16] Uncontested Facts ¶ 57

15. After further negotiations failed, Mekar Air Services filed a request for arbitration with the Sinnoh Chamber of Commerce (SCC) on 11 February 2020 where Mr Cavanaugh was the sole arbitrator.[17]

The arbitration proceedings

16. Arbitrator Recht Cavanaugh issued a decision in favor of Mekar Air Services on May 9, 2020. Due to its association with Vemma via the moon alliance, the award deemed Hawthorne not to be a bona fide third party.[18] Bribery allegations were leveled against Mr Cavanaugh, prompting Mekar Air Services to file a case with the Mekar High Commercial Court demanding recognition and enforcement of the award.[19] The award was however set aside by Sinnograd' s Supreme Arbitrazh Court on August 1, 2020.

17. Subsequently on August 23, 2020, the High Court of Mekar delivered a judgement that validated Mr Cavanaugh's award. Following that, on September 25, the Superior Court dismissed Vemma's appeal.[20]

Vemma Sells to Mekar

18. On 8 October 2020, after failing to secure another buyer, Vemma sold its stake in Caeli to Mekar for 400 million USD.

Vemma launches an ICSID claim

19. On 15 November 2020 Vemma filed a notice of arbitration against Mekar to seek compensation for its losses under the CEPTA.[21]

[17] Uncontested Facts ¶ 58
[18] Uncontested Facts ¶ 58
[19] Uncontested Facts ¶ 60
[20] Uncontested Facts ¶ 62
[21] Uncontested Facts ¶ 63

SUMMARY OF ARGUMENTS

THIS TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE MATTER BEFORE IT

20. This tribunal cannot hear the matter before it as the dispute does not arise out of an investment. The claims brought before the tribunal are those related to a contractual arrangement between the Claimant and the Respondent's representative Mekar Air Services.

21. Respondent submits that the proper Claimant in the matter is the Commonwealth of Bonooru and as such the dispute is between two states. If this tribunal finds that they are indeed the proper Claimant, Respondent submits that Vemma is a SOE that discharged essentially governmental functions and therefore lacks standing before this tribunal.

22. It is the Respondent's submission that Vemma has always been beholden to Bonooru and as such was acting on behalf of its parent state in not only advancing its interests but performing roles that are reserved for the state. As such they were acting as a state agent even before the assignment took place in March 2021 following the bail-in program.

THIS TRIBUNAL SHOULD GRANT LEAVE TO THE EXTERNAL ADVISORS OF THE CRPU

23. This tribunal should grant leave to the external advisors as their submission addresses matters within the scope of dispute and as such meet the requirements under the CEPTA and the Additional Facility Rules. In the event that the tribunal finds they fall outside the scope of dispute, Respondent submits that the issues raised have a bearing on the tribunal's jurisdiction and it is in the best interest of the tribunal to admit the submission.

24. Additionally, this tribunal should deny leave to the CBFI as the petitioner fails to meet the international law requirements to make amicus submissions. Their independence here is in doubt owing to the participation of the CFO of Lapras Legal in decisions around amicus submissions even when there was a financial benefit to be obtained by his law firm. Moreover, the submissions made by the CBFI will not assist the tribunal as they are similar to those of the disputing parties therefore not offering a different perspective.

THE RESPONDENT HAS NOT VIOLATED THE FET STANDARD

25. Respondent submits that there can be no legitimate expectation as to regulation stability due to the lack of specific representations given to Vemma to this effect.

26. Equally there is no denial of justice due to the delay in delivering judgement on Caeli's application for removal of airfare caps as Mekar actually expedited the hearing which was to be heard within 27 months but was heard in 13 months. Additionally the dismissal of Claimant's case was in line with Executive Order 5-2018, which permitted summary dismissals where there was little or no likely success on the merits.

27. Respondent submits that the continued application of airfare caps does not amount to arbitrary conduct as the caps were placed fairly above Caeli's charged fares hence did not limit the Claimant's ability to revise fares to cope with the difficult economic situation in Mekar.

28. With regards to discrimination, the Respondent avers that the differential treatment was justified as Caeli Airways was a monopoly and granting subsidies would occasion skewing of market in Caeli's favour which is a ground for denial as per the Executive Order 9-2018.

29. As to the enforcement of the award rendered by Mr. Cavanaugh, Respondent submits that this does not amount to a denial of justice as in Mekari courts circumstantial evidence for criminal offences is inadmissible and therefore the courts were not bound by the decision of the courts at Sinnograd.

THE APPROPRIATE COMPENSATION METHOD SHOULD BE THE MARKET VALUE STANDARD

30. Without prejudice to our above arguments and in the event the tribunal finds that the Respondent violated the FET standard, the proper compensation standard should be the market value as it is the standard provided in the CEPTA. In addition to this the fair market value standard is too speculative and should not be applied by this tribunal.

APPLICABLE LAW

31. Pursuant to Article 9.17 of the CEPTA the parties agree to submit the dispute to arbitration under ICSID additional facility rules. The use of the ICSID additional facility rules arises from the fact that Mekar has not signed or ratified the ICSID convention.

32. Both Bonooru and Mekar are parties to the *Vienna Convention on laws of treaties* ("VCLT") and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

33. Pursuant to Article 1.4 of the CEPTA both parties recognize their rights and obligations to other agreements which they are part of, but the CEPTA is to prevail over any other agreement in cases of inconsistencies.

ARGUMENTS

THIS TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE MATTER BEFORE IT

34. According to the CEPTA, Bonooru and Mekar agreed that disputes relating to covered investments may be submitted to ICSID Tribunals under the ICSID Additional Facility Rules where mutual agreement had failed. The Claimant made risky business strategies that failed to account for the fluctuation in fuel prices,[22] the difficult economic situation in Mekar and the volatility of ticket sales in the region.[23] This led them to incur commercial losses and they now seek compensation for their own actions.

35. The above issues are related to the performance of the contract and the commercial risks involved with operating in the airline industry and as such cannot be said to be related to an investment. It is also Respondent's submission that the Claimant is not the proper claimant and that the proper claimant should be the state of Bonooru, making this dispute state-v-state.

36. Respondent submits that the tribunal does not have the jurisdiction to hear the matter before it for the following reasons: (A) Claimant did not make an investment under the CEPTA or CIL; (B) Claimant does not qualify as an investor under the CEPTA or CIL and (C) In the event this tribunal finds that the claimant is an investor, their actions can be attributed to the State of Bonooru.

[22] Uncontested Facts ¶ 29
[23] Uncontested Facts ¶ 29

A. CLAIMANT DID NOT MAKE AN INVESTMENT UNDER THE CEPTA OR CIL

i. The transaction before this tribunal does not amount to an investment under the CEPTA

37. Article 31 of the VCLT provides that treaties are to be interpreted in good faith in accordance with the ordinary meaning of the terms.[24] As stated in *Eskosol*,[25] this interpretation ought to be in relation to the context in which the words are used including the surrounding words in surrounding passages.

38. The CEPTA defines an investment to have three characteristics: commitment of capital or other resources, an expectation of profit or an assumption of risk.[26] The Respondent acknowledges that Vemma purchased shares in Caeli Airways. However, this was under a share purchase agreement which is distinct from an investment agreement.[27]

39. Owing to the above argument, the claims brought before this tribunal relate to contractual claims whose risks were purely commercial and there was no expectation of profits on the part of Claimant As a result, there is no investment as defined in CEPTA.

ii. The transaction before this tribunal does not qualify as an investment under CIL

40. Tribunals such as *Joy Mining*[28], *Lesi Dipenta*[29] and others have applied the *Salini* Test first laid out in *Salini v Morocco*[30] to define investments under international law. According to Sonorajah, the test lays down the hallmarks of investments to include contribution in money or in kind or industry, duration of commitment, presence of risk and economic development.[31]

[24] Article 31, VCLT
[25] Eskosol ¶ 95
[26] Article 9.1 CEPTA
[27] Uncontested Facts ¶ 26
[28] Joy Mining ¶ 49-63
[29] Lesi Dipenta ¶ 13
[30] Salini ¶ 52
[31] Sonorajah p 301

41. The *Salini* Test is applied on a case-to-case basis and there have been many variations of the test broadly categorised into two main groups. The first approach is the jurisdictional approach which is rigid and focused on the explicit presence of the different hallmarks.[32] The second approach is the typical characteristics approach which is laxer and focuses on defining an investment based on the presence of typical characteristics as opposed to their explicit existence.[33]

42. Respondent urges the tribunal to apply the jurisdictional approach owing to the explicit definition of elements that must be present for an investment to exist. Respondent respectfully requests this tribunal to apply the test used in *MHS*[34] which defined an investment owing to the presence of Contribution of the enterprise, duration of the commitment, assumption of risk and expectation of profit as these elements are the same as those required under CEPTA.

43. Respondent admits that there was a contribution made and that the Claimant operated Caeli for 9 years Even then, this does not mean that there was an investment owing to the fact that: (a) Claimants claims are purely contractual and (b) the risks involved were operational.

a) Claimants' claims are purely contractual

44. A claim is considered purely contractual where the breaches are those arising solely out of a contract and applies also to circumstances where the breach is as a result of the state exercising sovereign power even if this affects the businesses equilibrium as their nature is foreign to the contract.[35]

45. The Claimant alleges that Mekar violated its obligation under CEPTA owing to the way it investigated Caeli, handled its judicial matters among others. The actions of the

[32] MHS ¶ 84-104
[33] MHS ¶ 84-104
[34] MHS ¶ 84-104
[35] Abaclat ¶ 318

Respondent were those that originated from the State's authority to regulate as well as from legislations that are outside the CEPTA such as the MRTPA.

46. It is therefore Mekar's submission that the Claimant's claims are those related to the obligations of Mekar Air Services under the Share Purchase Agreement and the failure of which would give rise to contractual disputes which are outside the jurisdiction of this tribunal.

b) Risks involved are operational and not investment risks

47. Even if the claims made are those related to an investment the risk involved in the matter before this tribunal relate to those of ordinary business and are not related to a risk on return on investment.[36]

48. The risks assumed by Vemma are those related to ordinary airline business such as volatility in demand on tickets,[37] the changes in fuel prices in Mekar,[38] the failure to service long standing debts[39] among other risks that were occasioned by the strategies Vemma chose to use against the advice of Mekar Air Services.

49. It follows that the losses incurred due to the ambitious strategies and ignorance of advice of the Mekari representatives cannot be attributed to the actions of the state in exercising its regulatory power and additionally the risk cannot be seen to be those concerning a return on investment as there was no investment initially.

50. Based on the foregoing arguments this tribunal should find that there was no investment and that the claims made are purely those of a contractual nature.

[36] Romak ¶ 230
[37] Uncontested Facts ¶ 29
[38] Uncontested Facts ¶ 33
[39] Uncontested Facts ¶ 51

B. CLAIMANT DOES NOT QUALIFY AS AN INVESTOR UNDER THE CEPTA OF CIL

51. Biscomb states that to determine the *ratione persone* requirement tribunals consider one of three approaches; looking into the incorporation of a company, the seat of corporation/ siege social approach or the test of control.[40]

52. Respondent submits that the CEPTA defines an investor to be a natural person or an enterprise with the nationality of a Party.[41] It then goes ahead to define an enterprise with the nationality of a party to be one incorporated in the territory of a Party and to have significant business in that territory.[42]

53. While it is not in contention that the Vemma is incorporated in Bonooru, Respondent contests that Claimant has significant business in the territory.

54. Respondent submits that Claimant is a SOE acting as agent of the State of Bonooru and therefore precluded from standing before this tribunal as ICSID Tribunals do not hear matters between states.[43]

55. It is therefore Respondents position that this tribunal should find it lacks jurisdiction as the Claimant is a State-Owned Enterprise (SOE). A SOE is defined as either a commercial enterprise that is predominantly owned by the state or controlled by a state or one in which the state has a controlling interest.[44]

56. Respondent acknowledges that SOEs are not precluded from appearing before ICSID tribunals unless they act as an agent of their state or discharge essentially governmental functions.[45] The requirments of the *Broches Test* according to the tribunal in *Rumeli*[46] are synonymous to Articles 5 and 8 of the ILC Articles on State

[40] Biscomb. See also Aucoven ¶ 107-108
[41] Article 9.1 CEPTA
[42] Article 9.1 CEPTA
[43] Maffezini ¶ 74
[44] Paulson p195-196. See also Mulchinsik p 3
[45] CSOB ¶ 16-27
[46] Rumeli ¶ 309-313

Responsibility.[47] Respondent maintains that Vemma in its participation under the Horizon 2020 scheme as well as its operation of routes between Mekar and Bonooru performed essentially governmental functions.

57. Concerning the Claimant's participation in the Horizon 2020 scheme it is stated that subsides were granted to Vemma for its proposal to use Caeli airways to attract tourists into Bonooru.[48] This is a function that is specific to the State performed by the Ministry of Tourism. Respondent is aware that according to the tribunal in *Hamester v Ghana*[49] the fact that actions advance a national interest does not amount to performance of a government function. However, it is worth stating that had Vemma opted to achieve this purpose through the Royal Narnian which it owns fully there would be no issue. However, the Claimant instead opted to use Caeli Airways to do the bidding of Bonooru and as such the tribunal should find that Claimant was acting as agent of Bonooru.

C. IF THE TRIBUNAL FINDS CLAIMANT IS AN INVESTOR, ITS ACTIONS ARE ATTRIBUTABLE TO BONOORU

58. Attribution refers to the process or operation aimed at identifying and circumscribing the conduct of individuals or entities to be treated as actions of a state.[50] It is used to access the extent to which a state is involved with a particular investment.[51]

59. According to the tribunal in *Maffezini,*[52] actions of an enterprise are attributable to a state where it is shown that the state: (i) controls the enterprise (ii) directs the state and (iii) enterprise discharges government functions.

[47] Article 5 ARSIWA provides that the actions of entities or individuals enabled by law to perform governmental functions shall be attributed to States. Article 8 ARSIWA provides that the actions of entities or individuals directed by the state shall be considered state actions
[48] Uncontested Facts ¶ 28
[49] Hamester ¶ 145
[50] Olleson p 457
[51] Kovacs p 26
[52] Maffezini ¶ 77

i. Claimant is an enterprise controlled by the State of Bonooru

60. On the matter of control, this element is established where there is direct or indirect control of an enterprise by a state. Control does not necessarily mean ownership and beyond this could have more than one meaning.[53] It was determined in *Aguas del Tunari*[54] that the term controlled could mean that the enterprise was controlled in the past or had the capacity to be controlled. It should be noted that under ICSID it was envisioned that a minority share as little as 15% together with other facts may be sufficient to prove control.[55]

61. While Respondent recognises that the corporate framework of an entity cannot be sufficient to determine control and has been stated to be irrelevant in some instances,[56] the same reasoning cannot be applied in the matter before this tribunal as the ownership and interest of Bonooru are not isolated facts but can be linked to Vemma's actions in its operation of Caeli.[57]

62. Bonooru owns a controlling share in Vemma at 31-38% while all other shareholders held a maximum of 7%.[58] As though this were not enough, Vemma's BOD is majorly made up of Bonooru representatives who on occasion form a majority and make decisions on behalf of the enterprise.[59] It is worth noting that the controlling share is held by the Ministry of Tourism which is also the body that granted subsidies under the Horizon 2020 Scheme.[60]

63. Respondent urges the tribunal to find that Vemma is a state-controlled enterprise based on the aforementioned facts.

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[53] Aguas del Tunari ¶ 231
[54] Aguas del Tunari ¶ 233
[55] Talinn ¶ 369
[56] BUCG ¶ 42
[57] BUCG ¶ 39. The analysis of a company's corporate structure should be with regards to the fact specific context which means its relevance ought to be linked to the actions of the enterprise in its discharge of its duties under the agreement

[58] PO4 ¶ 1
[59] PO3 ¶ 3
[60] Uncontested Facts ¶ 28. See also Memorandum ¶ 5

ii. Claimant is a state directed enterprise

64. As to the element of direction, this is established where it can be shown that there were specific directions given by the State or the State exercised control over the entity to in effect become responsible for their actions.[61] The specific question to be answered is whether the State instructed Vemma.[62]

65. Not only did Bonooru have a controlling stake, but its representatives also made up a majority on the BOD. In addition to this, the Prime Minister stated that Bonooru would maintain control over BA Holdings successor to ensure it provided the mobility rights of its citizens.[63] True to this words, the Claimant operated routes between Mekar and Bonooru to advance its objective enshrined in its memorandum of association[64] Respondents would like to clarify that pursuing the objective is not the issue. The main concern is that Vemma continued to operate these routes despite the fact that they were the contribution of major losses incurred by Caeli.[65]

66. The tribunal should therefore conclude that Vemma is an enterprise directed by Bonooru.

iii. Claimants discharged essentially governmental functions

67. In *Maffezini*[66] governmental functions were defined to be actions that are reserved for a state or those not performed by private individuals or those not performed by private entities. The determination of this element is to be based on the domestic practice of the specific state.[67] This means the tribunal ought to assess this element based on the laws of Bonooru and the practices conducted in Bonooru.[68]

[61] Crawford p 113. See also Article 8 ARSIWA
[62] UAB ¶ 825
[63] Uncontested Facts ¶ 8
[64] Clause 3(h) Memorandum
[65] Uncontested Facts ¶ 33
[66] Maffezini ¶ 79
[67] Commentary on ARSIWA p 101
[68] Crawford p 108-109

68. According to San Martin and Muller, attribution of acts of an enterprise under article 5 of the ARSIWA two elements ought to be fulfilled; the entity must be empowered with government authority and an act performed in exercise of government authority.[69] This approach has been used by tribunals such as EDF,[70] Jan de Nul[71] and Hamester.[72]

69. Respondent submits that up until the privatisation of BA holdings, Bonooru provided for the mobility rights of its citizens.[73] The only other transport system that was managed by an enterprise was the Ferries and the entity that managed them is a state company.[74] Through the Privatisation of Enterprises Act 1972 Vemma became the successor of BA Holdings.[75] In addition to this, Vemma received subsidies under the Horizon 2020 scheme to enable it draw in tourists into Bonooru's growing markets.[76]

70. Enabling the mobility rights of the citizens of Bonooru amounts to performance of a governmental function as it was a function that was reserved for the state and usually performed by state companies. Vemma also performed governmental functions by drawing tourists into Bonooru using Caeli Airways.

71. Based on arguments above this tribunal should find that the Claimant was discharging essential governmental functions.

ISSUE I: Jurisdiction Conclusion

72. This tribunal should find that it lacks jurisdiction to hear the matter before it as it relates to purely commercial claims and as such the *ratione materiae* requirement of Article 2 of the Additional Facility Rules is not met.

[69] Martin and Muller B2
[70] EDF Ltd ¶ 194
[71] Jan de Nul ¶ 163-164
[72] Hamester ¶ 176
[73] Privatisation of BA Holdings ¶ 56
[74] National Ferry Workers ¶ 22-26
[75] Uncontested Facts ¶ 7
[76] Uncontested Facts ¶ 28

73. The ratione personae requirement is not met as the Claimant is a SOE that acted as an agent of its state in ensuring the mobility rights of Bonoori citizens was provided as well as their participation in drawing in tourists into Bonooru using Mekar's flag bearer and were therefore discharging essentially governmental functions.

AMICUS SUBMISSIONS

A. THIS TRIBUNAL SHOULD GRANT LEAVE TO THE EXTERNAL ADVISORS OF THE CRPU (CRPU)

74. Article 9.19 provides the admissibility requirements for amicus submissions stating that they will be admissible where they assist the tribunal in deciding on the arguments of the disputing parties.[77] Similarly, Article 41 of the Arbitration Rules provides that non-party submissions may be admitted where they assist the tribunal in deciding a matter of fact or law.[78]

75. The tribunal should grant leave to CRPU as (i) the petitioner addresses matters within the scope of dispute and (ii) the petitioner makes a submission with a bearing on the tribunal's jurisdiction.

i. The CRPU address matters within the scope of dispute

76. According to the tribunal in *Apotex*[79] the limiting of submissions to the scope of the dispute is to prevent unnatural broadening of the arguments which would be evident where the submissions made appear distant from the dispute. In the matter before this tribunal it may be argued that the *ratione legis* arguments advanced by the petitioner are outside the scope of the dispute however this is not the case.

77. The claims made by the CRPU are not far from the dispute at hand as they relate to the rights the Claimant claims before this tribunal and whether in the first place Vemma had these rights. While the Respondent admits that the issues raised have not

[77] Article 9.19(3) CEPTA
[78] Article 41 Arbitration Rules
[79] Apotex PO on participation of BNM ¶ 27

been advanced by the disputing parties that is not reason enough for the tribunal to dismiss the claims as they have a bearing on the tribunal's jurisdiction.

ii. The CRPU's submission has a bearing on the tribunal's jurisdiction

78. Respondent urges this tribunal to take note of the reasoning of the tribunal in *Infinito Gold*[80] which determined that the claims advanced by the petitioner that were similar as those of the CRPU would be admissible.

79. The tribunal reached this conclusion after considering that the claims made if proven would lead to the annulment of the tribunal's award. Additionally, it would nullify the tribunal's jurisdiction in the event proceedings were still underway.

80. Similarly in the matter before this tribunal the same consequences will befall this tribunal if it opts to deny leave to the petitioner. It may be submitted that the claims are unsubstantiated however, the mere fact that the investigations are been conducted 10 years after the fact does not mean that the claims are not true and it is only until investigations are concluded that such conclusions could be made.

81. Therefore in the spirit of increasing the transparency of proceedings and recognising the significant interest the petitioner has alongside the fact that the claims are within the limits of the dispute, this tribunal should grant leave to the CRPU.

B. THIS TRIBUNAL SHOULD DENY LEAVE TO THE CBFI

82. Respondent submits that this tribunal should deny leave to the CBFI as they are not independent and their submission is similar to that of the disputing parties.

83. Article 9.19(3) of the CEPTA provides that amicus submissions ought to assist the tribunal decide on the arguments of the disputing parties and Article 41 provides that in determining if non-party submissions will be beneficial the tribunal needs to consider if the perspective offered is different.

[80] Infinito Gold ¶ 33-37

84. Respondents contest the admissibility of CBFI as (i) their submissions are not independent and (ii) the submission is similar to that of the disputing parties.

i. CBFI's submission is not independent

85. Amicus submissions ought to show that the petitioner has the expertise, experience and independence to assist the tribunal.[81] The purpose of amicus is to be a friend of the tribunal and not of a party. As such independence is determined by looking at the petitioner's submission and determining if their submissions are averse to those of one party and aligned to the other.

86. The independence of a petitioner will be put in doubt where it can be proven on the face of things that the petitioner has a financial benefit to obtain from the case.[82] The Respondent notes that according to tribunals such as *Eli Lilly*[83] and *Philip Morris*[84] participation of a member in an association does not preclude it from making submissions.

87. In the matter before this tribunal, the concern is that a member of the CBFI has a direct financial interest in the matter and as such there exists a conflict of interest.[85] Moreover, the CFO of Lapras Legal continues to make decisions around amicus submissions against the provisions of the CBFI Amicus Submission Guidelines.[86]

88. This tribunals should conclude that the submissions of the petitioner will be biased towards the Claimant and as such do not meet their purpose under the CEPTA and CIL to assist the tribunal.

[81] Aguas Proviciales ¶ 30-32
[82] Von Pezold PO2 ¶ 2-3
[83] Eli Lilly PO4
[84] Philip Morris PO3
[85] CBFI Application for leave ¶ 7
[86] PO3 ¶ 12

ii. CBFI makes submission that are similar to those of the disputing parties

89. In the event that the tribunal finds that the CBFI are independent Respondent maintains that the submission is similar to that of the disputing parties and will not offer a different perspective.

90. Respondent submits that according to the tribunal in *UPS*[87], amicus submissions may be denied where it can be shown that the parties can substantially submit on the competing arguments.

91. The petitioners propose that the tribunal determine its jurisdiction by looking at the nature of activities done by Claimant and not the purpose to be achieved. The respondent has already addressed this issue and agrees that this is the standard to be used. It is also expected that Claimant will call for application of the same standard.

92. It therefore follows that the argument made by the petitioner will not be beneficial to the tribunal as it will be a restatement of the arguments made by the disputing parties and the tribunal should conclude that the submissions fails to meet the criteria of Article 41 of the Arbitration Rules.

ISSUE II: Amicus Submission Conclusion

93. This tribunal should grant leave to CRPU as their submission is within the scope of dispute as they relate to the rights that the Claimant claims before this tribunal and whether the rights were properly acquired. Equally the CRPU addresses an issue that has a bearing on the tribunal's jurisdiction.

94. Finally, the tribunal should deny leave to the CBFI as their submissions are averse to those of Respondent and aligned to those of Claimant putting their independence in doubt. Additionally, the issues they wish to address before this tribunal have been sufficiently addressed by the parties at dispute.

[87] UPS ¶ 71

RESPONDENT DID NOT VIOLATE ARTICLE 9.9 OF THE CEPTA

95. Article 9.9 of the CEPTA is an autonomous fair and equitable treatment (FET) standard since the provisions do not refer to international law.[88]

96. Claimant attempts to benefit from an unfair finding of a violation of the FET standard at the expense of Respondent. The burden of proof is on the claimant to demonstrate that it did not receive FET.[89] The Tribunal's decision on FET "cannot be reached in the abstract; it must be based on the facts of the specific instance."[90]

97. The claimant therefore has the burden of proving that it did not receive FET.[91] In finding a violation of FET, the tribunal must evaluate the specific circumstances of the particular case and consider whether the facts taken in totality are sufficient to support the claimant's FET claim.[92] The burden is therefore on the claimant to prove that the respondent's conduct as a whole has violated the FET standard.

98. In the present case, claimant has failed to prove that the respondent breached any element of the FET standard. In particular Mekar did not breach Article 9.9 because (A) Mekar did not frustrate the claimant's legitimate expectations, (B) Mekar did not deny the claimant justice, (C) Mekar was not unreasonable in decision making and (D) Mekar did not impair the claimant's investment with discriminatory measures.

A. MEKAR DID NOT FRUSTRATE THE CLAIMANT'S LEGITIMATE EXPECTATIONS

99. Legitimate expectations constitute the most often considered sub-elements of the FET standard and it is the core of the standard. The claimant may contend that there existed a legitimate expectation of regulatory stability and that this was frustrated when the Respondent investigated the claimant's investment.

[88] UNCTAD Investment Report at 18; Tecmed ¶155; Saluka ¶286
[89] Tudor p. 138
[90] Mondev ¶ 118
[91] Tudor ¶ 138
[92] Micula ¶ 517

100. Legitimate expectations must be judged against an objective standard[93] at the time of investing.[94] In general, such expectations can develop in two ways: (i) through a promise[95] and (ii) the general legal framework.[96]

i. The Respondent did not make any promise of regulatory stability that induced Vemma to make its investment

101. Dolzer and Schreuer opine that specific representations are important in proving the creation of legitimate expectations.[97] As held by the tribunal in *Parkerings*,[98] those representations may either be explicit or implicit.

102. In an assessment of the element of specificity in the present case, two fundamental elements are lacking in the Claimant's evaluation. These are (a) the amendment of a law does not amount to a representation of regulatory stability and alternatively (b) the reliance on such a representation is unreasonable.

ii. The amendment of the MRTPA does not give rise to a specific representation

103. Not every state measure can be a basis of legitimate expectation. In the present case and as defined by some tribunals, there needs to be a specific commitment to establish the foundation of a legitimate expectations.[99] The tribunal in EDF noted that:

> *"The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of*

[93] Charanne ¶ 495
[94] ESPF ¶ 513, Charanne ¶ 495, Toto ¶ 165
[95] Micula ¶ 668, Wate Management ¶ 98, Parkerings ¶ 331
[96] Micula ¶ 673, Charanne ¶ 494, EDF ¶ 217
[97] Dolzer & Schreuer p. 371
[98] Parkerings ¶ 331
[99] EDF ¶ 217, Article 9.9 (3) CEPTA

any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."

104. Representations must be directly addressed to an investor and must promise to do something specific.[100] Statements of a general nature do not create legitimate expectations.[101] Furthermore, not every representation or promise made by the host state can be considered authentic.[102] For justified expectations to be generated, the representations must be explicit in their content and specifically intended to the investor.[103]

105. In the present case, the Monopoly and Restrictive Trade Practice Act (MRTPA), was amended to inspire investor confidence and provide for the creation of the CCM.[104] It did not specify which investor but was rather general in its content. Therefore, Claimant's supposition of an expectation of regulatory stability remains unfounded on due to the lack of specificity.

iii. Vemma could not reasonably rely on the amendment of the MRTPA as a specific representation for regulatory stability

106. Following the above, this tribunal must decide whether Vemma was reasonable in relying on the expectations it purports from those representations. The tribunal in *Micula*[105] was of the opinion that:

"expectation must be a determining factor in an investor's decision to invest, or in the manner or magnitude of its investments".

[100] El paso ¶ 375-377, ADF ¶ 189
[101] Continental ¶ 261.
[102] Feldman ¶ 148
[103] El Paso ¶ 375
[104] Uncontested Facts ¶ 19
[105] Micula ¶ 672

107. Therefore, the consideration is not whether Vemma was persuaded by the amendment of the MRTPA but rather whether a reasonable third party would have been influenced by the same.

108. It is important to note that the MRTPA was amended and not formed therefore the purpose of its amendment was not to bring in new investors but rather to generate confidence to the investors who would decide to invest.[106]

109. Additionally, Vemma was not swayed by the amendment of the MRTPA to invest, rather it was the marketing done by Mekar that led to it proposing its bid.[107] Therefore, the amendment does not play a part in inducing an investment.

110. Given the above circumstances, no reasonable third party would have expected that the amendment of the MRTPA gave reasonable expectations.

iv. The investigation done by the CCM was in line with the Respondent's regulatory rights

111. There is no stabilization clause in the present case and this omission is reasonable grounds for the exercise of a host states regulatory right.[108] The tribunal in *El Paso*[109] noted that the economic and legal life is evolutionary by nature. Drawing from this it is unreasonable for the Claimant to contend that they expected a stable regulatory framework.

112. In the present case, to determine whether the exercise of Respondent's right to regulate amounts to a violation of Claimant's legitimate expectations there needs to be an evaluation of (a) the rational nature of the Respondent's changes and (b) Vemma's exercise of due diligence

[106] Uncontested Facts ¶ 19
[107] Uncontested Facts ¶ 22
[108] Parkerings ¶ 332
[109] El paso ¶ 352

a) The investigation by the CCM was a rational measure meant to ensure consumer protection

113. In determining what the test of reasonableness entails the *AES*[110] tribunal found that:

> *"...A rational policy is taken by a state […] with the aim of addressing a public interest matter […] A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it."*

114. A rational policy must be understood in light of a public interest and can include economic or social matters.[111]

115. Article 9.8 of the CEPTA provides that

> *"...the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity."*[112]

116. Additionally, Article 9.8.2 provides that:

> *"...the mere fact that a Party regulates, including through a modification to its 2730 laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section."*[113]

117. The CCM in exercising the regulatory right of ensuring consumer protection, investigated Caeli Airways to determine whether it had adopted any supra competitive profits and predatory pricing strategies.[114] Despite Caeli not meeting the

[110] AES ¶ 10.3.8-10.3.9
[111] Saluka ¶ 305, Lemire ¶ 285
[112] Article 9.8, CEPTA
[113] Article 9.8.2, CEPTA
[114] Uncontested Facts ¶ 36

required market share necessary for an investigation to be conducted, CCM acting on the discretion provided by the MRTPA, investigated Caeli with the goal of consumer protection in mind.

118. The CCM subsequently imposed airfare caps on Caeli which was also a measure meant to protect consumers as a lack of such would have eventually turned Caeli into a monopoly whose effect would be the offering of inflated airfare tickets to the citizens of Mekar.

119. In essence, the investigation done by the CCM, is based on a rational policy meant to protect consumers and the effect it might have had on claimant's investment should not amount to a breach of a legitimate expectation in line with Article 9.8.2 of the CEPTA.[115]

b) Vemma failed to exercise due diligence

120. In *Saluka v. Czech Republic*,[116] the Tribunal noted that it would be irrational to expect an investor to expect circumstances that existed at the time of the investment to stay totally unchanged. The investor is required to exercise to exercise due diligence and anticipate changes in the legal environment.[117]

121. A responsible investor must make reasonable efforts to gather information on potential regulatory changes that are reasonably foreseeable at the time of investment.[118]

122. In the present case, Mekar has had a long history of political and economic instability.[119]Given this shaky past any reasonable person would have foreseen a possibility of regulatory changes especially in an effort to ensure consumer protection.

[115] Article 9.8.2 CEPTA
[116] Saluka ¶ 305
[117] Parkerings ¶ 333.
[118] Charanne ¶ 505
[119] Uncontested Facts ¶ 12

123. Additionally, Vemma was warned by Mekar of its outrageous business activities but failed to listen to the advice.[120] Therefore CCM's investigation was not unreasonable but rather can be considered a last resort to Vemma's unsatisfactory management of Caeli. Vemma should suffer the consequences of its failure to exercise due diligence.

B. RESPONDENT DID NOT DENY THE CLAIMANT JUSTICE

124. Respondent submits that it did not deny claimant justice as (i) the enforcement of the set aside award was not a wrongful act, (ii) delay does not give rise to denial of justice and (iii) the premature dismissal of a case cannot rise to denial of justice.

i. The enforcement of the set aside award was not a wrongful act

125. The recognition and enforcement of awards is controlled by the state in which the setting aside or enforcement action is taken. In instances where the enforcement is sought and the seat of arbitration are parties to the New York Convention, then the award is subject to the provisions of the New York Convention.[121]

126. In the present case, the enforcement of the award that was set aside by the Supreme court of Sinnograd cannot amount to a denial of justice. The award was challenged by the Claimant on the basis of the arbitrator's impartiality. However Article 31 of the Sinnoh Chamber of Commerce provide for the following grounds necessary for one to challenge an arbitrator:

> *".....(a) A party may challenge any arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed by the parties.*

[120] Uncontested Facts ¶ 31
[121] Article V, New York Convention

(b) A party may challenge an arbitrator it has appointed, or in whose appointment it has participated, only for reasons it becomes aware of after the appointment was made.

(c) A party wishing to challenge an arbitrator shall submit a written statement to the Secretariat stating the reasons for the challenge, within 15 days from the date the circumstances giving rise to the challenge became known to the party. Failure to challenge an arbitrator within the stipulated time constitutes a waiver of the party's right to make the challenge."

127. The Claimant failed to meet any of the above requirements once they had doubt as to the impartiality of the arbitrator. As a result of this the claim to challenge the award amounts to a violation of the rules of procedure and in turn the set aside award has no effect.

128. In conclusion, the late response by the claimant with regards to the arbitrator's appointment proves that in enforcing the set aside award, Mekar was exercising its right and thus that cannot be a basis for a claim on denial of justice.

ii. Delay does not occasion a denial of justice

129. The claimant may contend that there was delay occasioned by the Mekari courts in listening to the matters which amounts to denial of justice. However, the Respondent submits that there was no denial of justice with regards to delay as, (a) the claimant needed to have foreseen the delay and (b) the delay in question cannot be considered a denial of justice.

a) The Claimant needed to have foreseen a delay in the administration of commercial decisions

130. The tribunal in *Mamidoil v Albania*[122], endorsed the view that an investor has to demonstrate proper diligence for its expectations to be protected and that Such diligence also extends to an evaluation of the overall circumstances and an understanding of the content and the context of the law and administrative practice. As a result, the question before this tribunal is whether the claimants could have expected their cases to be adjudicated swiftly by investing in Mekar.

131. In the present case, Mekar has historically been seen to take long periods of time to listen to commercial matter due to the significant rise in its population as opposed to the growth of its courts. The estimated time given for commercial matters to be heard was 27 months.[123]

132. Even though the estimated time given was 27 months, the respondent heard Vemma's case in a span of 13 months.[124] This shows that they not only heard the case in the expected period but also expedited the hearing. It is only reasonable that had the claimant evaluated the administrative framework, then it would have expected that the cases would take a long period to be heard.

b) The delay that the claimants contend on does not rise to a level of a violation to be considered as a denial of justice

133. In its assessment in *Jan De Nul,*[125] the tribunal noted that the 10 years it took to obtain a judgement due to complexity of the issues raised could not amount to a denial of justice. Instead, it could only be construed to amount to unsatisfactory administration of justice.

[122] Mamidoil ¶671
[123] Uncontested Facts, ¶ 13
[124] Uncontested Facts, ¶ 44
[125] Jan De Nul ¶ 204

134. Therefore, the 13 months taken to listen to the case could not amount to a denial of justice and in turn a violation of the FET standard.

iii. The premature dismissal of the case cannot give rise to a level of denial of justice

135. Claimant may contend that the Respondent prematurely dismissed its case on the removal of airfare caps. However, Respondent submits that the case was not dismissed prematurely and that the court did not need to listen to every aspect of the case, only the material aspects of the case are relevant.

136. Executive Order 5-2014 grants a court the ability to dismiss a claim by way of summary judgment where the is little to no chance of success.[126] The court relying on that order granted the Claimant a decision by way of summary judgment.

137. Additionally the brevity of a decision which came in the form of a summary judgement in the present case cannot give rise to a denial of justice.[127]

138. Finally, Respondent submits that Courts do not need to deal with every argument of the parties to reach a conclusion.[128]. The crucial point of determination is whether the court failed to decide material aspects of the case such that it can be said not to have been decided at all which is not the case in the case at hand as there was an interim decision with regards to airfare caps.[129]

C. RESPONDENT WAS REASONABLE IN ITS DECISION MAKING

139. An act is considered reasonable if it is rationally and proportionally connected to a state's public policy.[130]

[126] PO3, ¶ 8
[127] Bridgestone ¶ 516
[128] Phillip Morris ¶ 557
[129] Uncontested Facts, ¶ 54
[130] Dolzer & Schreuer p. 173, Schefer p. 280-281, AES ¶ 10.3.7, Saluka ¶ 400

140. Mekar's imposition of airfare caps was a reasonable measure as (i) it was meant to ensure consumer protection and (ii) Mekar had a right to regulate to achieve this policy objective.

i. The imposition of airfare caps was a rational measure meant to ensure consumer protection

141. A measure is rationally and proportionally connected to a state public policy if the state's public policy objective correlates with the state's measures.[131] Article 9.8 of the CEPTA provides that parties may regulate to achieve public policy objectives such as consumer protection.[132]

142. In imposing airfare caps on Caeli, the CCM's objective was the protection of consumers as a failure to do so would have led to Caeli becoming a monopoly in turn offering inflated airfare tickets to the Mekari citizens.[133]

ii. Mekar had a right to regulate to achieve consumer protection

143. Article 9.8.2 of the CEPTA provides that in the case where a party regulates and as a result there is harm occasioned by the investor, then that cannot amount to a violation of the FET standard.[134]

144. The Claimant may allege that the airfare caps hurt its profitability, however the Respondent submits that this factor should not be an issue in contention due to the provisions of Article 9.8 of the CEPTA. Additionally, the imposition of the airfare cannot be regarded as unreasonable as it was proportionally related to achieving consumer protection.

[131] Schefer p. 281
[132] Article 9.8 CEPTA
[133] Uncontested Facts ¶ 37
[134] Article 9.8.2 CEPTA

D. THE CHALLENGED MEASURE WAS NON-DISCRIMINATORY

145. Article 9.9.2 (c) provides that an action that is discriminatory is a violation of the FET standard.[135]

146. The tribunal in *Lemire v Ukraine*[136] observed that:

> "*To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be 'discriminatory and expose the claimant to sectional or racial prejudice'; or a measure must 'target Claimant's investments specifically as foreign investments.*"

147. Additionally various tribunals have often applied a three-step analysis in the determination of a discriminatory measure which looks at similar cases, that are treated differently and without reasonable justification.[137]

148. The Executive Order 9-2018 is not discriminatory because (i)Caeli is not in like circumstances with other airlines. Alternatively, if this tribunal finds that Caeli is in like circumstances with other airlines, then (ii)the denial of subsidies to Caeli is justified.

i. Caeli is not in a like circumstance with other airlines in Mekar

149. In determining what constitutes like circumstances, tribunals often look at whether the investment operate in the same market segment and are the approximately similar in size.[138]

[135] Article 9.9.2 (c), CEPTA
[136] Lemire ¶ 261
[137] Saluka ¶ 307, Plama ¶ 184, Lemire ¶ 261, Lidercon ¶ 169
[138] Levy de Levi ¶ 396

150. Caeli airways is not similar to Jet green and Star wings because it has significantly more people flying in it as opposed to its competitors. Caeli is considered the national flag bearer to Mekar and is therefore more popular than its competitors.

ii. Alternatively, Mekar's denial of subsidies to Caeli is justified

151. In the *National Grid v Argentina*,[139] the respondent's argued that the companies were a natural monopoly and therefore it was impossible to give them the same treatment as other operators which the tribunal accepted.

152. Granting Caeli airways subsidies would have allowed them to outcompete other airlines and become a monopoly in Mekar. If this were to happen then they would offer their services at inflated prices and in turn hurt consumers. Therefore this denial of subsides was a regulatory act taken by respondent in a bid to protect consumers.

153. The evidence of the possibility of them being a monopoly shows the impossibility of giving them the same treatment as other airlines. Additionally, the secretary of civil aviation had discretion in the granting of subsidies.[140]

154. Granting them subsidies would skew market conditions at the detriment of its competitors and it is with regards to this that the Respondent submits that the denial of subsidies is justified.

ISSUE III: FET Conclusion

155. Mekar's measures do not violate Article 9.9 of the CEPTA because Mekar treated the claimant with regards to the provisions of the FET standard. Mekar did not violate Claimant's legitimate expectations, did not deny the Claimant justice, did not act in an unreasonable manner and did discriminate against the Claimant's investment.

[139] National Grid ¶ 200-201
[140] Annex VIII ¶ 1915

DAMAGES

156. The Claimant requests for compensation for damages whose sum amounts to 1.1 billion USD which includes the already paid 400 million USD.

157. This tribunal should not grant the Claimant's calculation of damages as (A) Mekar did not violate the FET standard under the CEPTA, (B) Claimant's calculation of damages is too speculative and (C) alternatively, the appropriate compensation standard should be the market value standard.

A. RESPONDENT DID NOT VIOLATE THE FET STANDARD UNDER THE CEPTA

158. As outlined in section III of this memorial, the claimant did not violate Article 9.9 of the CEPTA. Therefore, Mekar does not owe the Claimant compensation.

B. THIS TRIBUNAL SHOULD REJECT CLAIMANT'S CALCULATION OF DAMAGES SINCE IT IS TOO SPECULATIVE

159. Claimants have requested for 1.1 billion USD as the total damages which to say the least is an exorbitant price.

160. Claimant may contend that due to the provision of the Most favoured nation (MFN) clause under Article 9.7 of the CEPTA then the fair market value standard should be used since the Arrakis- Mekar BIT calls for its application.[141]

161. However we submit that the wording in the base treaty (CEPTA) does not provide for matters of compensation and therefore due to this exclusion the Arrakis – Mekar BIT cannot be applied in matters of awards and compensation.[142]

[141] Article 9.7 CEPTA
[142] Article 9.7 CEPTA

162. The express provisions found in Article 9.7 give rise to implied limitations and in particular with regards to compensation. This is the principle of *expression unius est exclusion alterius* which provides that express inclusion of one thing implies an exclusion of others.[143]

163. Therefore the claimant's contention that the FMV standard should be used with respect to the MFN provisions is unfounded. Additionally, Respondent submits that due to the reliance of the discounted cash flow (DCF) method which is too speculative to determine the fair market value then the DCF methodology should not be used in calculation of damages.

164. In applying the DCF method ICSID tribunals such as *Tenaris*[144] *and Rusoro Mining*[145] often looked at, (i) sufficient history of profitability and (ii) predictability of prices for products.

i. Claimant's investment has failed to show a sufficient history of profitability

165. Investment tribunals have rejected the DCF method if a company has not been making sufficient profits for a long period to make predictions of profitability. The Tenaris tribunal found that a period of 3.5 years was too short to construct a DCF model.[146]

166. Therefore, we submit that the claimants have failed to show a sufficient history of profitability. In the present case, Caeli was able to increase its profits significantly from 2010 to 2013. The profit maximization is only visible once Vemma became investors in 2011 and was only present till 2013 after which the claimant's revenue declined.[147] This two-and-a-half-year period is insufficient to show a history of profitability therefore placing doubt on the application of the DCF method.

[143] National Grid ¶
[144] Tenaris ¶ 528-532
[145] Rusoro ¶ 759
[146] Tenaris ¶ 530
[147] Uncontested Facts ¶ 30

ii. The uncertainty caused by the economic crisis renders the DCF method inappropriate

167. In applying the DCF method the predictability of investor's goods is an important consideration. The tribunal in *Rusoro*[148] found that the DCF method would be inappropriate unless the price at which enterprises will be able to sell its products can be determined with reasonable certainty.

168. The airline industry operates on uncertainty as ticket prices vary depending on the economic situations, political climate and even more recently existential risks such as the Covid–19 pandemic. Due to the unpredictability of the airline industry and in particular the air tickets the DCF method becomes unsuited to determine the assessments of aviation industries value. This coupled with the economic crisis that ensued in Mekar is a situation that gives rise to uncertainty with regards to predictability of prices.[149]

C. ALTERNATIVELY, THE APPROPRIATE COMPENSATION STANDARD SHOULD BE THE MARKET VALUE STANDARD

169. International valuation standard defines market value as

> *".... the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arms-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion."*[150]

170. In the present case the property in question was Caeli and the date of valuation was the date at which the Respondent rightfully found to be 400 million USD. The claimant may contend that it had been valued at 1.1 billion, however, this valuation

[148] Rusoro ¶ 759
[149] Uncontested Facts ¶ 39
[150] International valuation standard

was only an estimate of its peak valuation and not a proper assessment of its valuation.[151]

171. Additionally, Vemma was a willing seller as it had not been coerced to sell its stake in Caeli.[152] The sell happened after it had marketed its investment and failed to secure a third-party purchaser therefore, the requirement of an arms-length transaction has been met.

172. As a result of the above, instead of applying the speculative fair market value standard this tribunal should consider the application of the market value standard. Article 9.21 of the CEPTA considers the market value standard to be the appropriate standard.[153] As the CEPTA applies to both claimants and investment then the provisions should also apply to both of them.

ISSUE IV: Damages Conclusion

173. This tribunal should not award compensation because Mekar did not violate Article 9.9 of the CEPTA. Additionally, the Claimant's calculation of damages using the fair market standard is too speculative and instead this tribunal should apply the market value standard.

[151] PO4 ¶ 4
[152] Uncontested Facts ¶ 63
[153] Article 9.21 CEPTA

REQUEST FOR RELIEF

Considering the above, Respondent respectfully requests this tribunal to find that:

1. It does not have jurisdiction to determine the matter
2. It should grant leave to the CRPU
3. The Respondent has not violated Article 9.9 of the CEPTA
4. The Market Value standard is the appropriate compensation standard

Respectfully Submitted on 23 September 2021 by

JESSUP

On behalf of Respondent

The Federal Republic of Mekar