**TEAM KIRSCH**

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**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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**In the Matter of an Arbitration under the International Centre for Settlement of Investment Disputes Arbitration (Additional Facility) Rules**

**Between:**

**VEMMA HOLDINGS INC.**

**(Claimant)**

**v.**

**THE FEDERAL REPUBLIC OF MEKAR**

**(Respondent)**

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**ICSID Case No. ARB(AF)/20/78**

**TRIBUNAL:**
**Ms. Twyla Sands (President)**
**Mr. Long Feng**
**Professor Jaqen H'ghar**

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# MEMORIAL FOR RESPONDENT

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## LIST OF ABBREVIATIONS

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| ¶ (¶¶) | Paragraph (Paragraphs) |
| AOA | Articles of Association |
| BIT | Bilateral Investment Treaty |
| BPB | PJSC Bonoorian People's Bank |
| CBFI | Consortium of Bonoori Foreign Investors |
| CCM | Competition Commission of Mekar |
| CEPTA | 2014 Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement |
| CRPU | Committee on Reform of Public Utilities |
| EU | European Union |
| FDI | Foreign Direct Investment |
| FET | Fair and Equitable Treatment |
| FMV | Fair Market Value |
| FTC | Free Trade Commission |
| ICJ | International Court of Justice |

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|---|---|
| ICSID | International Centre for Settlement of Investment Disputes |
| ILC | International Law Commission |
| MFN | Most Favoured Nation Treatment |
| MOA | Memorandum of Association |
| MON | Mekari MON |
| MRTP | Monopolistic and Restrictive Trade Practice Act |
| MV | Market Value |
| NAFTA | North American Free Trade Agreement |
| p. (pp.) | Page (Pages) |
| PO | Procedural Order |
| SCC | Sinnoh Chamber of Commerce |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCT | United Nations Conference on Trade and Development |
| USD | US Dollars |
| WTO | World Trade Organization |

## LIST OF AUTHORITIES

### Legal Instruments

| | |
|---|---|
| ARSIWA | International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Supplement No 10 (A/56/10) |
| FTC Statement | NAFTA Free Trade Commission, Statement on Non-Disputing Party. Participation (October 7, 2003) |
| ICSID Additional Facility Rules | Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (as revised in 2006) |
| ICSID Arbitration Rules | Rules for Procedure for Arbitration Proceedings (Arbitration Rules 2006) |
| New York Convention | United Nation Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) |
| Turkey-Uzbekistan BIT (1992) | Agreement between the Republic of Turkey and the Republic of Uzbekistan concerning the Reciprocal Promotion and Protection of Investments |
| UNCITRAL Transparency Rules | UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (April 01, 2014) |
| VCLT | Vienna Convention on the Law of Treaties (May 23, 1969) 1155 U.N.T.S. 331 |

### Awards

| | |
|---|---|
| *Agility* | Agility Public Warehousing Company K.S.C. v. Republic of Iraq, ICSID Case No. ARB/17/7, Final Award (February 22, 2021) |
| *Aguas-Jurisdiction* | Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (October 21, 2005) |

| | |
|---|---|
| *Alex* | Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001) |
| *Apotex-PO 2* | Apotex Inc. v. United States of America, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (October 11, 2011) |
| *Apotex-PO 4* | Apotex Holdings Inc v United States of America, ICSID Case No ARB(AF)/12/ 1, Procedural Order No. 4 on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party (March 04, 2013) |
| *Apotex-PO 5* | Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 5 on the Participation of the Applicant, BNM, as a Non-Disputing Party (March 04, 2013) |
| *Archer* | Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Concurring Opinion of Arthur W. Rovine (Award) (November 21, 2007) |
| *Ascom* | Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I), SCC Case No. 116/2010, Award (December 19, 2013) |
| *Azinian* | Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (November 01, 1999) |
| *Bear Creek* | Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5 (July 21, 2016) |
| *Biwater* | Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No 5 (February 02, 2007) |
| *Blusun* | Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award (December 27, 2016) |

| | |
|---|---|
| *Bosh International* | Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award (October 25, 2012) |
| *Bridgestone* | Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Award (August 14, 2020) |
| *Caratube* | Caratube International Oil Company LLP v. Republic of Kazakhstan (I), ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (February 21, 2014) |
| *Champion* | Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award (October 27, 2006) |
| *Chevron* | Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh, ICSID Case No. ARB/06/10, Award (May 17, 2010) |
| *Copper* | Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-02, Award (March 15, 2016) |
| *Daimler* | Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (August 22, 2012) |
| *Eco Oro* | Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 6 Decision on Non-Disputing Parties' Application (February 18, 2019) |
| *El Paso* | El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award (October 31, 2011) |
| *Eli Lilly* | Eli Lilly and Company v. The Government of Canada, ICSID Case No. UNCT/14/2, Procedural Order No. 4 (February 23, 2016) |
| *Enron* | Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) |

| | |
|---|---|
| *FREIF* | FREIF Eurowind Holdings Ltd v. Kingdom of Spain, SCC Case No. 2017/060, Final Award (March 08, 2021) |
| *Genin* | Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001) |
| *Getma (II)* | Getma v. Guinea (II), ICSID Case No. ARB/11/29, Sentence (August 16, 2016) |
| *Glamis Gold* | Glamis Gold Ltd. v. United States of America, UNCITRAL Award (June 8, 2005) |
| *Glencore* | Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award (August 27, 2019) |
| *Hamester* | Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (June 18, 2010) |
| *Hesham* | Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, Ad hoc Arbitration, Final Award (December 15, 2014) |
| *Iberdrola (I)* | Iberdrola Energía, S.A. v. Republic of Guatemala (I), ICSID Case No. ARB/09/5, Award (August 17, 2012) |
| *İçkale* | İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award (March 08, 2016) |
| *ICS (I)* | ICS Inspection and Control Services Limited v. The Argentine Republic (I), PCA Case No. 2010-09, Award on Jurisdiction (February 10, 2012) |
| *Infinito-PO 2* | Infinito Gold Ltd v Republic of Costa Rica, ICSID Case No ARB/14/5, Procedural Order No 2 (June 01, 2016) |
| *Jorge* | Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award (June 5, 2020) |
| *Krederi* | Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award (July 02, 2018) |
| *Lemire (II)-Jurisdiction* | Joseph Charles Lemire v. Ukraine (II), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010) |

| | |
|---|---|
| *Lemire (II)* | Joseph Charles Lemire v. Ukraine (II), ICSID Case No. ARB/06/18, Award (March 28, 2011) |
| *LG&E* | LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (October 03, 2006) |
| *Loewen* | Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003) |
| *Maffezini* | Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (November 13, 2000) |
| *Maffezini-Jurisdiction* | Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of The Tribunal On Objections To Jurisdiction (January 25, 2000) |
| *Metal-Tech* | Metal-Tech v. Uzbekistan Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (October 04, 2013) |
| *Methanex* | Methanex Corporation v. United States of America, UNCITRAL Decision of the Tribunal on Petition from Third Persons to Intervene as "Amici Curiae" (January 15, 2001) |
| *MTD* | MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004) |
| *National Grid* | National Grid plc v. The Argentine Republic, UNCITRAL Award (November 03, 2008) |
| *Nykomb* | Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC Case No. 118/2001, SCC, Arbitral Award (December 16, 2003) |
| *Occidental (II)* | Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (October 05, 2012) |
| *Oostergetel* | Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL Final Award (April 23, 2012) |

| | |
|---|---|
| *Parkerings* | Parkerings–Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (September 11, 2007) |
| *Quiborax* | Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award (September 16, 2015) |
| *Resolute* | 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 (June 29, 2017) |
| *Saluka* | Saluka Investments BV v. The Czech Republic, PCA Case No. 200104, Partial Award (March 17, 2006) |
| *Sempra* | Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award (September 28, 2007) |
| *Silver Ridge* | Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37, Award (February 26, 2021) |
| *Suez* | Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (March 17, 2006) |
| *Tallinn* | United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, Award (June 21, 2019) |
| *Tecmed* | Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) |
| *Tethyan* | Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on the Respondent's Application to Dismiss the Claims (with reasons) (November 10, 2017) |
| *Thunderbird* | International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL Award (January 26, 2006) |
| *Tokios* | Tokios Tokelés v. Ukraine, Dissenting Opinion by Mr. Daniel M. Price (Award) (July 26, 2007) |

| | |
|---|---|
| *UFG* | Unión Fenosa Gas v. Egypt, ICSID Case No. ARB/14/4, Award (August 31, 2018) |
| *Vedanta* | Vedanta Resources PLC v. Republic of India, PCA Case No. 2016-05, Judgment of the High Court of Singapore [2020] SGHC 208 (October 08, 2020) |
| *Venezuela* | Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award (September 23, 2003) |
| *Vivendi (II)* | Vivendi v. Argentina (II) Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. ICSID Case No. ARB/03/19, Order in response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005) |
| *Vivendi (II)-Amicus* | Vivendi v. Argentina (II) Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. ICSID Case No. ARB/03/19, Order in Response to a Petition by Five NonGovernmental Organizations for Permission to make an amicus curiae Submission (February 12, 2007) |
| *von Pezold* | von Pezold and others v. Zimbabwe Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No 2 (June 26, 2012) |
| *Waste Management* | Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004) |
| *World Duty* | World Duty-Free v. Kenya, ICSID Case No. ARB/00/7, Award (October 04, 2006) |
| *Yukos Universal* | Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA, Case No.AA 227, Final Award (July 18, 2014) |

**Other Decisions**

| | |
|---|---|
| *ICJ/ELSI* | ICJ, Elettronica Sicula SpA (ELSI), United States v. Italy, Judgment, Merits, [1989] ICJ Rep 15 |

| | |
|---|---|
| *ICJ/Indonesia* | Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia v Malaysia, Judgment, Application for Permission to Intervene, [2001] ICJ Rep 575 (October 23) |
| *ICJ/Nicaragua* | Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment (June 27, 1986), Separate Opinion of Judge Ago, ICJ Reports 1986 |
| *Yukos/EWHC* | Yukos Capital SARL v. OJSC Rosneft Oil Company, [2014] EWHC 2188 (Comm), England and Wales High Court (Commercial Court) (July 03, 2014) |

**Books**

| | |
|---|---|
| Burke (2013) | Ciarán Burke (2013) An equitable framework for humanitarian intervention. Hart Publishing. |
| Crawford (2002) | James Crawford (2002) The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries. Cambridge University Press. |
| De Stefano (2020) | Carlo de Stefano (2020) Attribution in International Law and Arbitration. Oxford University Press. |
| Dolzer & Schreuer (2008) | Rudolf Dolzer & Christoph H. Schreuer (2008) Principles of International Investment Law. Oxford University Press. |
| Dolzer & Stevens (1995) | Rudolf Dolzer & Margrete Stevens (1995) Bilateral Investment Treaties. Martinus Nijhoff Publishers. |
| Mouyal (2016) | Wandahl Mouyal (2016) International Investment Law and the Right to Regulate: A Human Rights Perspective. Routledge. |
| Paulsson (2006) | Jan Paulsson (2006) Denial of Justice in International Law. Cambridge University Press. |
| Rajput (2018) | Aniruddha Rajput (2018) Regulatory Freedom and Indirect Expropriation in Investment Arbitration. Kluwer Law International. |

| | |
|---|---|
| Schreuer (2009) | Christoph H. Schreuer (2009) The ICSID Convention: A Commentary. Cambridge University Press. |
| Sinclair & Schreuer (2009) | Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair (2009) (2nd eds) The ICSID Convention: A Commentary. Cambridge University Press. |

**Book Chapters**

| | |
|---|---|
| Feldman (2011) | Mark Feldman (2011). The Standing of State-Owned Entities under Investment Treaties, In: Karl P. Sauvant ed Yearbook on International Investment Law & Policy 2010-2011. Oxford University Press. |
| Knahr (2011) | Christina Knahr (2011). The new rules on participation of non-disputing parties in ICSID arbitration: Blessing or curse?, In: C. Brown & K. Miles (Eds.), Evolution in Investment Treaty Law and Arbitration. Cambridge University Press. |
| Miles & Weiss (2021) | Craig Miles and David Weiss (2021). Overview of Principles Reducing Damages, In: John A. Trenor, The Guide to Damages in International Arbitration. Law Business Research Ltd. |
| Salmon (2010) | Jean Salmon (2010). Part III The Sources of International Responsibility, Chapter 27 Duration of the Breach, In: James Crawford, Alain Pellet, Simon Olleson, Kate Parlett, The Law of International Responsibility. Oxford University Press. |
| Schreuer & Kriebaum (2009) | Christoph H. Schreuer & Ursula Kriebaum (2009). At What Time Must Legitimate Expectations Exist?, In: Jacques Werner & Arif Hyder Ali (eds.), Law Beyond Conventional Thought. CMP Publishing. |
| Schreuer (2007) | Christoph H. Schreuer (2007). Protection against Arbitrary or Discriminatory Measures, In: Roger P. Alford & Catherine A. Rogers, The Future of Investment Arbitration. Oxford University Press. |

| | |
|---|---|
| Zeiler (2009) | Gerold Zeiler (2009). Part II, Chapter VII, Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings, In: Christina Binder, U. Kriebaum, A. Reinisch & S. Wittich (eds.), International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer. Oxford University Press. |


**Journal Articles**


| | |
|---|---|
| Bastin (2014) | Lucas Bastin (2014) Amici Curiae in Investor-State Arbitration: Eight Recent Trends. Arbitration International 30(1): 137-140 |
| Blyschak (2011) | Paul Blyschak (2011) State Owned Enterprises and International Investment Treaties. Journal of International Law and International Relations 6(2): 1-52 |
| Born & Forrest (2019) | Gary Born & Stephanie Forrest (2019) Amicus Curiae Participation in Investment Arbitration. ICSID Review-Foreign Investment Law Journal 34(3): 626-665 |
| Broches (1966) | Aron Broches (1966) The Convention on The Settlement of Investment Disputes: Some Observations on Jurisdiction. Columbia Journal of Transnational Law 5: 261-80 |
| Feldman (2016) | Mark Feldman (2016) State-Owned Enterprises as Claimants in International Investment Arbitration. ICSID Review-Foreign Investment Law Journal 31(1): 24 - 35 |
| Fortier & Marquis (2019) | The Hon. L. Yves Fortier & Laurence Marquis (2019) Fortier Dealing with corruption in international arbitration: The interactions of conflicts of interest and corruption, BCDR International Arbitration Review 6(1): 217-234 |
| McLaughlin (2020) | Mark McLaughlin (2020) Defining a State-Owned Enterprise in International Investment Agreements ICSID Review. Foreign Investment Law Journal, 34(3): 595-625 |
| Mohtashami & El-Hosseny (2016) | Reza Mohtashami & Farouk El-Hosseny (2016) State-Owned Enterprises as Claimants in Investment Treaty Arbitration: |

| | |
|---|---|
| | Is the Broches Test on the Ebb?. BCDR International Arbitration Review 3(2): 371-388 |
| Mourre (2006) | Alexis Mourre (2006) Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?. LPICT 5(2): 257-271. |
| Newcombe & Lemaire (2001) | Andrew Newcombe & Axelle Lemaire (2001) Should Amici Curiae Participate in Investment Treaty Arbitrations?. Vindobona Journal of International Commercial Law and Arbitration 5(1): 22-40 |
| Petrochilos (2013) | Georgios Petrochilos (2013) Case Comment : Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, When is Conduct by a University Attributable to the State? ICSID Review-Foreign Investment Law Journal 28(2): 262 - 67. |
| Sadowshi (2014) | Wojciech Sadowski (2014), Yukos and Contributory Fault, Transnational Dispute Management 11: 73-120 |
| Savarese (2007) | Savarese (2007) Amicus curiae participation in Investor-State arbitral proceedings. Italian Yearbook of International Law 17: 99-121 |
| Schreuer (2005) | Christoph H. Schreuer (2005) Fair and Equitable Treatment in Arbitral Practice. The Journal of World Investment & Trade 6(3): 357-386 |
| Triantafilou (2010) | E. Triantafilou (2010) Is a connection to the “public interest” a meaningful prerequisite of third party participation in investment arbitration?. Berkeley Journal of International Law 5: 38-46 |
| Vandevelde (2010) | Kenneth Vandevelde (2010) A Unified Theory of Fair and Equitable Treatment. NYU Journal of International Law and Politics 43(1): 43–106. |
| Vesel (2014) | Scott Vesel (2014) A 'Creeping' Violation of the Fair and Equitable Treatment Standard?. Arbitration International 30(3): 553-564 |

**Miscellaneous**

| | |
|---|---|
| ASA (2001) | International Glossary of Business Valuation Terms, American Society of Appraisers (June 06, 2001) ASA website |
| IVSC (2006) | International Valuation Standards Council (2016) IVS 104: Bases of Value, Exposure Draft |
| ICSID History (2009) | ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. II-1, 1968 (reprinted in 2009) |
| Broches (1972) | Broches Aron (1972), "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Volume 136)", in: Collected Courses of the Hague Academy of International Law |
| Muchlinski (2014) | Peter Muchlinski (2014), Corporations in International Law, Max Planck Encyclopedias of International Law |
| Lu Wang (2017) | Lu Wang (2017), State-Owned Enterprises and the International Investment Law Regime, Doctoral Thesis at University of Liverpool |

## STATEMENT OF FACTS

1. **PARTIES TO THE DISPUTE**: Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") is an airline holding company incorporated under the laws of Commonwealth of Bonooru with 100% ownership in Royal Narnian, a leading global airline that created the Moon Alliance along with five other major airlines. Bonooru chose Vemma as the successor of BA Holdings and retained a minority shareholding of 31% to 38% in Vemma from the date of its incorporation until March 2020. This was subsequently increased to 55% on March 2, 2021 as part of its bail-in program. During the privatisation process of BA Holdings, Bonooru's Constitutional Court and the then Prime Minister in a speech acknowledged that State representation in Vemma was preserved for it to continue to perform government functions of its predecessor.

   The Federal Republic of Mekar ("**Mekar**" or "**Respondent**") is situated approximately 1,600 km to the South of Bonooru. Its currency is the Mekari MON. Historically, Mekar witnessed prolonged political instability, mass emigration, and exploitation of resources by regional powers. As the population of Mekar grew from 6 million to 10.8 million, it became difficult for the judicial system to expand at the same rate. The average time for adjudication of disputes before the Mekari Courts rose to 22 months, and it is even higher in commercial matters since the State prioritised criminal matters to avoid prolonged detention for the accused.

2. **Investment IN CAELI**: Owing to the instability created by the 2008 financial crisis, Mekar decided to sell 85% stake in the State-owned Caeli Airways through a competitive bidding process, as part of its privatization programme. For this purpose, Caeli's core assets were marketed to potential bidders.

   Vemma emerged as the highest bidder and its tender valued at USD 800 million was accepted on January 5, 2011. Vemma's bid proposed fleet renewal and expansion, route expansion, Caeli's Moon Alliance membership along with refinancement of Caeli's debt liability from BPB. CCM approved Vemma's participation in the Moon Alliance along with its acquisition in Caeli Airways. It sought an undertaking from Caeli to not engage in high-level co-operation on competition parameters with its Moon Alliance members, which was duly submitted. Subsequently, a Share Purchase Agreement was executed on March 29, 2011.

Vemma's investment in Caeli also helped promote tourism in Bonooru by increasing air connectivity in the Greater Narnian region. One of the pillars of Caeli Airways' business model during this period was catering to customers travelling from Mekar to Bonooru. Due to this, Vemma received recurring subsidies between 2011 and 2016 as part of Bonooru's Horizon 2020 scheme under the aegis of the Caspian Project.

3. **EXTRAVAGANT APPROACH OF VEMMA**: During 2012, natural formations from the Eldin volcanic eruption piqued tourist interest in Mekar. To capitalise on this, Vemma Holdings decided to offer low-fare, long distance flights into Mekar, adding 20 new destinations in 2012. They were warned about risky expansion policies by the representatives of Mekar Airservices (Respondent), given the volatility of demand in the region, especially Mekar. Conversely, Vemma's representatives on Caeli's board continued to project optimism for the subsequent years. However, its revenue from these routes continued declining during the fall and winter quarters of between 2011 and 2013.

4. **RAPID EXPANSION OF CAELI AND CCM'S INVESTIGATION**: Owing to the global oil price crash in June 2014, Caeli was able to shore up greater profits. It continued with its strategy of fleet expansion and slashed airfares, but refused to inject profits to improve its financial health. Caeli's rapid expansion drew CCM's attention which led to the initiation of the First Investigation in September 2016. CCM indicated its intention to investigate owing to the anti-competitive measures of predatory pricing and secondary slot trading adopted by Caeli. This investigation was concluded in August 2018, when Caeli was found guilty of having breached Mekar's antitrust legislation and a MON 150 million fine was imposed.
   In December 2016, a consortium of small regional airlines filed a complaint before the CCM alleging that Caeli had launched flights on specific routes solely with the intention of pushing out competitors, pursuant to which the CCM launched another antitrust investigation. This investigation was concluded on January 01, 2019 when CCM found Caeli guilty of having squeezed out concessions from the Phenac Airport and imposed a fine of MON 200 million. As an interim measure, CCM placed airfare caps on Caeli in September 2016 to prevent it from earning supra-competitive profits in the future. Subsequently, they were lifted in October 2019, once Caeli's market share with its fellow Moon Alliance members fell below 40%.

5. **MEKAR'S ECONOMIC CRISIS**: In late 2016 when the value of MON began to depreciate, Caeli was permitted to denominate its airfare in USD. Subsequently on January 30, 2018,

Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON.

6. **GRANT OF SUBSIDIES**: On September 25, 2018, the Mekari President passed Executive Order 9-2018 granting subsidies to airlines for each Mekari citizen travelling on board. Caeli Airways was one of the only two airlines owned in any significant part by a foreign government operating in Mekar, the other being Larry Air and they both were not granted subsidies under this order. This was done considering the unique advantage that State-owned companies have over privately-owned airlines.

7. **JUDICIAL REVIEW**: Caeli appealed CCM's decision before the Mekari court. After considering the matter on merits, Justice VanDuzer issued his interim decision. The airfare caps were not removed since the court found CCM's decision justifiable, considering the facts of the matter.

8. **SCC ARBITRATION**: Vemma received an offer for its full investment in Caeli Airways from Hawthorne Group LLP, a Sinnoh-based private equity group with stakes in various low-cost airlines. Mekar Airservices rejected this offer, stating it to be artificially inflated and not an arm's length commercial price. After failed negotiations, Mekar Airservices decided to file for arbitration on February 11, 2020 with the SCC. The award decided that the offer received from Hawthorne Group was not from a bona fide third party as per Article 48 of the Shareholders Agreement. Subsequently a report by CILS was released alleging that the SCC Secretariat received certain bribes to render an award in favour of Mekar Airservices. In light of the same, the Supreme Arbitrazh Court of Sinnograd decided to set aside the order. However, on August 23, 2020, the High Commercial Court of Mekar recognised and enforced the SCC Award taking into account the evidence on record and its public policy. Vemma subsequently appealed this decision to the Superior Court of Mekar, which dismissed the appeal on merits.

9. **INSTITUTION OF ICSID ARBITRATION**: Vemma could not secure another buyer and ultimately decided to sell its stake in Caeli to Mekar Airservices at USD 400 million. It simultaneously filed a notice of arbitration on November 15, 2020 to seek compensation for its losses under the 2014 Bonooru - Mekar CEPTA.

## SUMMARY OF ARGUMENTS

1. **JURISDICTION:** The Tribunal lacks jurisdiction in this arbitration proceeding since this is a State-State dispute, which are excluded from the scope of the ICSID Additional Facility Rules as well as CEPTA. The Claimant is a State-owned enterprise in which Bonooru continuously exercised control. Additionally, in undertaking the investment activity in Caeli Airways, the Claimant was performing an essential government function of ensuring mobility rights and facilitating Bonooru's Caspian Project. Having acted as an agent of the State of Bonooru and discharged essential government functions on its behalf, the Claimant satisfies both limbs of the Broches test. Thus, it is to be characterised as a 'State' rather than as '*investor*', denying the Tribunal jurisdiction to preside over this dispute.

2. **ADMISSIBILITY OF *AMICI* SUBMISSIONS:** The submission made by External Advisors ought to be accepted as it fulfils the exhaustive list of criteria considered for *amici* submissions. The Tribunal will immensely benefit from their submission as they highlight strong public interest in addressing bribery allegations related to the Claimant's investment. On the other hand, CBFI's submission ought to be barred since it lacks independence and neutrality owing to Lapras Legal Capital's membership in CBFI and involvement in this proceeding. Lastly, they fail to specify the public interest aspect of their submission which further highlights the need for barring their submission.

3. **MERITS - FET:** The Respondent's conduct has neither individually nor cumulatively violated the FET standard under Article 9.9 of CEPTA. There has been no denial of justice since the Claimant was provided access to legal recourse before the Mekari judiciary. The Respondent has not breached due process since regulatory action against Caeli was conducted in accordance with domestic law. Providing subsidies to only private entities will not constitute as discriminatory conduct since there is a reasonable rationale for denial of subsidies. Lastly, the Respondent has not treated the investment in an abusive manner.

4. **COMPENSATION:** The MV standard should be considered over the FMV standard as the MV standard was expressly agreed to by the parties under CEPTA. The FMV standard cannot be imported through the MFN from another treaty and international law principles will not be applicable. The Respondent is not liable to pay further compensation as USD 400 million has already been paid in accordance with MV.

## ARGUMENTS

## JURISDICTION

### I. WHETHER THE TRIBUNAL HAS JURISDICTION UNDER CHAPTER 9 OF THE CEPTA?

1. The Respondent submits that the Tribunal lacks jurisdiction over this dispute since neither ICSID Additional Facility Rules nor CEPTA contemplate State-to-State Arbitration. Under Article 9.16 and 9.17 of CEPTA, only an '*investor*' can initiate a dispute.[1] Similarly, a dispute under the Additional Facility Rules can only be initiated between a State and '*national of another State*'.[2] The CEPTA and the Additional Facility Rules are thus similar to the ICSID Convention, which was drafted keeping in mind disputes arising between private investors and host States.[3] The jurisdictional provision in the ICSID Convention specifically addresses disputes between a private investor and a State, thereby excluding those between private parties as well as those between two States.[4]

2. The relevant test to determine whether a State-owned or State-controlled enterprise that has undertaken an investment activity should be categorised as '*State*' or an '*investor*' is the *Broches* test, formulated in the preparatory work of the ICSID Convention.[5] The preparatory work of the Convention is to be used as a supplementary means of interpretation[6] and since the object and purpose of both ICSID Convention and the Additional Facility Rules is to decide on disputes between investors and States only, the *Broches* test[7] founded in the *travaux preparatoires*[8] of the ICSID Convention is relevant and ought to be applied in this proceedings under the Additional Facility Rules.

3. The test provides that a State-owned enterprise should not be disqualified as a '*national*' of a contracting State unless it acts as an agent for the government or discharges an essential government function.[9] In light of this test, it is contended that the Claimant does not have

[1] CEPTA, Article 9.16, p.79.
[2] Article 2, ICSID Additional Facility Rules.
[3] ICSID History (2009), p. 11, ¶ 30.
[4] Zeiler (2009), p. 80; Broches (1966), pp. 263-65.
[5] ICSID History (2009), p. 11, ¶ 30.
[6] Article 32, VCLT.
[7] Broches (1972), ¶¶ 331, 355.
[8] ICSID History (2009), p. 11, ¶ 30.
[9] Broches (1972), ¶¶ 331, 355.

the standing as an '*investor of a Party*' under CEPTA or as a '*national of another State*' under Additional Facility Rules since the Claimant **(A)** is a State-owned enterprise, **(B)** performed essential government functions and **(C)** acted as an agent of the State of Bonooru.

**A. Claimant is a State-owned enterprise**

4. A State-owned enterprise is a commercial enterprise predominantly owned or controlled by a State or State institutions.[10] Thus, ownership and control are key factors to be considered when determining whether an enterprise is a State-entity. The ownership of a majority of shares does not necessarily mean control.[11] The drafters of the ICSID Convention kept control as a flexible concept which was to be determined on a case to case basis.[12] Control has been defined as having the number of a company's voting shares that is by itself sufficient to make key decisions of the company.[13] Thus, even a minority shareholder may exercise controlling power[14] in a company by way of the percentage of shares held or legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, etc.[15]

5. In the present dispute, Bonooru has always maintained a sizable stake and exercised control over the Claimant's activities. Bonooru's ownership in the Claimant ranged between 31% - 38% since its inception in the 1980s until March 2021.[16] As affirmed by the Constitutional Court of Bonooru, the State through its continuous participation in the Claimant by way of owning significant shares would ensure that the Claimant operates for public benefit thereby guaranteeing mobility rights of its citizens.[17] The Bonoori government was responsible for electing its officials to the Claimant's Board of Directors, [18] who not only attended all the board meetings but also constituted majority vote in its decisions,[19] thus

[10] Muchlinski (2014), p. 11.
[11] *Tallinn* ¶¶ 369, 370; *Occidental (II)* ¶ 104; *Caratube* ¶ 273.
[12] ICSID History (2009), pp. 359, 360, 448, 870; *Tallinn* ¶ 366.
[13] *Thunderbird* ¶ 108.
[14] Schreuer (2009), ¶ 851.
[15] *Aguas-Jurisdiction* ¶ 264.
[16] Uncontested Facts, p. 29, ¶ 10, Lines 933-34.
[17] Annex III, p. 43, ¶ 3, Lines 1491-95.
[18] Annex IV, p. 46, ¶ 3, Lines 1575-76.
[19] PO-3, p. 86, ¶ 3, Lines 3156-60.

depicting State control. These facts illustrate that Bonooru always intended to directly or indirectly own and control the Claimant.

6. Factors that influence *ratione personae* jurisdiction in a dispute have to be examined on a continuous basis.[20] This has also been observed by MARK MCLAUGHLIN in his work[21], where he argues that given the lifespan of some investments, it may become important to demonstrate ongoing control in respect of the investment. Satisfying this requirement will need an analysis of the relational nexus between the home State and the enterprise's decision-making body, as well as how this was used in reference to a specific investment. As noted by the Tribunal in *Vivendi (I)*[22]questions relating to control can be examined using facts that may have arisen subsequent to the registration of the dispute. It has also been reiterated by the ICJ that acts occurring after the crystallization of a dispute can be taken into consideration if such acts are in normal continuation of past activities.[23]

7. In the present dispute, this continuous interest of Bonooru in the Claimant was emphasised in Bonoori Prime Minister's speech where he stated that "*government plans to maintain significant interest in Bonooru Air and always will*."[24] Royal Narnian is the successor of Bonooru Air, fully owned and controlled by the Claimant.[25] In consonance with the State's continuous interest, the Claimant underwent major restructuring in March 2021 after the registration of this dispute and in that process, not only did Bonooru's shareholding in Claimant increased to 55% but its Board of Directors in its entirety was replaced by government officials.[26] Its functions include paramilitary activities and at present, Bonooru's justice department is aiding its legal team with regard to this arbitration.[27] These events showcase the continuous control that Bonooru has always maintained in the Claimant.

[20] *Loewen* ¶ 225.
[21] McLaughlin (2020), pp. 595-625.
[22] *Vivendi (I)* ¶¶ 53, 65.
[23] *ICJ/Indonesia,* p. 682, ¶ 135.
[24] Uncontested Facts, p. 29, ¶ 8, Lines 922-23.
[25] *Id.* p. 29, ¶ 10, Lines 932-33.
[26] *Id*. p. 40, ¶ 65, Lines 1410-12.
[27] *Id*. p. 40, ¶ 65, Lines 1412-14.

8. Thus, Bonooru's control over the Claimant's activities before the registration of this dispute and the heightened ownership and control post-March 2021 cumulatively establish that the Claimant is a State-owned and State-controlled enterprise.

**B. Claimant performed essential government functions in undertaking the investment related activities**

9. It is submitted that the Claimant while undertaking activities related to its investment in Caeli was discharging essential government functions, considering the **(1)** public nature of activities undertaken by the Claimant and **(2)** purpose of the activities to further public policy considerations of Bonooru.

***(1) Public nature of activities undertaken by the Claimant***

10. The Broches test as mentioned earlier prohibits participation of State-owned enterprises under ICSID proceedings when the entity discharges essential government functions or acts as an agent of a State.[28] These two components are an echo[29] of Article 5 and Article 8 of ILC Articles on State Responsibility,[30] and ICSID Tribunals have relied on these Articles to determine the existence of either components.[31]

11. Considering the first component, in determining whether an entity performed an essential government function, the Tribunal in *Maffezini*[32] refers to the *functional test,* which looks at whether the company was performing activities of public nature that are usually not undertaken by private entities. Several factors have to be taken into consideration when determining whether a person or an entity which is not *de jure* an organ of the State is authorized to exercise governmental authority. Some of these are - whether the government participated in the creation of the entity, whether the entity was created to carry out a government function, whether the entity is subject to the policy consideration of the State, etc.[33]

[28] Broches (1972), p. 354, ¶ 5.
[29] Blyschak (2011), p. 35.
[30] Article 5 & 8, ARSIWA.
[31] De Stefano (2020), pp. 96-177.
[32] *Maffezini-Jurisdiction* ¶ 79.
[33] *Chevron* ¶ 144.

12. Further, what is regarded as 'governmental' in nature often depends on the particular country, its history and traditions[34] and consequently, an activity that constitutes a government function in one country may not necessarily be a government function in others.[35] While commenting on a decision[36] that concluded higher education to be a governmental activity in Ukraine, Petrochilos notes that the test for determination of government function is whether the act or omission was related to the governmental authority granted to the concerned entity.[37]

13. As Bonooru is an archipelagic State, its Constitutional Court, highlighting the importance of aviation network, has stated that air travel serves a unique purpose in Bonooru compared to other nations around the globe and the citizens of Bonooru majorly rely on modern airways to travel within and outside the nation.[38] The Constitution of Bonooru through Article 70 guarantees mobility rights to its population[39] and there is a positive obligation on Bonooru to ensure connectivity to and from its islands.[40] Thus, the development of the aviation network is a governmental function in the specific context of Bonooru.

14. The Claimant inherited the functions of its State-owned predecessor[41] in developing the aviation network as mentioned under the Claimant's MOA[42]. As noted earlier by the Constitutional Court of Bonooru, the Claimant was to operate for public benefit[43] connecting remote communities,[44] rather than as a purely commercial, profit-oriented enterprise. For the same purpose, Bonooru maintained a significant interest in the Claimant through ownership and representation in the Board of Directors to ensure that these functions were being performed to facilitate mobility rights of its citizens. Thus, the different factors to be considered under the *functional test* are sufficiently met in the present dispute to establish performance of essential government functions.

15. The Claimant's investment in Caeli Airways was to further perform these very same public functions. Bonooru's governmental function of ensuring mobility applied not only to

[34] Crawford (2002), p. 101, ¶ 6.
[35] Petrochilos (2013), p. 267.
[36] *Bosh International* ¶ 157.
[37] Petrochilos (2013), p. 268.
[38] Annex III, p. 43, ¶ 56, Lines 1480-81, 1483-87.
[39] Annex I, Article 70, p. 41, Lines 1425-30.
[40] Annex III, p. 43, ¶ 56, Lines 1480-81.
[41] *Id*. p. 43, ¶ 59, Lines 1491-93.
[42] Annex IV, MOA, Clause 3(h), p. 44, Lines 1519-21.
[43] Annex III, p. 43, ¶ 59, Line 1497.
[44] Annex IV, MOA, Clause 3(h), p. 44, Lines 1519-21.

aviation development within the State, but also outside the State in the Greater Narnian Region.[45] Bonooru initiated the Caspian Project for this purpose.[46] The contribution of Claimant's investment in Caeli to this Project was highlighted by Bonooru's Secretary to the Ministry of Tourism herself, when she justified the rationale behind granting recurring subsidies to the Claimant.[47] She further emphasised Claimant's role by stating that:

> *"[Vemma's] contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of our population within the Greater Narnian region. Vemma has certainly lived up to the standards set by its predecessor in Bonooru."* [48]

16. The Claimant received recurring subsidies under the said Project between 2011 and 2016, which helped it carry on with flight operations despite the significant losses it incurred.[49] Therefore, the Claimant was essentially undertaking the investment activity to perform its public function of developing the aviation network in the region.

***(2) Purpose of activities to further public policy considerations of Bonooru***

17. States that are accustomed to utilizing State-owned enterprises as vehicles for fulfilment of public policy objectives in a domestic context may carry that inclination across borders while undertaking investment activities.[50] With regard to State-owned enterprises that are involved in investment activities, their evolving nature is driven by both political and economic objectives in addition to the commercial aspects of an investment.[51] Thus, it is conceivable that a State entity could simultaneously engage in governmental functions and commercial activities while undertaking an investment.[52] In this regard, goals and objectives that drive a State-owned enterprise's activities will be relevant for the purpose of determining whether the investment was being made with commercial reasons or to perform other public functions.[53]

18. In the present dispute, co-existence of commercial and governmental motives are evidenced in the Claimant's activities. Claimant's operation of Caeli was clearly linked to the Caspian

[45] Annex I, Article 70 (1) & (2), p. 41, Lines 1428-29.
[46] Uncontested Facts, p. 28, ¶ 4, Lines 889-92.
[47] *Id.* p. 32, ¶ 28, Lines 1081-88.
[48] PO-4, p. 89, ¶ 6, Lines 3294-97.
[49] *Id*. p. 89, ¶ 6, Lines 3291-92.
[50] McLaughlin (2020), pp. 595-625.
[51] Lu Wang (2017), p. 13.
[52] *Maffezini-Jurisdiction* ¶ 80; Mohtashami & El-Hosseny (2016), p. 379.
[53] Feldman (2011), pp. 615-637.

Project, a major public and foreign policy objective for Bonooru. Despite heavy losses incurred on the routes between Bonooru and Mekar, it continued operating on these routes against the advice of Respondent's representatives.[54] Although these routes were initially profitable due to high traffic; even when the route became commercially non-viable the Claimant continued its expansion in Mekar since its operations were aimed at facilitating the Caspian Project.[55]

19. This clearly points towards the Claimant's intention to not act as a purely commercial enterprise but rather as an entity primarily performing governmental functions while also considering commercial profits. Thus, in performing the above mentioned activities, the Claimant was promoting the purposes of Bonooru and performing essential government functions.

20. Taking into account the public nature and non-commercial purpose of activities undertaken by the Claimant in Bonooru and in Mekar through its investment in Caeli, it is submitted that the Claimant was performing essential government functions on behalf of Bonooru.

**C. Claimant acted as an agent of the State of Bonooru**

21. The term 'agent' has not been unanimously defined and is usually seen as an entity which acts as a direct component of the State apparatus.[56] Since the government agency limb of the Broches test has obvious parallels to ILC Article 8,[57] ICSID Tribunals have utilised jurisprudence developed in relation to this Article of the ILC Articles on State Responsibility as a valuable reference for evaluating government agency.[58] In light of these tests as elaborated below, it is submitted before this Tribunal that the Claimant was acting as an agent of the State of Bonooru since **(1)** agency arises from Claimant's performance of governmental functions and **(2)** Bonooru exercised control over the Claimant.

[54] Uncontested Facts, p. 33, ¶ 31, Lines 1108-14.
[55] PO-4, p. 89, ¶ 6, Lines 3295-97.
[56] *ICJ/Nicaragua* p. 188.
[57] Blyschak (2011), p. 35.
[58] *Id.* p. 36.

***(1) Agency arises from Claimant's performance of governmental functions***

22. As elaborated in the decisions of *Maffezini*[59] and *Hamester*[60], a presumption of State agency arises when an entity's purpose is performance of government functions. Similarly, SCHREUER in the context of investor-State arbitration notes:

> "*[t]he concept of 'agency' should be read not in structural terms but functionally . . . What matters is that [the agency] performs public functions on behalf of the Contracting State or one of its constituent subdivisions.*"[61]

Thus, factors of governmental functions and governmental agency are interrelated[62] and if an entity is brought into existence for performing essential government functions, it is consequently an agent of the State.

23. In the present dispute, the reason for establishment of the Claimant as reflected in its MOA was development of aviation infrastructure to protect mobility rights[63] of Bonooru's citizens. This was also reiterated by Prime Minister of Bonooru[64] and Constitutional Court of Bonooru[65] during the privatisation process. Therefore, the Claimant's aim and purpose was performance of governmental functions and this gives rise to a presumption of agency between the Claimant and State of Bonooru.

***(2) Bonooru exercised control over the Claimant***

24. The Tribunals in *Maffezini*[66] and *Hamester*[67] have held that acts performed by public or private entities under the State's direct or indirect control indicate acts performed under State agency in accordance with ILC Article 8. Relation between State ownership and State control can be illustrated by any voting leverage that confers a disproportionate level of decision-making power.[68] Control over an enterprise can also be established while referring to factors such as voting rights, equity participation and management,[69] which have to be looked at in conjunction.[70]

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[59] *Maffezini-Jurisdiction* ¶ 77.
[60] *Hamester* ¶ 157.
[61] Sinclair & Schreuer (2009), pp. 153-54.
[62] Feldman (2016), pp. 24-35.
[63] Annex IV, MOA, Clause 3(h), p. 44, Lines 1519-21.
[64] Uncontested Facts, p. 29, ¶ 8, Lines 922-25.
[65] Annex III, p. 43, ¶ 3, Lines 1491-97.
[66] *Maffezini-Jurisdiction* ¶ 77.
[67] *Hamester* ¶¶ 178, 180.
[68] Feldman (2016), pp. 24-35.
[69] *Venezuela* ¶ 113; *Caratube* ¶ 254.
[70] Schreuer (2009), ¶ 864.

25. As established earlier, Bonooru exercised indirect control over the Claimant by way of appointments of its representatives to the Board of Directors of Claimant[71] who not only attended every Board meeting but often constituted a majority vote on the Board's decisions.[72] This element of control and ownership only heightened after the registration of this dispute, and the Claimant is at present fully controlled by the Bonoori government.[73] Thus, the Claimant was, at the time of investment and even subsequently acting as an agent of Bonooru owing to the indirect control exercised by the latter. Therefore, Claimant's founding objective of performance of essential government functions combined with indirect control of Bonooru over its functioning establish that the Claimant was acting as an agent of Bonooru while undertaking investment in Caeli.

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*Thus, the Claimant in the present dispute is a State-owned enterprise that acted as an agent of the State of Bonooru and performed essential government functions while in the host State. Consequently, Claimant does not qualify as an 'investor of a Party' under CEPTA nor as a 'national' of a State under the ICSID Additional Facility Rules, therefore, the Tribunal lacks jurisdiction over the present dispute.*

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[71] Annex IV, AOA, Article 152.4, p. 46, Lines 1575-76.
[72] PO-3, p. 86, ¶ 3, Lines 3158-60.
[73] Uncontested Facts, p. 40, ¶ 65, Lines 1410-12.

## II. WHETHER THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT FOR FILING AMICI SUBMISSIONS?

26. Arbitral Tribunals have found their power to accept *amicus curiae's* participation in different instruments and rules. In the present dispute, the Tribunal exercises this power pursuant to Article 41(3) of the ICSID Additional Facility Rules, Article 4 of the UNCITRAL Rules on Transparency and Article 9.19 of CEPTA. Tribunals have followed different approaches towards deciding on the admissibility of *amici* submissions and have considered the criteria set out under various Rules to be inexhaustive.[74] In light of the same, it is submitted to this Tribunal that **(A)** the *amici* submission made by the External Advisors to CRPU should be accepted and **(B)** submission made by CBFI should be rejected.

### A. The amici submission made by the External Advisors to CRPU should be accepted

27. It is submitted before this Tribunal that the *amici* submission made by the External Advisors to CRPU should be accepted as the submission **(1)** addresses a matter within the scope of the dispute and **(2)** the External Advisors have a significant interest in the proceeding.

#### *(1) Submission address a matter within the scope of the dispute*

28. An important criterion for consideration while accepting *amici* submission is that the *amicus* should address a matter within the scope of the dispute.[75] The Tribunal in the *Apotex* case[76] has explicitly stated that it is:

> "*perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspective or insights beyond those of the disputing parties.*"

Thus, there is a wide scope for non-disputing party submissions to be filed in pursuance of public interest.

29. Further, an adverse finding of corruption may result in the Tribunal dismissing the claims due to lack of jurisdiction in arbitrations that involve illegally made investments.[77] The

[74] Born & Forrest (2019), p. 30; *Apotex-PO 4* ¶ 26.
[75] Rule 37(2)(b), ICSID Arbitration Rules; Rule 41(3)(b), ICSID Additional Facility Rules; Article 4, UNCITRAL Rules on Transparency.
[76] *Apotex-PO 2* ¶ 33.
[77] *Metal-Tech* ¶ 292; *UFG* ¶ 7.46; *Getma (II)* ¶ 17; *World Duty* ¶ 187.

Tribunal in the *Infinito* case[78] dealt with an objection to the Tribunal's jurisdiction presented by an *amicus* which adduced that the Claimant's investment was procured illegally. The Tribunal in this case allowed for the *amicus* submission as it possessed some critical information as to charges of corruption that affected the Tribunal's jurisdiction. This practice of involving *amicus* participation will help to eliminate the corruption existent in some investment activities and may increase trust in arbitral proceedings.[79]

30. In this context, the Tribunal cannot rule out the *amici* submission at an early stage without having heard from the non-disputing party since matters relating to corruption will play an important role in the assessment of its jurisdiction. To avoid this insidious plague from upending investor-State arbitrations, this issue must be evaluated with prudence.[80] These corruption charges have important legal consequences in the present case and form an important part of international public policy.[81] Therefore, the concern of the Claimant that the External Advisors' submission falls outside the scope of this dispute and raises a new jurisdictional question stands invalid. Tribunal ought to entertain the present application considering the public policy aspect of this submission.

***(2) External Advisors have a significant interest in the proceeding***

31. Most instruments permitting *amici* participation require an applicant to show that the issue on which it seeks to make contributions or the outcome of the arbitration in general may harm its interests.[82] This criterion generally implies that an applicant must have a '*significant*' interest in the arbitration, rather than a 'general' interest in the issues that may emerge.[83] However, as noted by GARY BORN and STEPHANIE FORREST,[84] several Tribunals do not even consider this factor for admissibility of *amicus* submissions. In cases such as *Methanex*[85] and *Biwater,*[86] Tribunals have followed up on the restricted importance of the '*significant*' interest criterion and permitted *amici* submissions even when the *amici* had less direct involvement with the subject matter of those cases.

[78] *Infinito-PO 2* ¶¶ 35, 49c.
[79] Knahr (2011), pp. 319-338.
[80] External Advisors-Amici Application, p. 19, Line 642.
[81] *World Duty* ¶ 157.
[82] *Eco Oro* ¶ 34.
[83] *Apotex-PO 5* ¶ 32.
[84] Born & Forrest (2019), p. 26.
[85] *Methanex* ¶ 17.
[86] *Biwater* ¶ 18.

32. In the present dispute, stagnation in anti-corruption efforts in Mekar directly impacts operations of the *amici* who regularly advise potential investors prospecting opportunities in Mekar.[87] The *amici* have also regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization projects.[88] Thus, it must be observed that the outcome of this arbitration will directly affect the interests of the External Advisors. Lastly, the considerable interest in this case by the External Advisors is also due to the transparency requirements in the rules that regulate this proceeding.[89] Thus, the acceptance of this *amici* submission would have the additional benefit of increasing transparency in investor-State arbitration.

33. Therefore, based on the aforementioned considerations, the Tribunal ought to accept the *amici* submission made by the External Advisors' as they impede strong public interest by addressing bribery allegations related to Claimant's investment. Consequently, their submission addresses a matter within the '*scope of the dispute*' and their involvement in the entire privatization process of Caeli enables them to provide a unique perspective and present unbiased facts. Lastly, they are independent from the disputing parties and possess a significant interest in the proceedings since stagnation of anti-corruption efforts in Mekar directly impacts operations of the *amici.* Therefore, the application is not intended to and will not disrupt the proceeding or unduly burden or unfairly prejudice either parties. Hence, the Tribunal ought to accept the application by the External Advisors.

**B. Submission made by CBFI should be rejected**

34. The crux of the Respondent's challenge to the above application is fourfold: **(1)** There are justifiable doubts as to CBFI's independence which forms an essential attribute of an *amicus curiae***, (2)** CBFI does not bring a new perspective, particular knowledge, or insight that is different from that of the disputing parties, **(3)** CBFI prejudices interests of one party**,** and **(4)** the submission does not address public interest concern in the arbitration

[87] External Advisors-Amici Application, p. 19, Line 644.
[88] *Id*. p. 19, Line 643.
[89] *Vivendi (II)* ¶ 22; *Biwater* ¶ 54.

***(1) There are justifiable doubts as to CBFI's independence which forms an essential attribute of an amici***

35. The non-disputing party should be independent from the disputing parties. This is implicit under Article 41(3)[90] which requires that the non-disputing party brings a perspective, particular knowledge, or insight that is different from that of the disputing parties.[91] In *Vivendi (II)*[92] the Tribunal indicated three factors with respect to judging the suitability of the applicant: expertise, experience, and independence. Further, when institutional rules or other instruments require *amici* applicants to disclose information relating to *amicus* submissions, Tribunals have presumed that independence is implicitly necessary.[93] For example, the FTC Statement[94] and the UNCITRAL Transparency Rules[95] contain a number of conditions which an *amicus* must comply with, including declaration of the *amicus*' relationships with the disputants, as well as any financial or other aid received from them. Thus, in evaluating independence, ICSID Tribunals have considered both the professional and financial relationship of the *amici* with the disputing parties.[96]

36. In the present dispute, both parties have agreed for disclosure of certain conditions[97] that an *amicus* should comply with. Therefore, both of them have implicitly agreed that a non-disputing party should be independent. With regard to the CBFI's submission, the participation of Lapras Legal Capital through CBFI raises a conflict of interest since Claimant and Lapras Legal Capital are both members of the CBFI.[98] The Claimant is being advised on funding strategies by Lapras Legal Capital for this proceeding against the Respondent.[99] Moreover, Lapras Legal Capital's CFO Horatio Velveteen could also vote in respect of the *amicus* submissions in the present proceedings irrespective of their direct financial interest.[100] The existence of this financial relationship between the Claimant and the CBFI raises a conflict of interest and affects the independence of the *amici*, leading to

[90] Article 41(3)(a), ICSID Additional Facility Rules.
[91] *von Pezold* ¶ 56.
[92] *Vivendi (II)* ¶ 24.
[93] *Eli Lilly* ¶ 4.
[94] Section B (2), FTC Statement.
[95] Article 4.2, UNCITRAL Rules on Transparency.
[96] *Suez* ¶ 32.
[97] CEPTA, Article 9.19, p. 80.
[98] CBFI-Amici Application, p. 16, ¶ 7, Line 520.
[99] *Id*. p. 16, ¶ 7, Line 521.
[100] PO-3, p. 87, ¶ 12, Line 3208.

legitimate doubts as to their neutrality.[101] Thus, the Claimant's apparent lack of independence and neutrality should be considered as a sufficient ground to bar the CBFI submission in the present matter.

***(2) CBFI does not bring a perspective, particular knowledge, or insight that is different from that of the disputing parties***

37. All arbitration rules that permit *amicus* submissions require the applicants to bring a new perspective, knowledge, or insight to the dispute[102] which is different and unique in terms of content and perspective.[103] Duplicate submissions by *amicus curiae* are always disfavoured.[104] In *Apotex*[105] the Tribunal was in a similar position where parties had made submissions regarding the interpretation of NAFTA provisions and while rejecting the submissions, the Tribunal held that *amicus* submission on similar matters would not bring a unique perspective different from the disputing parties. Furthermore, the *amici's* lack of independence from the disputing parties has additional consequences on the perspective and insight they bring to the dispute.[106]

38. In the present matter, the submission does not fulfil this requirement as the submission does not offer a perspective that is different from the disputing parties. Owing to CBFI's lack of independence, its submissions tend to completely favour the views presented by the Claimant, making them repetitive and redundant. Further it is submitted that the Claimant is already in a position to elaborate on these facts relating to the State of Bonooru and there is no need for a third party to do the same. Therefore, they do not bring any new perspective or insight relating to the present dispute at hand and fail to assist the Tribunal.

***(3) CBFI prejudices interests of one party***

39. Although submissions from non-disputing third parties are permitted in arbitration proceedings, such submissions should not unduly burden or unfairly prejudice a disputing party's submission or in any way disrupt the proceedings.[107] It should be noted that the

[101] *von Pezold* ¶ 51.
[102] Rule 37(2)(a), ICSID Arbitration Rules; Rule 41(3)(a), ICSID Additional Facility Rules; Article 4(3)(b), UNCITRAL Rules on Transparency.
[103] *von Pezold* ¶ 59.
[104] Newcombe & Lemaire (2001), pp. 36-37.
[105] *Apotex-PO 4* ¶ 32.
[106] *von Pezold* ¶ 41.
[107] *Bear Creek* ¶ 58.

friend of the court should not be the friend of one of the parties.[108] Previously a number of Tribunals have excluded non-disputing parties from participating when such participation is "*markedly biased, prejudicial or non-neutral*", or when they intend to argue in favour of just one disputing party.[109] The same is also mentioned under CEPTA[110] where the Tribunal is required to ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

40. In the present dispute, CBFI is not acting as a true *amicus curiae*. It is in fact seeking to assist only one of the parties, the Claimant. CBFI's interests are adverse to those of the Respondents and are entirely aligned with those of the Claimants. Therefore, the CBFI seeks to act as a friend of a party and not as a friend of the court. Allowing it to participate would compel the Respondents to meet two cases at once, which would be unfairly prejudicial. Thus, the Tribunal in light of the aforementioned reasons should not admit the submission from CBFI.

***(4) Submission does not address a public interest concern in the arbitration***

41. In considering *amici* submissions, investment Tribunals have assessed whether an *amicus curiae* has proved a public interest in the arbitration's subject matter.[111] This criteria has explicitly been mentioned under the Preamble and Article 1(4)(a) of the UNCITRAL Rules on Transparency, which become applicable in these proceedings due to Article 9.20 of CEPTA.[112] The Tribunal in *Resolute Forest*[113] recognized that interpreting NAFTA's jurisdictional provisions could have an influence on people other than the disputing parties but found that the applicant had not demonstrated that its submissions were in furtherance of this public interest. Similarly, in *Apotex*[114] the applicant's failure to specify the public interest aspect in its submission was enough to cause the application to be rejected.

42. In the present dispute, the CBFI's submission will elaborate upon the regulatory framework in Bonooru which allows companies to compete based on the free market principles irrespective of ownership. However, in doing so, the CBFI has failed to explain the particular public interest it would be seeking to address through its submission. Whilst it

[108] Mourre (2006), pp. 257-271.
[109] *Suez* ¶ 13; *von Pezold* ¶ 56.
[110] CEPTA, Article 9.19, p. 80.
[111] *Apotex-PO 5* ¶ 35; *Resolute* ¶ 4.7; *Suez* ¶ 18; Triantafilou (2010), p. 41; Savarese (2007), pp. 106-107.
[112] CEPTA, Article 9.20, p. 81.
[113] *Resolute* ¶ 4.7.
[114] *Apotex-PO 5* ¶ 36.

may be said that investment-arbitration Tribunals generally deal with matters of public importance, it remains for the applicant to identify the specific public interest which it considers to be at stake and the CBFI fails to do the same.

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*Thus, the submission made by External Advisors ought to be accepted as it fulfils the exhaustive list of criteria set by different Tribunals. On the other hand, the CBFI's submission ought to be barred since it fails to meet the necessary considerations and unfairly prejudices the Respondent.*

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## MERITS

## III. WHETHER THE RESPONDENT HAS VIOLATED ARTICLE 9.9 OF THE CEPTA?

43. Article 9.9(1) of CEPTA contemplates both, FET standard along with the full protection and security standard to be accorded to the covered investments[115] under the broader ambit of '*minimum standard of treatment*'.[116] Paragraph (2) further lists down specific instances of measures constituting a breach of FET,[117] and in the absence of any specific reference to customary international law[118] it has ensured that the standard set is autonomous[119] which ought to be interpreted in accordance with its ordinary meaning as per Article 31 of VCLT.[120]

44. The Respondent submits that the parameters listed under Article 9.9(2) have not been violated as **(A)** there were no individual violations of the FET standard, **(B)** no representations were made to induce the investment which frustrated the legitimate expectations of the Claimant, **(C)** the Respondent has a right to regulate and **(D)** creeping violations of FET cannot be established.

### A. Respondent's measures have not individually violated the FET standard

45. It is submitted that the FET standard under Article 9.9 has not been violated since the Respondents measures, considered individually, have not **(1)** resulted in a denial of justice, **(2)** breach of due process and transparency, **(3)** arbitrary or discriminatory conduct, or **(4)** the abusive treatment of Claimant's investment.

#### *(1) Respondent has not caused denial of justice*

46. Article 9.9(2)(a) of CEPTA states that a measure will be considered as being violative of FET if it causes a denial of justice in civil, criminal or administrative proceedings.[121] It is submitted that the Respondent's conduct did not amount to denial of justice as **(a)** the Claimant was provided adequate access to legal recourse, **(b)** the high threshold of denial

[115] CEPTA, Article 9.9 (1), p. 76.
[116] Dolzer & Schreuer (2008), pp. 134-135.
[117] Dolzer & Stevens (1995), p. 60.
[118] Schreuer (2005), p. 374.
[119] *Enron* ¶ 258; *MTD* ¶¶ 110-11; *National Grid* ¶ 167.
[120] *Tecmed* ¶ 155.
[121] CEPTA, Article 9.9 (2)(a), p. 76.

of justice has not been met, **(c)** no undue delay can be established and (**d)** Mekari Courts have the discretion to recognise and enforce arbitral awards in consonance with its public policy objectives.

(a) Claimant was provided adequate access to legal recourse

47. A claim for denial of justice only persists when it has been established that justice was rendered in a seriously inadequate manner[122] which may be against the principles of a fair trial,[123] for instance the right to be heard.[124] Accordingly, to establish a claim for denial of justice, the procedure through which justice is administered has to be considered[125] and this cannot include a mere disagreement or dissatisfaction with the court's verdict.[126] In the present dispute, a proper and adequate hearing was given to Caeli's case and Justice VanDuzer declined to grant the injunction only on balance of convenience,[127] in accordance with the principles of fair trials. Due consideration was also given to the merits of Caeli's appeal before dismissing the same.[128] Therefore, the mere disagreement of the Claimant with the verdict cannot amount to a denial of justice.

48. Further, investment Tribunals have held that violation of the host State's domestic laws cannot amount to the breach of FET clause.[129] It is not for arbitration Tribunals to function as appellate bodies and correct errors of domestic law which may be committed by domestic regulators.[130] In the present dispute, even if the decisions of the Mekari Courts were based on a misapplication of the Mekari law, it is not for the present Tribunal to go into the correctness of the decision. Therefore, since the Claimant was provided an adequate opportunity for redressal before the Mekari Courts no denial of justice can be said to have occurred.

(b) The high threshold for denial of justice has not been met

49. Investment Tribunals have accepted the notion that the threshold for establishing denial of justice is extremely high.[131] It requires 'manifest injustice' to be demonstrated which

[122] *Azinian* ¶ 102.
[123] Dolzer & Schreuer (2008), p. 154.
[124] *Krederi* ¶ 184.
[125] Paulsson (2006), p. 7.
[126] *Iberdrola (I)* ¶ 491.
[127] Uncontested Facts, p. 38, ¶ 54, Lines 1328-29.
[128] *Id.* p. 38, ¶ 54, Lines 1330-34.
[129] *Parkerings* ¶ 315.
[130] *Bridgestone* ¶ 410.
[131] *Hesham* ¶ 620.

"*offends a sense of judicial propriety.*"[132] However, considering that Caeli's case was heard within the judicial timeline and deliberated on merits, such conduct cannot amount to manifest injustice, which breaches the high threshold of denial of justice.

(c) No undue delay can be established

50. A denial of justice can be said to occur if the courts subject the case to undue delay.[133] In *Oostergetel*[134] the Tribunal also considered factors such as complexity of case, behaviour of litigants, significance of interests at stake and the behaviour of courts themselves while dismissing the claim for denial of justice to have arisen after two years of delay. In the present dispute, the Respondent's judicial system was overburdened due to the rising population of Mekar which prompted Mekari courts to prioritise criminal matters over civil matters to prevent delayed detention of accused.[135] While Caeli's case was registered in March 2018 a hearing could not be scheduled before April 2019 owing to the large number of cases arising from the Mekari economic crisis.[136] Such alleged delay of merely thirteen months is not sufficient to constitute a denial of justice under FET standard.

(d) Mekari Courts have discretion to recognise and enforce arbitral award

51. Section 36(1)(e) of the Commercial Arbitration Act of Mekar,[137] which has been modelled after Article V(1)(e) of the New York Convention,[138] states that the host State may refuse the recognition and enforcement of the award which has been set aside at its seat. Therefore, the use of the term 'may' grants discretion to the host State where recognition and enforcement is sought. Additionally, section 36(2)(b) of the Commercial Arbitration Act[139] along Article V(2)(b) of New York Convention[140] states that the recognition and enforcement can be stayed if the award is contrary to public policy.[141] In accordance with this, national courts have previously chosen not to recognize the decision of a seat of arbitration when the decision was contrary to public policy.[142] Further, claims related to

[132] *Agility* ¶ 210.
[133] *Azinian* ¶102.
[134] *Oostergetel* ¶ 290.
[135] Uncontested Facts, p. 30, ¶ 13, Line 952.
[136] *Id*. p. 36, ¶ 44, Lines 1233-35.
[137] Annex XIV, Section 36 (1), Commercial Arbitration Act of Mekar, p. 65, Lines 2246-47.
[138] Article V (1)(e), New York Convention.
[139] Annex XIV, Section 36 (2)(b), Commercial Arbitration Act of Mekar, p. 65, Lines 2251-52.
[140] Article V (2)(b), New York Convention.
[141] Annex XIV, Section 36 (2)(b), Commercial Arbitration Act of Mekar, p. 65, Lines 2251-52.
[142] *Yukos/EWHC* ¶ 12.

corruption are usually required to meet a high evidentiary threshold owing to difficulty in proving such a claim.[143]

52. In the present dispute, it is submitted that the recognition and enforcement of the SCC award, set aside by the Supreme Arbitraz Court of Sinnograd,[144] by the High Commercial Court and Superior Court of Mekar[145] was well within their discretionary powers. The allegations of corruption were merely based on CILS report which constitutes circumstantial evidence,[146] whereas CILS is an organisation which received foreign donations to interfere with Mekar's public policy.[147] Therefore, the non-consideration of such circumstantial evidence by Mekari Courts in the interests of Mekari public policy was a valid exercise of its discretionary powers.

***(2) Respondent has not violated due process and transparency***

53. Article 9.9(2)(b) of the CEPTA provides that a measure violates FET if it constitutes a fundamental breach of due process, which includes a fundamental breach of transparency in judicial and administrative proceedings.[148] Thus, it is submitted that the Respondent **(a)** has not breached due process and **(b)** has conducted itself in a transparent manner.

(a) No fundamental breach of due process can be established

54. Similar to denial of justice, the breach of due process claim requires establishing an act which offends a sense of judicial proprietary.[149] Under the FET clause, violation of due process refers to a failure in ensuring a fair treatment to an investor while administering justice.[150] Whereas in the present dispute, proper norms were followed while handling Caeli's case and administering justice. As per Executive Order 5-2014[151], the court is empowered to summarily dismiss a case without appeal if the judge finds that there was little or no chance of success on merits.[152] Therefore, Justice VanDuzer's dismissal of Caeli's appeal on merits[153] was in accordance with rule of law and due process.

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[143] *Tethyan* ¶ 335.
[144] Uncontested Facts, p. 39, ¶ 61, Lines 1378-79.
[145] *Id.* pp. 39-40, ¶ 62, Lines 1384-88.
[146] Annex XII, p. 61, Lines 2070-80.
[147] Annex XIV, p. 66, ¶ 13, Line 2290.
[148] CEPTA, Article 9.9 (2)(b), p. 76.
[149] *Jorge* ¶ 358.
[150] Vandevelde (2010), p. 89.
[151] PO-3, p. 86, ¶ 8, Lines 3181-83.
[152] *Id*.
[153] Uncontested Facts, p. 38, ¶ 54, Lines 1330-34.

(b) Respondent's conduct was in conformity with the principles of transparency

55. Transparency, which is often considered as an element of the FET standard,[154] requires clarity regarding the legal regime of a State[155] and its conduct should be free from ambiguity so that the investor is aware of the prevailing laws and administrative policies.[156] The Respondent has acted in accordance with the domestic laws and all judicial processes initiated against Caeli were done in a completely transparent manner. The Mekari competition legislation was accessible and MRTP provides CCM with discretionary powers in initiating *suo moto* investigations.[157] Further, transparency was ensured in conduction of the investigations as Caeli was informed through CCM's press release as to the grounds of initiation of the investigation.[158] Thus, regulatory action was initiated in a transparent manner against Caeli and the Respondent could not have breached the FET obligation.

***(3) Respondent has not acted in an arbitrary or discriminatory manner***

56. Article 9.9(2)(c) of the CEPTA prohibits arbitrary or discriminatory conduct under the FET standard.[159] Utilisation of the word '*arbitrary*' and '*discriminatory*' indicate that the standard is twofold,[160] and hence it is submitted that there was **(a)** neither arbitrary **(b)** nor discriminatory conduct rendered by the Respondent.

(a) No arbitrary conduct can be established

57. Arbitrary conduct refers to any procedural irregularity that may have been present and would amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action.[161] In the present dispute, the initiation of investigation against Caeli was in accordance with Chapter III of the MRTP Act, which grants discretion to CCM.[162] Therefore, such initiation was in accordance with domestic law. The primary motive behind the initiation of this investigation was only to regulate the Mekari market and it cannot be considered as an action in bad faith. In fact, CCM had sufficiently informed Caeli of the

[154] *Silver Ridge* ¶ 413.
[155] Zoellner (2006), p. 584.
[156] *Tecmed* ¶ 154; *LG&E* ¶ 131; *Champion* ¶ 164.
[157] Annex V, p. 47, Line 1600.
[158] Uncontested Facts, p. 34, ¶ 36, Line 1149.
[159] CEPTA, Article 9.9 (2)(c), p. 76.
[160] Schreuer (2007), p. 1.
[161] *Genin* ¶ 371.
[162] Annex V, p. 47, Lines 1600-04.

possibility of antitrust investigations if it were to indulge in anti-competitive conduct by seeking an undertaking to that effect.[163] Therefore, CCM's actions cannot be considered arbitrary in nature.

(b) No discriminatory conduct can be established

58. A measure is said to be discriminatory when individuals or entities in like circumstances[164] are treated differently[165] without any reasonable justification.[166] Such conduct should shock or surprise a sense of juridical propriety.[167] However, in the present dispute, the denial of subsidies to Caeli under the Executive Order 9-2018[168] cannot be considered discriminatory as subsidies were denied to all entities with significant ownership by a foreign government.[169] Sufficient reasons were also provided for such denial as such entities have a unique advantage over privately-owned entities.[170] Therefore, this is not sufficient to breach the threshold of improper judicial propriety and the differentiation against Caeli was not based on the State's whims or irrationality.

***(4) Respondent has not rendered abusive treatment***

59. Article 9.9(2)(d) of CEPTA states that a measure resulting in the abusive treatment of investors by way of coercion, duress or harassment will also result in an FET violation.[171] Such abusive treatment is said to occur if unjustified measures are undertaken by the host State[172] or investigations are conducted in a grossly unfair manner,[173] in order to harass the investor.[174]

60. However, in the present dispute, it is submitted that no such unjustified measures were undertaken by the host State merely to harass the Claimant or cause economic duress. The initiation of CCM investigations was only in response to Caeli's anti-competitive

[163] Uncontested Facts, p. 32, ¶ 25, Lines 1046-49.
[164] *Nykomb* ¶ 145.
[165] *Lemire (II)-Jurisdiction* ¶ 261.
[166] *Saluka* ¶ 313.
[167] *ICJ/ELSI* ¶ 15.
[168] Uncontested Facts, p. 37, ¶ 47, Line 1266.
[169] *Id*.
[170] Uncontested Facts, p. 37, ¶ 46, Lines 1262-64.
[171] CEPTA, Article 9.9(2)(d), p. 76.
[172] *Tokios* ¶ 17.
[173] *Krederi* ¶ 638.
[174] *Ascom* ¶ 1092.

practices[175], in accordance with Mekar's anti-trust legislation.[176] Passing of the decree requiring denomination of airfare in MON was only in response to the Mekari currency crisis.[177] The denial of subsidies under Executive Order 9-2018 was not specifically targeted against Caeli considering that other State-owned airlines were also not granted subsidies.[178] Furthermore, the issue of credit line at an inflated interest rate was owing to Caeli's credit rating[179] and the grounding of Caeli's fleet was in accordance with passenger safety considerations.[180]

61. Additionally, Caeli's dire financial condition and its eventual sale were a result of the Claimant's own risky business decisions[181] and none of the Respondent's measures can be said to have harassed or coerced the Claimant in selling off its investment in Caeli. Therefore, the Claimant's investment was not treated in an abusive manner.

**B. No specific representations were made that created legitimate expectations**

62. Article 9.9(3) of CEPTA does not provide for a specific violation of legitimate expectations of the investor, but instead grants discretion upon the Tribunal to consider certain specific representations being made in order to induce the covered investment.[182] Thus, it refers to certain representations, assurances or commitments made to the investor[183] at the time of making the investment[184] upon which the investor places reliance for making the investment.[185] In the present dispute, marketing of core assets of Caeli at the time of bidding as well as the privileges at Phenac International Airport[186] do not in themselves constitute specific representations. It was Caeli's own anti-competitive practice of squeezing out concessions from Phenac which attracted the second CCM investigation.[187]

63. Furthermore, in absence of a specific representation, general change in a State's regulatory framework cannot be considered as a representation which would breach legitimate

[175] Uncontested Facts, p. 35, ¶ 34, Lines 1127-29.
[176] Annex V, p. 47, Lines 1600-02.
[177] Uncontested Facts, p. 35, ¶ 39, Lines 1188-90.
[178] *Id.* p. 37, ¶ 47, Line 1266.
[179] *Id.* p. 38, ¶ 51, Lines 1302-05.
[180] *Id.* p. 37, ¶ 48, Lines 1273-75.
[181] *Id.* p. 33, ¶ 29, Lines 1095-99.
[182] CEPTA, Article 9.9(3), p. 76.
[183] *Glencore* ¶ 1368.
[184] Schreuer & Kriebaum (2009), p. 2.
[185] *Thunderbird* ¶ 1.
[186] Uncontested Facts, p. 31, ¶ 21, Lines 1012-15.
[187] PO-3, p. 86, ¶ 7, Lines 3175-77.

expectations.[188] Thus, the general state of the regulatory framework prevailing in Mekar does not constitute specific representation. The Claimant cannot contend the breach of legitimate expectations on account of lack of stable or predictable regulatory framework. Therefore, it is submitted that no specific representations were made to induce the Claimant's investment in Caeli which created legitimate expectations and the Tribunal should not consider the same.

## C. Respondent has a right to regulate

64. Article 9.8 of CEPTA recognizes the State's right to regulate to protect 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*."[189]

65. Thus, it ensures that the State has an inherent right to protect its public interest.[190] Under customary international law, it is a sovereign right of a State which should be exercised in furtherance of public policy objectives[191] and in investment arbitration, it is considered as one of the State's powers.[192]

66. In the present dispute, the Respondent's conduct was in conformity with its reasonable right to regulate. The initiation of CCM investigations[193] and the imposition of airfare caps can be justified under Mekar's consumer welfare objective as non-regulation of the same would result in Caeli profiteering from its dominant position which would ultimately have a detrimental effect on consumers. Further, a State has discretion to not abide by the decision of the seat of arbitration[194] and Mekar's decision to not abide by the Supreme Arbitraz Court of Sinnograd's decision[195] can be justified under a State's right to regulate. Similarly, the passing of Executive Order 5-2014, allowing summary dismissal of cases was justified

[188] *Blusun* ¶ 367.
[189] CEPTA, Article 9.8, p. 76.
[190] *Quiborax* ¶ 202.
[191] Rajput (2018), p. 103.
[192] Mouyal (2018), p. 114.
[193] Uncontested Facts, pp. 34-35, ¶¶ 36, 38, Lines 1242-1243, 1176-1178
[194] *Yukos/EWHC* ¶ 12.
[195] Uncontested Facts, p. 39, ¶ 61, Line 1378.

in the interests of expediting court proceedings and alleviating backlog before the Mekari Courts.[196]

67. Additionally, the passing of the decree requiring denomination of goods and services in MON was justified on account of the ongoing currency crisis in Mekar to inspire investor confidence.[197] The denial of subsidies under Executive Order 9-2018[198] and the issue of credit line at an inflated interest rate[199] was a similar exercise of the State's discretion in allocating its economic resources. Such measures should be considered by the Tribunal in light of a State's legitimate public policy interest while undergoing an economic crisis.

68. Thus, while considering whether the Respondent's actions were in accordance with the FET standard, the Tribunal ought to take into account the Respondent's right to regulate.

**D. Respondent's measures have not cumulatively violated the FET standard**

69. Tribunal should not consider Respondent's measures cumulatively to construe a violation of Article 9.9. Creeping FET is a mere judicial creation in the case of *El Paso*[200] and there is a limited scope for applying it in respect of FET claims.[201] In *El Paso* the Tribunal drew a parallel with the claim of creeping expropriation[202] and also considered Article 15 of the ILC Articles on State Responsibility.[203] However, such consideration of a series of acts or omissions under Article 15 is misplaced[204] as it only refers to a consideration of composite acts in respect of internationally wrongful acts. SALMON has considered a composite act to include breaches which are characterised due to a systematic policy.[205]

70. However, in the present dispute it is submitted that the alleged measures undertaken by the Respondent were not in pursuance of a systematic plan or policy and were mere isolated acts taken by various organs of the government in exercise of their regulatory powers. Therefore, the present context does not attract the application of ILC Article 15.

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[196] Uncontested Facts, p. 30, ¶ 13, Lines 952-53.
[197] *Id.* p. 35, ¶ 39, Lines 1189-90.
[198] *Id.* p. 36, ¶ 46, Lines 1252-56.
[199] *Id.* p. 38, ¶ 51, Line 1302.
[200] *El Paso* ¶ 515.
[201] Vesel (2014), p. 554.
[202] *El Paso* ¶ 518.
[203] *El Paso* ¶ 516; Article 15, ARSIWA.
[204] Vesel (2014), p. 556.
[205] Salmon (2010), pp. 383, 391.

71. Furthermore, such a cumulative breach of FET has not been envisaged by the provisions of CEPTA itself and a mere usage of the phrase '*measure or measures*' under Article 9.9(2)[206] refers to multiple actions consisting of a single FET breach and not a cumulative breach amounting to creeping FET. Therefore, there is no legal basis for the consideration of creeping FET either under international law or under the provisions of CEPTA.

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*Thus, the Respondent's conduct can neither amount to individual nor cumulative breaches of the parameters provided under Article 9.9. Rather, the Respondent acted in accordance with its legal framework and public policy, while upholding its treaty obligations.*

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[206] CEPTA, Article 9.9 (2), p. 76.

## IV. IF THE RESPONDENT HAS VIOLATED ARTICLE 9.9 OF THE CEPTA, WHAT THEN BECOMES THE APPROPRIATE COMPENSATION STANDARD?

72. Compensation will be payable only if Article 9.9 of CEPTA is violated, however, in the present dispute the Respondent submits that **(A)** since there was no violation of Article 9.9, no compensation is payable. **(B)** ***ARGUENDO****, assuming but not admitting* that compensation is payable, it should be paid at MV and **(C)** a reduced compensation amount should be considered.

### A. No compensation is payable

73. Compensation is not payable when a State acts in normal exercise of its regulatory powers and ensures a non-discriminatory conduct.[207] Thus, compensation cannot be awarded when obligations under the Treaty have not been violated and a State can only be made liable for its wrongful acts.[208] In lieu of the submissions made under the third issue, the Respondent has acted in compliance with Article 9.9 of CEPTA and regulatory action initiated has been in consonance with established legal practices. Accordingly, no compensation is payable.

74. Moreover, the Tribunal should consider that Respondent has already paid USD 400 million for purchasing Claimant's investment in Caeli[209] and no further compensation should be required to be paid by the Respondent.

### *B. ARGUENDO*: Compensation should be paid at MV

75. *Assuming but not admitting* that the Tribunal finds that compensation has to be paid, this should be done as per MV as opposed to the FMV standard. When parties have chosen a specific law to govern them, the intention of the parties should be given precedence by the Tribunal. [210] In the present dispute, the MV standard has been agreed to between the parties under Article 9.21(1)(a) of CEPTA[211] and this should not be derogated from.

76. MV has been defined as the estimated amount at which an asset or liability should exchange on a valuation date between a willing buyer and seller and where the parties had each acted

[207] *Saluka* ¶ 255.
[208] *FREIF* ¶ 666.
[209] Uncontested Facts, p. 40, ¶ 63, Line 1390.
[210] *Archer* ¶ 74.
[211] CEPTA, Article 9.21(1)(a), p. 82.

knowledgeably, prudently and without compulsion.[212] In the present dispute, it refers to the USD 400 million purchase price paid by the Respondent to the Claimant on October 08, 2020.[213]

77. On the other hand, FMV refers to the monetary equivalent of a price at which a hypothetical buyer and seller engage in a transaction, in an open and unrestricted market.[214] The Claimant is making an outrageously inflated claim of USD 1.1 billion, to be the FMV of the investment.[215] However, this will unnecessarily burden the Respondent and travel beyond the provisions of CEPTA wherein MV standard was given precedence.

78. Thus, MV is the more appropriate standard as **(1)** Claimant cannot import a more favourable treatment using MFN and **(2)** international law principles will not be applicable.

***(1) Compensation does not fall within the purview of MFN under CEPTA***

79. The Claimant seeks to import the FMV standard of compensation under Article 13 of the Arrakis-Mekar BIT[216] to the present dispute. However, the Respondent submits that 'compensation' does not fall within the purview of Article 9.7 of CEPTA containing the MFN principle[217] as **(a)** it does not conform with the limited list of treatments under paragraph (1) and **(b)** it constitutes a dispute resolution procedure, hence barred by paragraph (2). **(c)** ***ARGUENDO,*** *assuming but not admitting* that compensation is a substantive obligation, such obligations cannot be imported.

(a) Compensation is not covered under the limited list of Article 9.7(1)

80. Tribunals have held that only when an MFN clause includes phrases such as '*all matters*', would the MFN clause have a broad scope.[218] Otherwise, MFN clauses have a narrower scope and apply only to particular types of 'treatment'.[219] Article 9.7(1) of CEPTA provides a limited list of treatments such as the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of an investment.[220] Therefore, since compensation has not been expressly covered under the

[212] IVSC (2016), ¶ 30.1.
[213] Uncontested Facts, p. 40, ¶ 63, Line 1390.
[214] ASA (2001), p. 4; *El Paso* ¶ 702; *Sempra* ¶ 405.
[215] PO-4, p. 89, ¶ 3, Lines 3276-77.
[216] Arrakis – Mekar BIT 2006, Article 13, p. 84, Line 3092.
[217] CEPTA, Article 9.7, p. 76.
[218] *Daimler* ¶ 236.
[219] *ICS (I)* ¶ 299.
[220] CEPTA, Article 9.7, p. 76, Lines 2713-14.

purview of this limited list, it cannot be considered a 'treatment' as per the MFN clause under CEPTA.

(b) Compensation being a dispute resolution procedure is excluded by Article 9.7(2)

81. MFN clauses often include express exceptions to their applicability.[221] Similarly, Article 9.7(2) of CEPTA excludes the applicability of MFN to procedures for resolution of investment disputes.[222] It is submitted that the payment of compensation under Article 9.21 will only occur when the Tribunal makes a final award against the Respondent,[223] which is essentially a dispute resolution procedure. Additionally, 'Section E' of CEPTA makes an express reference to 'Settlement of Disputes'[224] thus indicating that the provisions contained in this part will constitute dispute resolution procedures. Therefore, 'compensation', being a dispute resolution procedure, has been excluded from the ambit of Article 9.7.

(c) ***ARGUENDO***: Compensation as a substantive obligation cannot be imported

82. *Assuming but not admitting* that compensation is a substantive obligation, as opposed to a dispute settlement procedure, the Tribunal should not allow the MV standard to be imported from Arrakis-Mekar BIT. In *İçkale*[225] the Tribunal held that substantive obligations cannot be imported through MFN clauses. Further, Article 9.7(2) expressly excludes substantive obligations in other investment treaties from the ambit of '*treatment*' absent measures adopted or maintained by parties.[226] However, it is submitted that in the present dispute, no such additional measures were adopted or maintained by the parties. Thus, even if compensation were considered as a substantive obligation, the same does not constitute a '*treatment*' within the ambit of Article 9.7.

***(2) International law principles will not be applicable***

83. In the words of *LAUTERPACHT,* gaps in international law arise when there is no clear rule in existence and in such instances international law principles can be considered as gap filling provisions.[227] Tribunals have given importance to the law chosen by parties and additional

[221] Article II, Turkey- Uzbekistan BIT (1992).
[222] CEPTA, Article 9.7 (2), p. 76, Lines 2715-17.
[223] *Id*. Article 9.21, p. 82, Lines 3017-21.
[224] *Id*. Section E, p. 79, Line 2853.
[225] *İçkale* ¶ 332.
[226] CEPTA, Article 9.7 (2), p. 76, Lines 2717-20.
[227] Burke (2013), p. 93.

principles are only applied to fill gaps in the chosen law.[228] The CEPTA already lays down MV as the appropriate standard of compensation under Article 9.21. Since the parties have agreed to the same under CEPTA, principles of international law cannot be applied for the determination of compensation.

## C. Reduced compensation amount should be considered

84. In the event that the Tribunal awards compensation, a reduced amount should be considered due to **(1)** the Claimant's negligent conduct and **(2)** the existence of certain mitigating factors.

### *(1) Respondent's contributory fault should be taken into account*

85. Tribunals have often considered the contributory fault of the investor to reduce the compensation amount.[229] This includes such instances where the investor's business decisions have led to losses regardless of the treatment provided by the host State.[230] Thus, a cause and effect relationship is established in claims of contributory fault.[231] In the present dispute, Caeli's risky business model resulted in its eventual losses. Therefore, it is submitted that the Tribunal ought to consider a reduced compensation amount as **(a)** Claimant's conduct was negligent and **(b)** such conduct directly led to the alleged damage.

(a) Claimant's conduct was negligent

86. Contributory fault is considered when the investor, through its negligent conduct such as bad business decisions,[232] increased the risks associated with the transaction[233] and that the investor was already aware about such risks at the time.[234] In the present dispute, the Claimant itself was at fault for having acted negligently while adopting its expansionist policies.[235] They were repeatedly cautioned by representatives of Mekar Airservices concerning the volatility of demand in the region,[236] however the Claimant deliberately

[228] *Vedanta* ¶ 156.
[229] *Copper* ¶¶ 6.100-6.102.
[230] *MTD* ¶ 242.
[231] Miles & Weiss (2021), p. 95.
[232] *Waste Management* ¶ 177; *Maffezini* ¶ 64.
[233] *MTD* ¶ 242.
[234] *MTD* ¶ 245; *Alex* ¶ 345.
[235] Uncontested Facts, p. 33, ¶ 31, Line 1108.
[236] *Id.* p. 33, ¶ 29, Line 1097.

chose to ignore such warnings and decided to increase the number of international routes.[237] This manifests a lack of due care and reflects negligence on behalf of the Claimant.

(b) Claimant's negligent conduct directly caused damage

87. In order to determine whether the Claimant's action directly resulted in damage, it has to be established whether the contribution was material or significant and whether the injury caused on account of the measures adopted by the host State would still have occurred in the absence of the investor's conduct.[238] This purports a causal link to be established[239] between the injury suffered and the wrongful act[240] and Tribunals have often referred to the '*but for*' test in determining compensation for the same.[241]

88. In the present dispute, financial losses faced by Caeli and the eventual need for the Claimant to sell off its investment would not have arisen, but for the Claimant's negligence in the adoption of its risky business model. In fact, various business analysts were of the opinion that there was a need to cut back on Caeli's expansive business model[242] and that Caeli's downfall can be attributed to the Claimant's risky business practices.[243] Thus, a causal link has been established between the Claimant's bad business decisions and the eventual dire financial conditions of Caeli.

***(2) State's mitigating factors should be considered***

89. Tribunals have often considered the impact of an economic crisis while determining the quantum of compensation.[244] For instance, in *Sempra*[245] the Tribunal recognised that Argentina was evidently going through an economic crisis and held that the effect of the economic crisis should be factored in for the valuation of compensation.

90. In the present dispute, the Respondent was facing a deteriorating economic situation, with a persistent negative compression due to its falling GDP and inflation.[246] Additionally, there was also an ongoing currency crisis in Mekar.[247] A shift to the FMV standard would

[237] Uncontested Facts, p. 33, ¶ 31, Line 1108.
[238] *Occidental (II)* ¶ 669.
[239] *Yukos Universal* ¶ 1596.
[240] Sadowski (2014), p 1.
[241] *Lemire (II)* ¶ 152.
[242] Uncontested Facts, p. 33, ¶ 33, Line 1125.
[243] *Id*. p. 38, ¶ 53, Line 1320.
[244] *Enron* ¶ 232; *National Grid* ¶ 274.
[245] *Sempra* ¶ 417.
[246] PO-3, p. 86, ¶ 4, Lines 3161-62.
[247] Uncontested Facts, p. 35, ¶ 39, Line 1187.

require Respondent to pay USD 700 million, an amount twice its consolidated annual public spending.[248] In light of the same, it is submitted that the Tribunal should factor in the economic burden faced by the Respondent in the payment of compensation and accordingly a reduced amount should be considered.

91. Thus, the Claimant has contributed to the alleged damage in a significant manner and mitigating factors should be weighed in for the calculation of compensation amount. If the Tribunal were to find that compensation is payable, the amount should be appropriately reduced. As a result, the MV standard would be more appropriate as opposed to the FMV standard which elicits an amplified compensation amount that would greatly prejudice the Respondent.

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*Thus, the Respondent has not violated Article 9.9 and no compensation is payable. Even if compensation is awarded by the Tribunal, MV is the appropriate standard, as already agreed to between the parties. Further, the Claimant's negligent conduct which contributed to Caeli's dire financial condition as well as the ongoing economic crisis in Mekar has to be taken into consideration.*

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[248] PO-3, p. 86, ¶ 4, Lines 3163-65.

## PRAYER FOR RELIEF

In light of the above submissions, the Respondent respectfully requests the Tribunal to:

a. Find that the Tribunal lacks jurisdiction over this dispute under Chapter 9 of CEPTA;

b. Grant leave for filing of non-disputing party submission from External Advisors to CRPU;

c. Deny leave for filing of non-disputing party submission from CBFI;

d. Find that the Respondent has neither individually nor cumulatively violated its FET obligation under Article 9.9 of CEPTA;

e. Find that the MV standard will be the appropriate standard of compensation if violation is found;

f. Order the reimbursement of all costs and expenses associated with the arbitration.

Submitted on September 23, 2021

By Team Kirsch

On behalf of Federal Republic of Mekar