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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FAILITY) RULES

In the proceeding

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

VEMMA HOLDINGS INC.

(Claimant)

versus

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

MEMORIAL FOR RESPONDENT

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TABLE OF ABBREVIATIONS

Abbreviation	Full citation
BIT/BITs	Bilateral Investment Treaty/Bilateral Investment Treaties
Bonooru	Commonwealth of Bonooru
BPB	PJSC Bonoorian People's Bank
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CRPU	Committee on Reform of Public Utilities
Facts	Statement of Uncontested Facts
Id.	Ibidem (immediately proceeding cited authority)
IIT	International Investment Treaty
ISDS	Investor-State Dispute Settlement
Mekar	Federal Republic of Mekar
No.	Number
p./pp.	Page/Pages
para.	Paragraph
PO3	Procedural Order No. 3.
PO4	Procedural Order No. 4.
SOE/SOEs	State-owned enterprise/State-owned enterprises
Vemma	Vemma Holdings Inc.
1994 BIT	1994 Bonooru – Mekar BIT

LIST OF AUTHORITIES

BOOKS, JOURNAL ARTICLES

Abbreviation	Full citation
Alberro	José Alberro: Estimating Damages Using DCF: From Free Cash Flow to the Firm to Free Cash Flow to Equity (and back; ICSID Review, Vol. 30, No. 3 (2015), pp. 689–698
Beharry	Christina L. Beharry, Contemporary and Emerging Issues on the Law of Damages and Valuation
Blyschak	Paul Blyschak, State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection, 6 J. INT'l L & INT'l REL. 1 (2011).
Broches	A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 135 Hague Rec. d. Cours 331, at 354–5 (1972).
Born-Forest	Garry Born and Stephanie Forrest, Amicus Curiae Participation in Investment Arbitration, ICSID review Vol 34. Pp 626-665
Douglas	Zachary Douglas. 2009. The International Law of Investment Claims. Cambridge: Cambridge University Press.
Estefanía	Ms Estefanía Ponce-Durán: Proportionality in FET. Proportionality in FET (jusmundi.com)
Feldman	Feldman, Mark, State-Owned Enterprises as Claimants in International Investment Arbitration (February 1, 2016). ICSID Review Foreign Investment Law Journal Vol. 31, Issue 1, 2016
Gazzini	Tarcisio Gazzini. 2016 Interpretation of International Investment Treaties. Oxford: Hart Publishing, 2016
International Investment Law	Bungenberg, Griebel, Hobe & Reinisch, International Investment Law (2015)
Newcombe-Lemaire	Andrew Newcombe and Axelle Lemaire, Should Amici Curiae Participate in Investment Treaty Arbitrations?, 5 VINDOBONA J. INT'L L. & ARB. 22 (2001).
Paulsson	Jan Paulsson, Arbitration Without Privity, in Thomas W. Wälde (ed.), The Energy Charter Treaty: An East-West Gateway for Investment and Trade (Kluwer, 1996).
Schreuer	Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair. 2009. The ICSID Convention: A Commentary (2nd edition). Cambridge: Cambridge University Press.

Sornarajah	M. Sornarajah, The International Law on Foreign Investment, Second Edition (2004)
Speranda	Ivo Speranda, Firm Valuation-New Methodological Approach, Economic Research, Vol. 25 (3)
Wälde and Sabahi	Thomas W. Wälde and Borzu Sabahi, Compensation, Damages, and Valuation, The Oxford Handbook of International Investment Law, 2012

OTHER SOURCES

Abbreviation	**Full citation**
ECB Statistics	European Central Bank, Statistics Paper Series (No.4, December 2013), Valuation of Foreign Direct Investment Positions, Final Report
International Glossary for Business Valuation Terms	International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6, 2001,
OECD Guidelines	OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition

JUDGEMENTS AND AWARDS

Abbreviation	**Full citation**
AdT	Aguas del Tunari, S.A. v. Republic of Bolivia, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 2005
Apotex	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1
Bear Creek	Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21
Biwater	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, award, ICSID Case No. ARB/05/22, 2008

BUCG	Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, Decision on Jurisdiction, ICSID Case No. ARB/14/30, 2017
Burlington Resources	
CMS	CMS Gas Transmission Company v. The Republic of Argentina, award, ICSID Case No. ARB/01/8, 2005
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/4, 1999
EDF	EDF (Services) Limited v. Romania, award, ICSID Case No. ARB/05/13, 2009
Electrabel	Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19
Enron	Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, award, ICSID Case No. ARB/01/3, 2007
Frontier	Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award
International Thunderbird Gaming	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL
Jan de Nul	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13
Maffezini	Emilio Agustín Maffezini v. The Kingdom of Spain, Decision of the Tribunal on Objections to Jurisdiction ICSID Case No. ARB/97/7, 2000
Methanex	Methanex Corporation v. United States of America, UNCITRAL (1999)
Micula	Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20
National Grid	National Grid plc v. The Argentine Republic, UNCITRAL
Pacific Rim	Pacific Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12
Philip Morris	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7
Salini	Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction, 2001

Saluka	Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006,
Sempra Energy	Sempra Energy International v. The Argentine Republic, jurisdiction, ICSID Case No. ARB/02/16, 2007
Toto	Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12
UPS	United Parcel Service of America, Inc. (UPS) v. Government of Canada, ICSID Case No. UNCT/02/1
Vacuum Salt	Vacuum Salt Products Ltd. v. Republic of Ghana, award, ICSID Case No. ARB/92/1, 1994

INTERNATIONAL TREATIES, RULES AND OTHER SOURCES

Abbreviation	**Full citation**
China-Mexico BIT	Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments
Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and National of other States
ILC Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001
Japan-Korea-China Tilateral Agreement	Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation, and Protection of Investment
USA-Korea FTA	USA-Korea Free Trade Agreement
China-Mexico BIT	Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments

STATEMENT OF FACTS

Parties to the dispute

Vemma Holding Inc., the 'Claimant', a Bonoori enterprise that invested in Caeli Airways and and turned it into a profitable airline.

The Federal Republic of Mekar, the 'Respondent'. The Caeli Airways is in its territory.

Timeline of the events that led to the present dispute

1. **In 2008** Bonooru's move towards decentralisation has propelled it as the dominant capital exporter in Greater Narnia.

2. **In 2010** Bonooru's government launched the Caspian Project. Bonooru plans to spend an estimated 100 Billion BAK between 2010 and 2030.

3. Bonooru is an archipelagic State comprising 109 islands, of which only four are 'major islands' spanning over 5000 square kilometres. Due to the disparate nature of Bonooru's geography, its major public facilities such as healthcare and educational institutions are concentrated on these 'major islands'.

4. **On 29 March 2011** Claimant purchased an 85% stake in Caeli Airways.

5. **On 28 October 2011** Claimant received the first subsidy under the "Horizon 2020" Scheme

6. **In April 2014,** Mekar and Bonooru signed the CEPTA.

7. **In June 2014,** crashing oil prices boosted Caeli Airways.

8. **At the end of 2015**, Claimant injected its income into new aircrafts despite its existing outstanding depts.

9. **On 9 September 2016** the CCM launched a suo moto investigation into Caeli Airways' activities.

10. **In 2016** interim airfare caps are placed on Caeli Airways by the CCM.

11. **In March 2017** a currency crisis ensued in Mekar.

12. **In July 2017** Caeli Airways was unable to secure a steady stream of revenue.

13. **In 2018** Caeli Airways requested the CCM to remove the interim airfare caps. Meanwhile, the increasing oil prices left Caeli Airways in a state of deeper financial distress.

14. **On 25 September 2018** the President of Mekar passed Executive Order 9-2018, granting subsidies to airlines for each Mekari citizen travelling on board. Caeli Airways' application for subsidies under this Order was rejected.

15. **On 17 October 2018** Mekar's deputy Minister of Transportation rationalised the denial of subsidies from Caeli Airways

16. **On 25 April 2019** Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps.

17. **On 8 June 2019**, Aviation Analytics uploaded a corrected version of its article of 7 June on its website, which clarified that Vemma had reached a "peak valuation of USD 1.1 Billion".

18. **On 15 June 2019**, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them and deciding on the merits of the case without submissions from the Caeli Ariways.

19. **On 8 October 2020**, Vemma sold its stake in Caeli to Mekar Airservices for 400 million USD.

20. **From 2 March 2021,** Bonooru restructured Vemma and increased its ownership in it.

SUMMARY OF ARGUMENTS

Phase I

1. **Issue 1:** Claimant was acting as an agent for the Bonoori government and was discharging essentially governmental functions, therefore it does not have standing under Art. 2 of the Facility Rules. Moreover, Bonooru and Mekar had the intention to bar the standing of SOEs like Claimant when drafting the CEPTA. Therefore, Claimant does not have standing in the present dispute and thus the Tribunal does not have jurisdiction.
2. **Issue 2**: The External advisors to the CRPU are honorable amici intent upon assisting the tribunal, regarding certain issues in Mekar, and therefore submitted their submission within the boundaries the ICSID convention allows them to. The CFBI should not be considered an honorable amicus because it is nor independent nor provides a different opinion to those of claimant.

Phase II

3. **Issue 3:** Respondent did not breach Article 9.9 of the CEPTA. Respondent did not act arbitrarily when it launched its investigation against Caeli Airways and did not deny subsidies from Caeli Airways arbitrarily. Respondent did not deny Justice from Caeli Airways and did not make a specific representation towards Claimant in order to induce investment.
4. **Issue 4:** Respondent has not violated the CEPTA it owes no compensation. Even if the Tribunal were to find an FET violation, the "market value" standard is applicable as a compensation standard. Respondent already paid the "market value" price of Claimant's investment by purchasing its shares. Furthermore, any compensation awarded to Claimant should be reduced because of the precarious approach of Claimant and the dire economic situation in Mekar.

ARGUMENTS

Phase I

I. The Tribunal has no jurisdiction in the present dispute

5. Vemma (the 'Claimant') invested in Caeli Airways, which is in the territory of Mekar (the 'Respondent'). Claimant has always had strong connections with Bonooru because, according to our submission, it was discharging essentially governmental functions and was acting as an agent for the Bonoori government. Bonooru's control over Claimant was even stronger at the time of the submission of its claims as Bonooru got a 55% of shares in Vemma and restructured the enterprise to perform more governmental activities.
6. Claimant has submitted its NoA pursuant to Art. 9.16 of the CEPTA and Art. 2 of the Facility Rules[1].
7. Respondent submits that the Tribunal cannot adjudicate in the present dispute as Claimant does not have standing under Art. 2 of the Facility Rules **(A)** nor under Chapter 9 of the CEPTA **(B)**.

A. Claimant does not have standing under Art. 2 of the Facility Rules

8. Claimant has submitted its claim under the Facility Rules. Simultaneously, the submission of the claim to arbitration shall satisfy the requirements of Chapter II of the ICSID Convention[2.]
9. When question of jurisdiction arises before an ICSID forum, it shall be considered that one of the expressed purposes of the ICSID Convention was to depoliticize investment disputes.[3] This approach shall be considered when analyzing the political objects of Bonooru.
10. The jurisdictional requirement of Art. 25 of the ICSID Convention is a dispute between "a Contracting State… and a national of another Contracting State". Art. 2 of the Facility Rules requires a proceeding "between a State… and a national of another State".

[1] NoA, p. 2
[2] CEPTA, Art. 9.17, para. 2. (a)
[3] Schreuer, Art. 25, para. 270

11. The Salini tribunal provided a definition for SOE, according to which "[generally], *any commercial company dominated or predominantly controlled by the State… is considered to be a State-owned company*."[4] However, this definition is not used as a test by tribunals. To determine whether any enterprise has standing under Art. 25 of the ICSID Convention, the Broches test is applicable[5], including a structural and a functional test. These two elements of the Broches test are developed in more detail.[6]
12. the Broches test is applicable under the Facility Rules as well because the same question is addressed as under the ICSID Convention, namely whether a given enterprise qualifies as a "*national of another State*" or not.
13. The Broches test, made by Aron Broches, the first Secretary-General of ICSID and one of the principal drafters of the ICSID Convention, provides that

> *"[for] purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'National of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."*[7]

14. The Broches test captures not only the government-owned, but the mixed economy enterprises too. It also shows that the decisive question is not whether an enterprise can be considered an SOE or not, but whether it was acting "*as an agent for the government*" or was "*discharging an essentially governmental function*". Furthermore, it resembles Art 5 and 8 of the ILC Draft Articles. Therefore, when applying the test, factors such as the "ownership, control, the nature, purposes and objectives of the entity"[8] shall be examined at the same time, as it was concluded by tribunals[9]. These factors can be analyzed simultaneously[10] and "*must be viewed in [their] own particular context, on the basis of all of the facts and circumstances*"[11]. Moreover, to establish the existence of a governmental control over an enterprise, the mere power to control is enough, the actual exercise of control is not necessary.[12]
15. Therefore, Respondent submits that Claimant does not have standing under Art. 2 of the Facility Rules, because it was acting as an agent for the Bonoori government **(1)** and it was discharging an essentially governmental function **(2)**.

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[4] para. 31.
[5] CSOB, para. 17.; BUCG, para. 33; Maffezini, para. 79.
[6] Salini, para. 31.; EDF, para. 198.
[7] A. Broches
[8] Maffezini, para. 76
[9] Id.; BUCG, para. 38.
[10] EDF, paras. 191-198.
[11] Vacuum Salt, para. 43.
[12] AdT, para. 227.

1. Claimant was acting as an agent for the Bonoori government

16. The meaning of "acting as an agent for the government" is determined by Art. 8 of the ILC Draft Articles. According to Art. 8 of the ILC Draft Articles

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

17. The Commentary further adds that where there is an evidence that "*the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result*", the conduct in question is attributable to the State.[13]
18. The International Thunderbird Gaming tribunal found a Factsficient *de facto* control despite a 50% ownership[14]. The tribunal further added that it is common to exercise control without owning majority voting rights in shareholders meeting. Control can be achieved, amongst others, "*by access to supplies, access to markets, [and] access to capital*".[15]
19. Accordingly, Respondent submits that Claimant was acting under the direction and control of Bonooru pursuing particular results.
20. On 10 November 1980, at the time of the privatization of Bonooru Air, the Prime Minister of Bonooru declared that they intended to "*maintain a significant interest*" in Bonooru Air's successor, which is the Claimant itself.[16] Claimant is the owner of Bonooru's flag carrier.[17] After realizing its investment, Claimant refinanced the remainder debt liability of Caeli Airways at more favourable rates than available on the market through BPB, a nationalised bank in Bonooru[18]. Since its incorporation, Bonooru's shares in Vemma ranged between 31% to 38%.[19] Additionally, no other shareholder holds more than a 7% stake in Vemma.[20] Moreover, for some meetings, Bonooru's representatives could pass decisions on their own when some other shareholders did not attend due to the ownership

[13] para. (6)
[14] para. 107.
[15] para. 108.
[16] Facts, p. 29, para. 8.
[17] Id., para. 9.
[18] Id., p. 31, para. 23 and p. 33, para. 30.
[19] Id., para. 10.
[20] PO4, p. 89, para 2.

and voting structure of Vemma[21]. Beginning from the 28 October 2011, Claimant received subsidies from Bonooru under the "Horizon 2020" Scheme.[22] Ms. Sabrina Blue, erstwhile head of Vemma's board of directors and current Secretary of Transport and Tourism of Bonooru, stated that these subsidies "*will offer substantial benefits not only to Vemma but to all of Bonnooru… This will boost the tourism infrastructure at our disposal*."[23] On 8 January 2019, after CCM concluded that Caeli had engaged in anti-competitive behaviour, Bonooru withdrew the part of the USD 30 Billion fund which was deployed to update Mekar's port and the Phenac International Airport, the base of Claimant's investment.[24] On 2 March 2021, after Claimant had sold its stakes to Mekar Airservices, Bonooru increased its shareholding in Vemma to 55%, its board of directors was replaced with governmental functionaries, its functions were expanded to paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department.[25]

21. Hence, the fact that Claimant was acting under the control of Bonooru and therefore was acting as an agent of Bonooru can be established with regard to three aspects.

22. First, the ownership of Bonooru was high enough in Vemma to pass certain decisions as the Bonoori representatives could form a majority. At the same time, the dominance of any other shareholder was very low as no one owned more than 7% stake. Moreover, since Vemma is the owner of Bonooru's flag carrier, Bonooru has clear interest in Vemma's financing. At present time, there is more evidence as for the governmental control since the governmental ownership has increased and Vemma is performing governmental functions with lawyers from the department of justice on board. Thus, even if the Tribunal were to find that Claimant was not an enterprise to be barred under the Facility Rules before selling Caeli Airways, at the time of the submission of its claims Claimant cannot have standing due to the heavily increased governmental control.

23. Second, Bonooru supplyed Claimant and injected capital into it through subsidies under the "Horizon 2020" Scheme, favourable credits by BPB, and a part of the USD 30 Billion fund which was deployed to the base of Claimant's investment. These leverages were able to maintain governmental control over Claimant, especially because only after receiving

[21] PO3, p. 86, para. 3.
[22] Facts., p. 32, para. 28.
[23] Id., p. 33, para. 28.
[24] PO4, p. 89, para. 1.
[25] Id., p. 40, para. 65.

the subsidies under the "Horizon 2020" Scheme could Claimant start being a profitable company and refinance its inherited debt liability from BPB. [26]

24. Third, considering the statements of the Bonoori Prime Minister from 1980 and of Ms. Sabrina Blue in terms of the subsidies under the "Horizon 2020" Scheme, Bonooru had the clear purpose to maintain control over Claimant. Ms. Sabrina Blue also uncovered that the particular result that Bonooru sought to achieve was a boosted Bonoori tourism infrastructure. Furthermore, the intention of Bonooru to assert its own interest through the USD 30 Billion fund became obvious by the fact that it withdrew its funding after learning the unfavourable result of the CCM's investigations.
25. Therefore, Respondent submits that Claimant was acting under the direction and control of the Bonoori government and thus was acting as an agent for Bonooru.

2. Claimant was discharging essentially governmental functions

26. As it was held by the Maffezini tribunal, when determining whether an enterprise was discharging an essentially governmental function, the purpose and the nature of its activities shall be examined.[27] This approach, which was followed by the Salini tribunal as well[28], is in line with Article 5 of the ILC Draft Articles, which shares obvious parallels with the "essentially governmental function" limb of the Broches test.[29] According to the Commentary of Article 5 of the Draft Articles, the purpose of the delegation of governmental functions is of "particular importance".[30] Another crucial aspect is whether the Claimant's activities were commercial in nature or not[31].
27. Claimant may argue that based on the CSOB decision only the purpose of Claimant's activities shall be considered. However, the CSOB decision was not completely persuasive[32]. First, the tribunal failed to recognize that the "government agent" test and the "essentially governmental function" test are conceptually distinct components of the Broches test.[33] Second, there was unreasonably more focus on the "essentially governmental function" test, which can be due to the lack of distinction between the two

[26] Facts, p. 33. paras. 29-33.
[27] Maffezini, para. 76.
[28] para. 31.
[29] Feldman, p. 33
[30] para (6)
[31] CSOB, para. 20.; BUCG, para. 35.
[32] Blyschak, p. 34; Feldman, p. 34
[33] CSOB, para 20 -21.

branches of the Broches test. Third, the relevance of 'purpose' in terms of the activities of SOEs was dismissed, however arguing that CSOB's purpose was the disconnection from the Czech state would have been valid. Fourth, the Tribunal cited no authority in support of its decision to exclude consideration of the SOE's purposes and did not address the customary international law attribution rule reflected in Article 5 of the ILC Draft Articles. In conclusion, the analysis of the purpose of the activities is the most likely to result a fair and reasonable outcome.[34]

28. As it was concluded in the Burlington Resources case, a tribunal should depart from the approach of a previous tribunal in case of "compelling contrary grounds"[35] The decision of the CSOB tribunal is one to be departed from. Instead, the approach of the Maffezini tribunal[36] shall be followed which deals with the purpose of the entity's actions and therefore can produce a fairer and more reasonable outcome.

29. Bonooru granted subsidies to Claimant under the "Horizon 2020" Scheme so that, as Ms. Sabrina Blue stated, "*Caeli Airways would draw more travellers from Mekar… to [Bonooru]*".[37] According to a former high-ranking employee within Bonooru's Ministry of Tourism, Ms. Kasumi, "*significant resources [were] put into flights between Mekar and Bonooru*", which is "*not profitable for Caeli Airways*", and "*seem to more benefit Bonooru than Vemma or Caeli*".[38] In a press conference in 2016 Ms Sabrina Blue lauded Claimant's

> *"contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of [the Bonoori] population… [Claimant] has certainly lived up to the standards set by its predecessor in Bonooru",*[39]

which was a purely government-owned airline.

30. Thus, the statements of Ms. Sabrina Blue show the purpose of Claimant to discharge essentially governmental functions, namely to draw Mekari travellers to Bonooru to enhance the Bonoori tourism infrastructure. Ms. Sabrina Blue also underlined that Claimant had managed to execute these governmental expectations. These activities can be considered governmental in nature, and not commercial, because their only beneficiary was Bonooru, and for the Claimant's investment it was not even profitable.

31. Therefore, Respondent submits that Claimant was discharging essentially governmental functions and consequently has no standing under Art. 2 of the Facility Rules.

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[34] Feldman, p. 32-33
[35] Burlington Resources, para. 99-100.
[36] para. 76.
[37] Facts, p. 32, para. 28.
[38] Annex VII, p. 55
[39] PO4, p. 89, para. 6.

B. Claimant does not have standing under Chapter 9 of the CEPTA

32. Even if the Tribunal were to find that Claimant has standing under Art. 2 of the Facility Rules, the Parties had the intention to bar standing of SOEs like Claimant.
33. The Salini tribunal provided a definition in respect of SOEs, according to which "[generally], *any commercial company dominated or predominantly controlled by the State… is considered to be a State-owned company*."[40] However, this definition was later not used as a test, like the Broches test, to determine whether an SOE can have standing or not. According to a definition given by the OECD, every enterprise qualifies as an SOE "*in which the state exercises ownership*"[41]. Regarding the level of control that Bonooru exercised over Claimant, especially at the time of the submission of its claims,, Claimant clearly qualifies as an SOE under both defintions.
34. The 'investor' definition of Art. 9.1 of the CEPTA is silent in respect of the standing of SOEs. Thus, by applying the literal interpretation of the CEPTA, the intention of the drafters remains vague.
35. According to Art. 31 of the VCLT a "*treaty shall be interpreted… in [its] context and in the light of its object and purpose*." Art. 32 Further adds that a treaty can be interpreted together with the "*circumstances of its conclusion*" to determine the meaning resulting from Art. 31.
36. Respondent submits that considering the context, object and purpose of the CEPTA together with the circumstances of its conclusion, Bonooru and Mekar had the intention to bar standing of SOEs like Claimant.
37. As for the object and purpose of the CEPTA, it is important to note that IITs which are not addressing the issue of the standing of SOEs, are originally not designed with SOEs in mind.[42] Furthermore, IITs, just like the ICSID Convention[43], aim to depoliticize disputes between States[44]. However, SOEs are likely to be motivated by political concerns rather than commercial concerns[45]. Therefore, there was no reason for the drafters of the CEPTA to grant standing for SOEs without any restriction.
38. Considering the context of the CEPTA, where the Parties intended to grant standing for the State, they did so expressly. The subrogation clause of the CEPTA in Art. 9.15

[40] para. 31.
[41] OECD Guidelines, p. 14
[42] Blyschak, p. 19
[43] Schreuer, Art. 25, para. 270
[44] Blyschak, p. 25
[45] Id., p. 32

expressly allows the contracting States to make a payment to their investors and thus take over rights and claims of the investor. In other IITs as well, when Parties intended to grant standing for SOEs, it was expressly prescribed[46]. However, the 'investor' definition of the CPETA incorporated in Art. 9.1. does not permit States or SOEs to claim the rights of private investors. Therefore, it can be concluded that the Parties did not intend to provide standing for SOEs due to the lack of expressed or implicated permission.

39. The circumstances of the conclusion of the CEPTA shows the clear intention of the Parties to bar standing of SOEs. The 1994 BIT expressly provided standing for "government-owned" enterprises[47]. However, this BIT was called "*the worst BIT in the history of BITs*" by Mekari politicians.[48] Subsequently, Mekari officials sought to negotiate a new agreement with Bonooru[49] and as a result Bonooru and Mekar concluded the CEPTA. The fact that the 1994 BIT expressly provided standing for government-owned enterprises, while the CEPTA does not include any such permission, shows the intention of the Parties to bar standing of SOEs under the CEPTA. This intention of the Parties is further strengthened by the fact that they wanted the CEPTA to be more beneficial for respondent States than the 1994 BIT.
40. Therefore, interpreting the CEPTA in its context and in the light of its object and purpose, together with the circumstances of its conclusion pursuant to Art. 31 and 32 of the VCLT, Bonooru and Mekar intended to bar the standing of SOEs like Claimant.
41. **Conclusion on Issue I**: Claimant was acting as an agent for the Bonoori government and at the same time was discharging essentially governmental functions. Furthermore, when drafting the CEPTA, Bonooru and Mekar had the intention to exclude standing of SOEs. Thus, Claimant does not have standing neither under Art. 2 of the Facility Rules nor under Chapter 9 of the CEPTA and consequently the Tribunal does not have jurisdiction.

[46] see eg. USA-Korea FTA, art. 11.28; China-Mexico BIT, art. 1; Japan-Korea-China Tilateral Agreement, art. 1(2) and (4)
[47] Art. I (a)
[48] PO3, p. 87, para. 14.
[49] Id.

II. The Tribunal should grant the leave sought for filing an amicus submission to the External Advisors to the CRPU, and should not grant the same for the CBFI

42. Amicus curiae participation has been non-existent in international investment arbitration for long[50]. Amicus submissions are undeniably a useful tool to grant transparency, and widespread acceptability on matters of public interest[51]. Amici submissions have been filed, by both the CBFI and External advisors to the CRPU. Pursuant to subarticle 3 of Article 9.19 of the CEPTA grants the tribunal explicit authority to hear any amicus submission it deems able to assist the tribunal or add any additional perspective to the dispute. The tribunal, as stated in numerous awards[52] has absolute discretion, when deciding the applicability of amicus curiae submissions. Therefore, the followings are submitted by Respondent to provide the tribunal additional perspective when deciding on the admissibility of the amicus submissions at hand.
43. Respondent submits that The External Advisors to the CRPU constitute honourable amici the tribunal should grant leave to file a submission (**A**). and, that the CBFI should not be recognised as an honourable amicus (**B**).

A. The External Advisors to the CRPU constitutes an honourable amicus the tribunal should grant leave to file a submission

44. As Rule 37(2) of the ICSID Arbitration Rules provides, the tribunal shall consider certain criteria when deciding on allowing amici submissions, although the criteria are not deterministic. Claimant in its „application to bar the amicus submission by the external advisors to the committee on reform of public utilities" provides, that the External Advisors to the CRPU does not fulfil certain requirements to be recognised by the tribunal as an honourable amicus. Claimant reasons, that the External Advisors to the CRPU „ fails to meet a threshold" necessary in order to file a submission by raising a new jurisdictional question concerning the ratione legis jurisdiction of the Tribunal.
45. Therefore, Respondent submits that the External Advisors to the CRPU made submissions within the scope permitted by Rule 37(2) b) (**1**), and that the External Advisors to the

[50] Methanex
[51] Philip Morris
[52] see Apotex, Bear Creek

CRPU represents public interest, regarding Mekar and the Greater Narnian region and is an independent, third party to the dispute, who can contribute useful perspective to the tribunal (**2).**

1. The External Advisors to the CRPU made submissions within the scope permitted by Rule 37(2)

46. The ICSID convention is different from other investment arbitration regimes when it comes to the jurisdictional requirements, because the parties are not free to waive or alter the jurisdictional requirements[53]. As Jan Paulsson stated "a single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may generate backlash"[54], therefore the tribunal should view jurisdictional issues of the upmost importance. In the event, where a tribunal's jurisdiction is limited by matters that are not from the parties consent, the tribunal has a duty to resolve every aspect of jurisdiction possible, in order not to go beyond the scope of its jurisdiction[55]. Therefore the permission of amicus submissions on jurisdictional issues not raised by the parties in international investment arbitration of these sorts are unobjectionable, as the tribunal has the obligation to address such jurisdictional matters regardless of the contribution of the parties.

2. The External Advisors to the CRPU represents public interest, regarding Mekar and the Greater Narnian region and is an independent, third party to the dispute, who can contribute useful perspective to the tribunal

47. As the External Advisors to the CRPU stated in its amicus submissions, it is a clearly financial advisory board to the CRPU formed to oversee the privatisation set up under the Law on Privatisation of State Property. The privatisation process was undeniably a public matter in Mekar, after as stated in point 18 of the FACTS inefficient governmental spending became a problem for the Mekari finances, and therefore Caeli airways was deemed fit for privatisation. As most instruments allowing amicus submissions require,

[53] As declared by the ICSID convention Article 25
[54] Paulsson, p. 442.
[55] Born – Forrest p 25

honorable amici shall demonstrate their its interest in the proceedings[56]. As stated in pont 16 of PO3 emma estimates the fair market value of its investment in Mekar to be USD 1.1 billion. According to Annex 4, that is the peak valuation Caeli airways has achieved in its affiliation with Vemma, therefore Vemma wishes to recoup the peak valuation of its investment to the detriment of the Mekari public. In matters of public interest, the requirement of different expertise or perspective should be considered broadly[57] by the tribunals. And several tribunals have held that the demonstration of interest should be considered broadly when it comes to matters of public interest too[58].

48. The External advisors to the CRPU can provide the tribunal particular knowledge, and insight regarding the investment scene in Mekar, as well as the greater Narnian region, in addition to insight to the inner mechanisms of the CRPU and the privatisation scheme in Mekar. Furthermore, as stated in point 12 of the FACTS Mekar is considered a corrupt country by international standards, and as the ratione legis of this jurisdiction shall concern issues of corruption, the external advisors to the CRPU can provide perspective when it comes to dealing with the governmental forces of Mekar. As these contributions and views are unlikely to duplicate the Respondent's, which would be unfavourable[59], therefore they shall contribute new perspective and depth to the tribunal's understanding of the financial and investment scene of the region, and in particular Mekar.
49. The External advisors to the CRPU are, and always were independent from the CRPU, as a financial advisory board to the Committee. Furthermore, as stated in point 41 of the FACTS the privatisation process of public utilities were partially reversed, and therefore the External Advisors are no longer advising the CRPU on privatisation.

B. The CBFI does not constitute an honorable amicus so the tribunal should not grant leave to file a submission

50. The CBFI is a non-profit entity, established, as stated in PO3 to provide services such as training and capacity building activities, networking opportunities, and most importantly collective advocacy to its members. Several Bonoori companies, of which many has contributed investments in the greater Narnian region and Mekar, as described in point 4

[56] Ibid.
[57] Apotex procedural order no. 2 para 21.
[58] Micula; Pacific Rim
[59] Newcombe-Lemaire

of the Facts. As stated in point 12 of PO3 Horatio Velveteen, CFO of Lapras Legal Capital voted in respect of the amicus submission. Lapras Legal Capital is an advisor for Vemma in respect of potential litigation funding and funders.

51. Therefore respondent submits that the CBFI is not an independent, third party to the dispute. (**1**) and that the CBFI fails to provide the tribunal with a new perspective expected from amicus curiae.

1. The CBFI is not an independent, third party to the dispute

52. The CBFI as a forum for Bonoori investors for collective advocacy takes into account the possibility it needs to exercise collective advocacy for the companies of Bonooru, while one or more of it's members are party to a proceeding. Therefore as stated in point 14 of PO3 under the CBFI's "Amicus Brief Submission Guidelines," members of the CBFI's Executive Committee cannot participate in discussions or votes in relation to a dispute in which they have a conflict of interest. As stated in point 12 of PO3 in its meeting on 29 March 2021, the CBFI's Executive Committee resolved unanimously that Mr. Velveteen could vote in respect of the amicus submission in Vemma's claim against Mekar. Lapras Legal Capital is an advisor for Vemma in respect of potential funding in respect of today's proceedings. Therefore there is a contractual relationship between Lapras Legal Capital, and Claimant. Claimant as stated in point 65 of the Facts sustained heavy losses on its investment in Caeli, and its unsustainable business models. Therefore Lapras Legal Capital was needed in order to produce funding for the procedure against Mekar. Lapras Legal Capital therefore has an interest in the proceedings both by maintaining their reputation as a credible advisor in funding proceedings, as they advised Vemma to pursue the claim, and furthermore as a party inherently interested in the financial success of their client.
53. Furthermore, Lapras Legal Capital is inherently interested in sustaining their reputation as a credible advisor in funding for several reasons. Firstly, as stated in the Amicus submission of the CBFI, in the disclosure it is stated that two members, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against Mekar under Chapter 9 of CEPTA. Furthermore as stated in point 14 of PO3 the BIT between Respondent and Bonooru has never been unanimously renowned, and Mekar has lost several high profile arbitral proceedings since.

54. In addition, the CBFI failed to disclose weather any of the two members currently pursuing claims against Mekar are part of the Executive Committee. The two companies in question have further interests, in order to pursue the tribunal to draft a favorable conclusion for their proceedings, in order to use those as legal basis in the future.

2. The CBFI fails to provide the tribunal with a new perspective expected from amicus curiae

55. As a tribunal noted[60] the party must demonstrate it's utility to the tribunal, in order to allow the tribunal to estimate the admissibility of the amicus. The CBFI fails to show any additional perspective to the proceedings, as it is likely to merely duplicates the Claimant's reasoning on the proceedings prior to this one, which is unfavourable[61] when it comes to amicus submissions.
56. The CBFI is unable to provide the tribunal particular knowledge, and insight regarding the investor scene in Bonooru, of which the parties have agreed and put together detailed passages in the Facts. Furthermore any contribution by the CBFI is likely to be influenced by the fact, that Bonooru is the major capital exporter in the region as stated in point 4 of the Facts.
57. **Conclusion on Issue II**: For the aforementioned reasons the Respondent submits that the Tribunal shall accept the amicus curiae submission of CRPU, however the amicus curiae submission of CBFI is not admissible in the present procedure.

[60] Methanex
[61] Newcombe-Lemaire

Phase II

III. Respondent provided fair and equitable treatment to Claimant and thus did not breach Article 9.9 of the CEPTA

58. Respondent invites the tribunal to take a deeper look at the justified reasons of the CCM investigations, the justification for the denial of subsidies, the rationale behind the court decisions of Mekar and the lack of specific representation to Claimant to induce investment.
59. Respondent did not breached Article 9.9 of the CEPTA. Respondent did not act arbitrarily when it launched its investigation against Caeli Airways **(A.)**, Respondent did not deny subsidies from Caeli Airways arbitrarily **(B.)**, Respondent did not deny Justice from Caeli Airways **(C.)** Respondent did not make a specific representation towards Claimant in order to induce investment **(D.)**.

A. Respondent did not act arbitrarily when it launched its investigation against Caeli Airways

60. Claimant argues that launching the suo moto CCM investigations against Caeli Airways had legal grounds and was therefore arbitrary in nature. Claimant argued that the CCM was not allowed to initiate the investigations as the market share of Caeli Airways at the time of the initiation of the investigations did not reach the legally required 50% market share, and its share in the market could not have been taken cumulatively with the market share of Royal Narnian, another member of the Moon Alliance Caeli Airways is a member of.
61. However, it needs to be pointed out that Claimant's argumentation is misleading in this regard. The Monopoly and Restrictive Trade Practice Act, as Amended in 2009 states:

> *"The CCM may open an investigation into behaviour it deems anti-competitive, suo moto if the following circumstances are met: a corporation obtains a market share*

greater than 50%. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share."[62]

62. It does not matter whether the market share of Caeli Airways reached the 50% threshold with or without the market share of Royal Narnian. According to the Monopoly Act the CCM has discretionary powers to launch investigations in industries requiring special attention where a corporation owns less than 50% market share.
63. Although Caeli Airways' market share was only 36% at that time, it was already starting to form a monopoly on the market. Caeli Airways adopted predatory pricing resulting from low airfares and loyalty programmes[63], in 2016, Caeli Airways became the only consistently profitable carrier on over half the routes to and from Phenac International Airport in Mekar[64], cooperated with Royal Narnian (100% of its shares owned by Claimant) another Moon Alliance member, in respect of lounge access, terminals, IT platforms, check-in operations and code sharing[4]. Due to all of these Caeli Airways started to achieve supra-competitive profits.
64. Therefore, Respondent needed to protect the fair competition and the consumers in Mekar from a forming monopoly. Respondent's right to regulate in such matter is protected under Article 9.8 of the CEPTA, as it states:

"For the purpose of this Chapter, ***the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as*** *national security, the protection of public health, safety, the environment, public morals,* ***social and consumer protection****, or the promotion and protection of cultural diversity."*[65]

65. As Respondent was trying to achieve a public policy objective its rights to regulate in the airline market cannot be deemed to have breached Article 9.9 of the CEPTA.
66. Claimant argued that the conduct of Respondent was arbitrary and disproportionate in this matter. However, as the Electrabel tribunal and several others[66] have stated: *"a measure will not be arbitrary if it is reasonably related to a rational policy"*[67] and *"A rational policy is taken by a state ... with the aim of addressing a public interest matter."*[68]
67. This view was also emphasised by Ms Estefanía Ponce-Durán as she stated:

[62] ANNEX V Monopoly and Restrictive Trade Practice Act, as Amended in 2009
[63] STATEMENT OF UNCONTESTED FACTS para 45.
[64] STATEMENT OF UNCONTESTED FACTS para 36.
[65] CEPTA Article 9.8
[66] Saluka and Micula
[67] Electrabel para 179.
[68] Electrabel para 179.

> *"a measure will not be arbitrary if it is related to a rational policy and considered the need for an appropriate correlation between the State's public policy and the measure adopted to achieve such policy."*[69]

68. The measure adopted by Respondent was also the least harsh: it only started an investigation against Caeli Airways, which was reasonable and proportionate to the forming monopoly.
69. The investigation launched by the CCM had legal grounds based on the Monopoly Act. This act of Respondent was protected by the right to regulate under Artile 9.8 of the CEPTA: Respondent launched the suo moto investigation in order to achieve a public policy objective, the protection of the consumers from the forming monopoly of Caeli Airways. Therefore, the investigation was not launched arbitrarily as it was related to a public policy objective protected under the CEPTA, and was reasonable and proportionate.

B. Respondent did not deny subsidies from Caeli Airways arbitrarily

70. Respondent highlights that its conduct was not discriminatory in relation to the denial of Caeli Airways' application for subsidies pursuant to Executive Order 9-2018. For this first the standard for discrimination needs to be examined.
71. According to the findings of the Saluka tribunal :

> *"State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification."*[70]

72. In the case of the denial of Claimant's application we need to highlight that the first and the third conditions are not met, as the cases cited by Claimant are not similar, and Respondent gave a reasonable justification
73. The cases were not similar. The other foreign airlines, cited by Claimant as being in similar situation, applying for the subsidies, such as Star Wings and JetGreen, were in fact very different from Caeli Airways: they were not state-owned airlines, while Caeli Airways, as Respondent previously have shown, is in fact state-owned.

[69] Estefanía
[70] Saluka para. 313.

74. The different treatment of these airlines was justified, as one of the highest government official, Mekar's deputy Minister of Transportation stated that:

> *"It would be unfair to grant certain State-owned companies even more of an advantage in our airline market to the detriment of our people"*[71]

75. Caeli Airways was also becoming a monopoly, which was a factor held by the National Grid Tribunal to deny similar treatment compared to other companies[72].
76. It is important to note, that Respondent's reasoning as to the denial of the subsidies was not just not discriminatory but was also Factsficient and consistent as Respondent denied subsidies from another state-owned airline:

> *"Caeli Airways was one of the only two airlines owned in any significant part by a foreign government operating in Mekar at the time, the other being the wholly government-owned Larry Air. Neither received subsidies under Executive Order 9-2018."*[73]

77. The decision also had a Factsficient reasoning behind it:
78. According to Executive Order 9-2018 the Secretary of Civil Aviation had discretionary powers to decide on whether subsidies were to be provided to an applicant or not.
79. The Secretary of Civil Aviation made its decision of not providing subsidies to Caeli Airways according to Executive Order 9-2018 (B) which states that the Secretary of Civil Aviation may determine in its own discretion whether *"the intended obligation would not skew market conditions in favour of one or more enterprises"*[74]
80. As giving subsidies to an airline building a monopoly would have skewed the market, the Secretary of Civil Aviation decided not to provide subsidies to Caeli Airways. Therefore, the decision had Factsficient reasoning.

C. Respondent did not deny Justice from Caeli Airways

81. Claimant argued that its investment, Caeli Airways was denied justice by the court of Respondent and its due process rights were violated provided for in Article 9.9 of the CEPTA.

[71] Facts para 46.
[72] National Grid para 193.
[73] Facts para 47.
[74] Executive Order 9-2018

82. Respondent argues that the general slowness of the courts of Respondent did not constitute denial of justice **(1)** and that Respondent's courts did not deny justice from Caeli Airways when they decided on the merits of the case **(2)**.

1. The length of the court proceedings did not constitute denial of justice

83. Claimant argued that its investment, Caeli Airways was denied justice by the Courts of Respondent, which constitutes a breach of the fair and equitable treatment standard of the CEPTA.
84. Claimant argued that the fact that a hearing in relation to its claims against the CCM regarding the stay on the airfare caps was scheduled only in eleven months after filing the claim constituted denial of justice. However, this was nothing new for Claimant. It needs to be noted that the population of Mekar almost doubled in the last forty years but its judicial system could not expand accordingly to be able to settle matters quickly:

> *"Between 1980 and 2015, the population of Mekar grew from 6 million to 10.8 million. Its judicial system failed to expand at the same rate in this period. As a result, the average time taken from commencing an action to receiving a final decision in Mekari courts rose from 9 months in 1980 to 22 months in 2015. This was even higher in commercial matters (~27 months), as Mekar prioritized criminal cases to avoid prolonged detention for the accused."*[75]

85. As the Tribunal can see, Claimant's case was actually given even more time than the average commercial matter is given in Mekar, as its case was heard in thirteen months after filing and decided on in only fifteen months compared to the twenty-seven months on average.
86. Claimant argued that even though the case was decided in only fifteen months, but its case was first heard eleven months after filing the claim. Therefore, it needs to be established as to what delay breaches the requirement of a fair hearing. According to the findings of the Toto tribunal:

> *"To assess whether court delays are in* ***breach of the requirement of a fair hearing****, the ICCPR Commission takes into account* ***the complexity of the matter****,* ***whether the***

[75] Facts para 13.

> ***Claimants availed themselves of the possibilities of accelerating the proceedings****...*"[76]

87. In this specific case it can be seen that Claimant did not try to accelerate the proceedings. Claimant first accepted the airfare caps imposed by the CCM in 2016 and only tried to protest against them after they became burdensome due to the economic crisis in 2017. In Respondent's view this shows that Claimant, even though it had known that commercial proceedings take a longer time to settle than forty years ago, still did not try to protest against the airfare caps for well over a year and thus lost precious time due to their own actions.
88. The amount of delay suffered by Claimant due to the court only rendering a final judgement over 2 years later was also an important part of the argument of Claimant. It has to be noted that the threshold that needs to be met by the delays in court proceedings in order to breach the fair and equitable treatment standard is quite high. Arbitral tribunals, such as the Toto[77] and Frontier[78] have stated that a delay of 3 and even 6 years respectively did not amount to a breach of the fair and equitable treatment standard, and did not constitute denial of justice.
89. It was held by the Jan de Nul tribunal that a delay in court proceeding amounting to ten years still does not qualify as a breach of the fair and equitable treatment:

> *"the Tribunal notes that the Judgment ... hardly qualifies as an "ideal" decision to close nearly ten years of proceedings. This ... cannot be said to amount to a denial of justice on this ground."*[79]

90. Therefore, it can be seen that Respondent did not deny justice from Claimant in civil proceedings, therefore it did not breach Claimant's rights to fair and equitable treatment under the CEPTA.

[76] Toto para 160.
[77] Toto para 199.
[78] Frontier para 334.
[79] Jan de Nul para 199.

2. The courts in Mekar did not deny justice from Caeli Airways when they decided on the merits of the case

91. Claimant also argued that its right to due process was violated by Respondent as its court rendered a final award on the merits of the case without giving a chance to Claimant to make submissions on the merits and thus breached Claimant's rights to fair and equitable treatment under the CEPTA.

92. It needs to be noted that the court of Respondent made its decision in accordance with the law. Executive Order 5-2014 grants special rights to the judges:

> *"[it]grants a court the ability to dismiss without appeal a case by way of summary judgment where the judge finds there is very little chance of success on the merits. Mekar's President passed Executive Order 5-2014 in 2014 to expedite court proceedings and alleviate the backlog in Mekari courts."*[80]

93. As the summary judgement of Justice VanDuzer stated:

> *"Further, the Court has considered the Applicant's prima facie case on the merits in its examination of this request for temporary injunction. It does not foresee the possibility of arriving at a different final decision. Therefore, to save the precious resources of our courts, and to avoid the parties waiting in anticipation, the Court also dismisses the merits of the Applicant's appeal at this point."*[81]

94. Therefore, the summary judgement of Respondent's court made on the merits did violate the right to due process of Claimant as the decision was made in accordance with the law.

D. Respondent did not make a specific representation towards Claimant in order to induce investment

95. Claimant argued that Respondent made a specific representation in order to induce Claimant to invest in Mekar and thus created a legitimate expectation for Claimant, upon which it relied in making the decision on whether to invest in Mekar or not.

[80] PO 3 para 8.
[81] Facts para 54.

96. Claimant argued that Respondent made specific representation through the changes in its legal system. Respondent changed its legislation in relation to the Monopoly Act of Mekar in order to increase investor confidence:

    "Additionally, to inspire investor confidence, the new legislature revised Mekar's Monopoly and Restrictive Trade Practice Act in 2009"[82]

97. Contrary to Claimant's argumentation, however, Respondent did not make a specific representation with its amendment of the Monopoly Act. It was stated by the EDF tribunal, that for a specific representation to occur there needs to be *"specific promises or representations are made by the State to the investor"*[83] The change in legislation was merely aimed to inspire investors in general, not to induce an investment from Claimant specifically.

98. Respondent's changes in the legislation did not create a legitimate expectation for Claimant either. As it was stated by the Phillip Morris tribunal:

    "Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law."[84]

99. As the Monopoly Act is applicable to all corporations in Mekar, not legitimate expectations could have arisen on behalf of Claimant.

100. **Conclusion on Issue 3**: Respondent did not breached Article 9.9 of the CEPTA. Respondent did not act arbitrarily when it launched its investigation against Caeli Airways, Respondent did not deny subsidies from Caeli Airways arbitrarily, Respondent did not deny Justice from Caeli Airways, Respondent did not make a specific representation towards Claimant in order to induce investment.

IV. The 'market value' standard is the applicable compensation standard

101. Respondent has not violated the CEPTA since there is no causation between Claimant's harm and the activities of Respondent. Therefore, Respondent owes no compensation to Claimant.[85]

102. Even if the Tribunal were to find that Respondent violated the CEPTA, our submission is that the Tribunal should apply the "market value" standard, because it is prescribed by

[82] Facts para 19.
[83] EDF para 217.
[84] Phillip Morris para 426.
[85] Biwater, para. 778.

Art. 9.21 of the CEPTA **(A).** Respondent further submits that it already paid the "market value" price of Claimant's investment by purchasing its stake for USD 400 million **(B)**. Thus, Respondent owes no compensation.

103. Furthermore, if the Tribunal were to award any compensation to Claimant, it should be reduced because Claimant did not change on its risky and ill-advised rapid expansion and Respondent is in a detrimental economic situation **(C)**.

A. The Tribunal should apply the 'market value' standard contained in Art. 9.21 of the CEPTA

104. According to Art. 9.21 para. 1. (a) of the CEPTA, the tribunal may award "*monetary damages at a market value*". Therefore, it is expressly set forth that the 'market value standard' is applicable, not the "fair market value".

105. Claimant may argue that in the field of international investment law tribunals did not differentiate between the two standards. Respondent submits that there is a difference **(1)**, and the Parties intended to make difference when drafting the CEPTA **(2)**. Furthermore, Claimant cannot avail the "fair market value" standard under the MFN clause of the CEPTA **(3)**.

1. There is a difference between "market value" and "fair market value"

106. The CEPTA provides no definition for the compensation standards. However, an accepted definition by tribunals for "fair market value" is

> *"the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."*[86]

107. According to a valuation of the European Central Bank on foreign direct investment positions, the "market value" means

> *„the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's-length transaction."*[87]

108. Therefore, there is an existing difference between the "market value" and the "fair market value". Both Bonooru and Mekar were knowledgeable, willing buyers and there was an

[86] CMS., para. 402.; Sempra, para. 405.; International Glossary for Business Valuation Terms, p. 4
[87] ECB p. 16

arm's-length, numerically USD 400 million worth, transaction between them. Consequently, the valuation date shall be the time of this transaction.

109. On the contrary, the "fair market value" is not applicable since it is not the standard that the CEPTA prescribes. Moreover, it would be inappropriate to set the compensation standard based on a transaction between a hypothetical willing buyer and seller, while there was a real arm's-length transaction between an existing buyer and seller. In addition, due to the extreme volatility of the MOK[88] the "fair market value" standard would contain a high level of speculation.

2. Bonooru and Mekar intended to make difference between "market value" and "fair market value"

110. If a particular intention is expressed in respect of the interpretation of an IIT, it shall be respected, regardles of the appropriate interpretation of other IITs concluded between other parties. In the present case, Bonooru and Mekar had the particular intention to differentiate between the meaning of "market value" and "fair market value".[89] According to Art. 31 para. 1. of the VCLT, a treaty shall be interpreted in its context.

111. Contrary to the provision of Art. 9.21, the expropriation clause of the CEPTA[90] provides for the "fair market value" standard as a due compensation. Consequently, the Parties intended to apply the "market value" standard for compensations, with the exception of the "fair market value" standard in case of expropriation. Considering that Claimant is alleging an FET violation, the general compensation standard, namely the "market value" standard is applicable.

112. In conclusion, the Tribunal should take into account that the Parties expressed their intention to interpret the meaning of "fair market value" and "market value" differently, and in case of FET violations to apply the latter as the compensation standard.

3. Claimant cannot avail the "fair market value" standard under the MFN clause of the CEPTA

[88] Facts, p. 33, para 29.
[89] Sempra, para. 144.; Enron, para. 47.
[90] Art. 9.12, para. 2.

113. Art. 9.7 paragraph 1. of the CEPTA provides for the MFN treatment. However, paragraph 2. list designates the exceptions to paragraph 1.

114. According to paragraph 2. of the MFN clause,

> *"[substantive] obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article".*

115. Therefore, prescribing the "fair market value" in other treaties of Respondent cannot give rise to a breach of the MFN treatment, because it does not constitute a "treatment". As a result, Claimant cannot refer to arbitral decisions either where the "fair market value" was awarded because that standard was prescribed by the applicable IIT.

116. Consequently, Claimant cannot avail the "fair market value" standard based on the MFN clause of the CEPTA.

B. Under the "market value" standard Claimant is owed no compensation

117. Claimant was following an exorbitant approach and ignoring its debts, despite the warnings of Mekar. As a result, Claimant was not able to sell its stake for more than USD 400 million.

118. Caeli could capture global connecting traffic flows and grow ahead of the market because its base was the geographically well-positioned Phenac International Airport.[91] In the year of investing in Caeli, Claimant started receiving subsidies from Bonooru under the "Horizon 2020" Scheme.[92] In 2014 oil prices crashed to a five-year low[93], which was also beneficial for Caeli.[94] Furthermore, instead of injecting profits into outstanding debts and conceiving of the possibility of rising oil prices, that finally happened in 2018,[95] Claimant was excessively expanding[96]. For example, Claimant invested in 45 Boeing 737 MAX aircrafts[97] and cross-continental routes[98] when it could have refunded its debts.

119. Therefore, Respondent submits that the eventual failure of Caeli was inevitable because of the extravagant approach of Claimant. At the same time, the early success of Caeli was due to the favourable geographical positioning of Phenac International Airport, the subsidies from Bonooru, the low oil prices, and its short-term strategies. Consequently,

[91] Facts, p. 32, para. 27.
[92] Id., para. 28.
[93] Id., p. 33, para 33.
[94] Annex VII, p. 54
[95] Facts, p. 37, para. 48.,
[96] Annex IX, p. 57, line 1955
[97] Facts, p. 34, para. 35.
[98] Id., p. 33, para. 29.

Claimant could not sell its stakes in an arm's-length transaction for more than USD 400 million. Since Respondent paid this price, it owes no compensation.

C. The Tribunal should reduce any compensation awarded to Claimant

120. Respondent submits that any compensation awarded to Claimant should be reduced because Claimant should bear responsibility for its investment and its risky behaviour. Furthermore, an awarded compensation should be reduced because of the dire economic situation on Mekar.

121. Misunderstanding the risk associated with a business activity when valuing an investment can result in over-compensation. The failure to factor in the risk would put the investor in an unfairly better position as it could change a high-yield and high-risk investment to a high-yield but at the same time low-risk arbitral proceeding. In such case the investor would only bear the litigation risk instead of the investment risk. To avoid this, the Tribunal can adopt risk mitigation measures, for example a discount rate that reflects the high risk.[99]

122. Claimant took a high-yield and high-risk investment.[100] If the Tribunal did not consider the high-risk nature of Claimant's investment, then Claimant would only need to bear responsibility for the litigation factor with the same high-yield. In addition, Claimant was following a hazardous business model by investing into new aircrafts and cross-continental routes instead of refunding its debts and calculating with the potentially rising oil prices. At the same Respondent suggested Claimant to inject its profit into the reimbursement of its debts.[101] Moreover, the dire economic situation of Respondent is also a reason to reduce the awarded compensation.

123. Therefore, Respondent submits that any awarded compensation should be reduced primarily because of the precarious and ill-advised behaviour of Claimant, and the detrimental economic situation of Mekar.

124. **Conclusion on Issue 4**: Respondent submits that the applicable standard is the "market value" standard set out in the CEPTA. Furthermore, any awarded compensation shall be reduced due to the mitigating factors.

[99] Wälde and Sabahi, p. 11
[100] Appendix IX, p. 57
[101] Facts, p. 34, para. 35.

REQUEST FOR RELIEF

For the foregoing reasons, Respondent respectfully requests the Tribunal to find that:

1) Claimant does not have standing in the proceedings, therefore the Tribunal does not have jurisdiction

2) The amicus submission by the CRPU shall be admitted, while the submission by the CBFI shall be deemed unfit for the proceedings.

3) Respondent did not violate the FET obligation set out in the CEPTA

4) Repondent owes no compensation. Should the Tribunal find that Respondent is obliged to pay compensation, the compensation must be based on the "market value" standard.

Respectfully submitted on the 23th of September 2021

Singed by

Counsels for Respondent