TEAM KORETSKY

In the matter between:

VEMMA HOLDINGS INC. (CLAIMANT)

AND

THE FEDERAL REPUBLIC OF MEKAR (RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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8. Mamidoil Jetoil Greek Petroleum Products Societe SA v. The Republic of Albania, ICSID case no ARB/11/24, Award, 30 March 2015, para 634.
9. Biwater v Tanzania (2008), ICSID case no. ARB/05/22, Final Award, 25 July 2008, para 601.

ARTICLES AND WEBSITES

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
CEPTA	Comprehensive and Economic Trade Agreement
CBFI	Consortium of Bonooru Foreign Investors
CCM	Competition Commission of Mekar

FET	Fair and Equitable Treatment
Facts	Statement of Uncontested Facts
ICSID	International Centre for Settlement of Investment Disputes
Notice	Notice of Arbitration
Response	Response to the Notice of Arbitration
P. (pp)	page(pages)
Para	Paragraph
PO1	Procedural Order 1
PO2	Procedural Order 2
PO3	Procedural Order 3
SOE	State Owned Enterprise

MRTP	Monopoly and Restrictive Trade Act

STATEMENT OF RELEVANT FACTS

1. Greater Narnia Region is an area that spans across 11 independent countries, covering a land mass of 7.9 million square kilometres.

2. The Federal Republic of Mekar is a developing country. Having faced economic and political tumult since the decline of the colonial Pevensian administration, the country has maintained a strict regulatory hold on its investment policies, despite opening up to foreign investment.

3. Due to the increasing financial constraints of Mekar, there was a merger of the two major airlines in Mekar to become one: Caeli Airways. In addition, radical policy reforms were made in the airline industry, to encourage foreign investors. Subsequently, Mekar Air services sought to sell its stakes to Foreign investors.

4. The Commonwealth of Bonooru ('Bonooru') is a developing country located North of the Greater Narnian Region. Due to its unique geographical outlook, the country has had to pay special attention to investing in amenities, particularly developing the transport industry. This led the country to begin investment in domestic airways and subsequently, privatization of the formerly sole Bonooru Airs.

5. In 2014, Bonooru and Mekar signed a Comprehensive and Economic Partnership Trade Agreement, selling 85% of its stakes in Caeli Airways to Vemma Holdings, an airway holding company owned by Bonooru.

6. While initially, Vemma Holdings fared quite well with Caeli Airways, it soon experienced a decline in profits, due to its extravagant approach to expansion.

7. The Competition Commission of Mekar soon had to open investigations on Vemma, upon learning about its involvement in agreements that enabled it to establish predatory pricing strategies, coupled with its rapid growth. This resulted in the CCM placing airfare caps on Vemma as an interim measure.

8. Again, a group of Vemma's competitors approached the CCM to complain about Vemma's anti-competitive activities, prompting a second investigation.

9. Following this, the Mekari currency (MON) began to decline rapidly. In response, the Mekari government passed a law, asking all investors to price all their goods and services in MON. Neither an application to be exempted from this rule nor an application that the airfare caps be lifted was granted to Caeli Airways. Caeli sought to appeal this in a High Court of Mekar, unsuccessfully.

10. Caeli Airways' stakes in the Mekari Air industry had already begun to decline significantly.

11. Despite the airfare caps having been lifted, Vemma decided to sell its stakes in Caeli Airways to Hawthorne Group. Mekar rejected this offer, as Hawthorne group was not a bona fide third party, considering its membership of the Moon Alliance. In order to resolve this problem, the parties decided to resort to arbitration.

12. The tribunal ruled in favour of the Respondent and awarded the offer to Mekar Services. In little time, corruption allegations had arisen against the selected arbitrator, leading Vemma to once again appeal the tribunal's decision at the Arbitrazh Court of Sinnograd.

13. Mekar sought to enforce the award which was denied at Sinnograd, before the courts of Mekar. The Court reviewed the decision of the Sinnograd courts and enforced the award, in favour of Mekar, making Mekar the legitimate purchaser of the Vemma's shares.

14. Unable to find another suitable buyer, Vemma sold its stakes to Mekar, after which it appealed the case before this tribunal.

ISSUES FOR DETERMINATION

Issue 1

Whether the tribunal has jurisdiction under chapter 9 of the CEPTA.

Issue 2

Whether the tribunal should grant the leave sought for filing amici submissions

Issue 3

Whether the respondent is in violation of Art. 9.9 of the CEPTA.

Issue 4

If the Respondent has violated Art. 9.9, what then becomes the appropriate compensation standard and if the contributory negligence of the claimant will avail them any compensation

SUMMARY OF ARGUMENTS

Issue 1

a. The present tribunal does not have jurisdiction to hear the claimant's case, given that the present dispute constitutes state - to- state arbitration.

b. Mekar has not consented to state-state Arbitration with Bonooru under Chapter 9 of CEPTA.

Issue 2

a. The Amici submission does not satisfy legal requirements as provided in Article 9.19 of the CEPTA and other legal authorities.

b. The public interest requirement for amici submissions under Article 9.19 of the CEPTA and also Article 4 of the UNCITRAL rules on transparency has not been met by the CBFI.

c. The Amici submissions of the External Advisor's to the Committee on Reform of Public Utilities are of greater significance to the Effective resolution of this Case

Issue 3

a. Delay of the courts did not meet the 'inequality with nationals' test

b. Refusal to remove airfare caps and allow Caeli raise its prices was legal and based on balance of convenience

c. Denial of Caeli airways access to subsidies based on its peculiarities

d. Denial of Hawthorne offer was because the fact that Hawthorne was not a bona fide third party

e. The High Court's decision to uphold the enforcement of the award did not amount to corruption

f. The interim decision to dismiss Claimant's case on the merit was accounted for and in accordance with Mekari Law.

g. The CCM acted within the bounds of its legal authority to have initiated the first investigation against Caeli Airways and thus was not in breach of article 9.9of the CEPTA

Issue 4

a. The appropriate standard of compensation as per Article 9.21 of the CEPTA is "market value" and thus should be complied with.

b. Claimant did not conduct its due diligence and so cannot rely on the FET for succour to the detriment of the Respondent

c. The Claimant was warned by the Respondent but it paid no heed.

d. The economy of Mekar is already in a dire situation. Payment of the fair market value standard would be injurious to the already sick economy.

Part I: JURISDICTION

1. **a. The present tribunal does not have jurisdiction to hear the claimant's case, given that the present dispute constitutes state - to- state arbitration**. (i) Even if the claimant was not a state-owned enterprise at the time it made its investment in Mekar, it certainly became a state-owned enterprise by march 2021, when the Government of Bonooru increased its interest in Vemma to a controlling 55% stake. (ii) Consequent on (i) above, the arbitration should in effect be between Bonooru and Mekar. Thus, the ICSID Additional Facility Rules under which the Claimant instituted this action is not the applicable law. This is because Article 2 of the ICSID Additional Facility Rules only contemplates proceedings between a state (or a constituent, subdivision or agency of a state) and a national of another state.

b. Mekar has not consented to state-state Arbitration with Bonooru under Chapter 9 of CEPTA.

2. Even though **section 2 of Article 9.27** as seen above, expressly provided that such consent shall satisfy the requirements of writing, it did not provide that the provisions of the Additional Facility Rules should not be complied with. In other words, the said consent above does not preclude the due process of the law. It is clearly stated in Article 2 of the Additional Facility Rules that the rules ***only contemplate disputes between a state and a national of another state.***

3. It is pertinent to distinguish this case from the case of **Niko Resources Ltd v Bapex & Petrobangla[1].** In the aforementioned case the respondent consented through a written agreement to the jurisdiction of the tribunal but in the instant case the parties merely consented that arbitration shall be the first course of action if any dispute arises.

4. In light of the foregoing, the Respondent submits that Vemma is not entitled to bring the present claims under the ICSID Additional Facility Rules. Therefore, we urge the tribunal to dismiss their claims.

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[1] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/11 and No. ARB/10/18

5. Also to determine what constitutes a state owned enterprise , the tribunal in Urban Construction v Yemen applied the Broches Test. This test has two ingredients and they are:

   i. To determine a state owned enterprise, the extent to which the state owned enterprise acts as an entity of the state rather than as a commercial party must be proven.

   ii. It must be proven that the State Owned enterprise performs it's governmental functions when it comes to a particular investment.

6. Applying the above test to this case, it can be seen that the Claimant is a State Owned enterprise and as such, this arbitration amounts to a State to State arbitration which has not been provided for under the ICSID and also has not been consented to by the respondents.

PART II: AMICUS CURIAE APPLICATIONS

Whether the tribunal should grant the leave sought for filing Amici submissions

7. Article 9.19[2] of the CEPTA Rules provides for the ingredients of Amici Submission and it is enlisted thus:

> *1. The submission must regard a matter of fact or law, within the scope of the dispute that may assist the tribunal in evaluating the arguments of disputing parties.*
>
> *2. The person or entity applying for amici submission should not be any of the disputing parties but one who has a significant interest in the arbitral proceedings.*
>
> *3. Each submission shall identify the author, disclose any affiliation, direct or indirect, with any disputing party.*
>
> *4. The tribunal shall ensure that the submissions do not disrupt/unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.*

A. The participation of Lapras Legal Capital does not satisfy the requirement of independence from disputing parties

8. An essential attribute of Amici Curiae as provided in Par 9.19(2) of the CEPTA (as highlighted above) is independence from the disputing parties. The participation of Lapras Legal Capital in this arbitration through CBFI raises a conflict of interest. Paragraph 7 of the Amicus Submission of CBFI clearly evidenced this.[3]

b. The public interest requirement for amici submissions under Article 9.19 of the CEPTA and also Article 4 of the UNCITRAL rules on transparency has not been met by the CBFI

[2] p 80, lines 2923 - 2929
[3] p 16, lines 520 – 522

9. In ***Apotex Inc v The Government of the U.S.,***[4]an application for leave to submit an amicus brief by a non-disputing party (study center for sustainable finance) was declined. In rejecting the request, the tribunal stated that the application did not meet the criteria for non-disputing participation because:

    (a) such participation would not be of assistance to the tribunal;

    (b) the Center had no interest in the case;

    (c) the center had not identified the particular public interest it would be seeking to address through its proposed submission.

10. The tribunal in Aguas v Provincials stated that the major role of the amici is to help the decision maker to arrive at its decision by making arguments and bringing perspectives that the parties may not be able to provide

11. The UNCITRAL rules on transparency guides the submission of amici curiae in the present case. According to Article 4 (3) , the tribunal shall determine whether the third person has significant interest in the case.

12. In the instant case, CBFI does not file its amicus application in pursuit of any public interest

c. *The Amici submissions of the External Advisor's to the Committee on Reform of Public Utilities are of greater significance to the Effective resolution of this Case*

13. The External Advisory committee is significant because Amici had actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Vemma Holdings Inc. ("Vemma").[5] In addition, the

[4] Apotex Holdings Incorporation and Apotex Inc. V. United States of America, ICSID Case No. ARB (AF)/12/1

[5] Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p.19, lines 619 - 624

Amici, as independent advisors, was involved in the entirety of the privatization process, and are in the unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party. Finally, the External Advisory Committee has a general interest in promoting fair business practices in Mekar. They have regularly acted as interveners before federal courts in Mekar, in relation to judicial proceedings concerning approval for privatization projects.

14. Thus, we pray this tribunal that the Amicus Submission of CBFI be jettisoned whilst the Amicus Submission of the External Advisory Committee be admitted ***because it is significant to this dispute and will help the tribunal in efficiently resolving this dispute***

PART III: MEKAR DID NOT BREACH OF THE FAIR AND EQUITABLE TREATMENT OBLIGATION

Whether the Respondent is in violation of article 9.9 of the comprehensive and economic partnerships trade agreement (CEPTA)

15. The Respondent's actions did not constitute denial of justice, according to the standards set in article 9.9 of the CEPTA.

a. ***Delay of the courts did not meet the 'inequality with nationals' test***

16. In the Ambatielos Case, the tribunal established that for an investor to successfully make claims of denial of justice, it must be sufficiently demonstrated that such an investor has been treated differently from the citizens of the state. The legal system must be shown to have manifestly discriminated against the investor state. Conversely, the delay of the courts was not out of character in Mekar, even for citizens.[6] It therefore does not meet the standard of absence of "administration of justice on a footing of equality with the nationals of the country", as set in the Ambatielos case.[7] There is also no proof of "willful neglect of duty" as is required in Neer v Mexico.[8]

b. ***Refusal to remove airfare caps and allow Caeli raise its prices was legal and based on balance of convenience***

17. The CCM let the airfare caps linger until its first and second investigations on Caeli were complete.[9] This action was in accordance to the provision of the MRTP[10] in that Mekar had the legal obligation to take whatever interim measures it deemed fit, in the event that investigations were opened against any party. More so, the Claimant's actions at the time

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[6] Para 14, Facts, lines 949 – 953, p. 29.
[7] The Ambatielos Claim, Breece v United Kingdom of Great Britain and Northern Ireland), RIAA, Volume XII, pp. 83 – 153, 6th March, 1956.
[8] L. Fay, H. Neer and Pauline Neer (USA) v United Mexican States, RIAA, Volume IV, pp 60 – 66, 15th October, 1926.
[9] Para 45, Facts, lines 1242 – 1250, pp 36.
[10] Article 4(d, e), Monopoly and Trade Restrictive Practices Act, ¶ 1615 – 1627, pp 47.

were capable of pushing other airways out of the market and thus, required urgent interim intervention by the Mekari government, pursuant to Article 4(b) of the MRTP.

18. Furthermore, the application for removal of the caps was a temporary injunction and thus was declined on the grounds of a balance of convenience, considering the strong financial standing of Caeli at the time.[11] The tribunal in the case of *Gujarat Bottling Co. Ltd. vs. Coca Cola Company*[12] observed that: *the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the balance of convenience lies.*

19. Considering the anti-competitive posture of the Claimant's activities at the time, it was reasonable to have concluded that, weighed against the potential harm likely to be caused by Caeli as well as its dominant market share size, it was better, on the balance of convenience, to keep the caps on.

c. *Denial of Caeli airways access to subsidies was Legal because of its Peculiarities*

20. Caeli Airways was not "in like circumstances" with other airlines which were granted subsidies, in that it was a state-owned enterprise while others were privately-owned. This means that, granting of subsidies to Caeli Airways would have enabled it earn supra-competitive benefits over other airlines,[13] since it already was receiving funding from its home state.

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[11] Para 54, Facts, lines 1323 – 1329.
[12] Gujarat Bottling Co. Ltd. vs. Coca Cola Company and Others, 1995(5) SCC 545
[13] Para 46, Facts, Lines 1261 – 1265, p 37.

21. It is also important to note that Caeli was already in a better position than other airlines as it, singly, owned 43% market share. Its closest competition was *JetGreen* Airways which owned 21%.[14] This means Caeli led the market with 22% market share.

d. ***Denial of Hawthorne offer was based on the fact that Hawthorne was not a bona fide third party***

22. Hawthorne was not a *bona fide third party,* as it was affiliated to Caeli by virtue of its Moon Alliance membership.[15]

e. ***The High Court's decision to uphold the enforcement of the award did not amount to corruption***

23. Since morality and justice are very relative concepts, the most basic notions of morality and justice must be considered in accordance with facts and law.[16]

24. Also, the evidence produced by the Claimant was not enough to substantiate its allegations of corruption. The **ONLY** evidence produced by the Claimant, against Mr. Cavannaugh was neither **STRONG** enough circumstantial evidence nor was it adduced beyond reasonable doubt.[17] In its ruling, the High court found that the evidence was 'circumstantial at best'.

f. ***The interim decision to dismiss Claimant's case on the merit was accounted for and in accordance to Mekari Law.***

25. The appeal to the Court by Caeli Airways was summarily dismissed on the grounds that the case had very little chance of success.[18] Pursuant to the provisions of the procedural order no 3[19], this action was legally permissible. Also noteworthy is the fact that the judicial system in Mekar was heavily be-laboured at the time.

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[14] Para 6, Procedural Order No.3, Lines 1266 -1268, p 38.
[15] Article 39 (i) (a), Shareholders' Agreement.
[16] Para 9, High Commercial Court Ruling, Lines 2262 – 2263, p 66.
[17] Para 10, High Commercial Court Ruling, lines 2271 – 2273, p 66.
[18] Par 54, Statement of Uncontested Facts, lines 1330 – 1334, pp 38.
[19] Par 8, Procedural Order No. 3, lines 3178 - 3185 pp 86.

g. ***The CCM acted within the bounds of its legal authority to have initiated the first investigation against Caeli Airways and thus was not in breach of article 9.9of the CEPTA***

26. It was necessary to compositely consider the market shares of Caeli Airways and that of Royal Narnian because Caeli was found to have engaged in anti-competitive activities. These activities were in violation of the provisions of the MRTP.[20]

27. Secondly, the CCM has the powers to exercise discretion in initiating investigation against corporations, especially in industries that require special attention.[21] The airline industry in Mekar was definitely one that required special attention, given that it contributed immensely to the already dwindling economy of Mekar at the time.

[20] B, Arrangements and Agreements that Lessen Competition Substantially, ¶ 1679 – 1680, pp. 49.

[21] 3 (b), Monopoly and Trade Practices Act, lines 1600 – 1603, pp. 47

PART IV: STANDARD OF COMPENSATION

Whether the fair market value standard of compensation is the appropriate standard

a. The appropriate standard of compensation as per Article 9.21 of the CEPTA is "market value" and thus should be complied with.

28. Neither the ***Most Favoured Nation Clause*** in the CEPTA nor international law allows the Claimant to derogate from the standard expressly prescribed in the CEPTA.[22]The provision of Article 9.7(i) does not apply to this scenario by virtue of the provisor in article 9.7(2).

29. The Arrakis-Mekar BIT itself ceased to be in force with the inception of the CEPTA.[23]Invoking the fair market value standard from it would amount to invoking a more favourable treatment from another clause. This would be in violation of article 9.9 (7) of the CEPTA.[24]

b. The presence of mitigating factors

30. Assuming without conceding that the respondent has violated article 9.9 of CEPTA and in the event that the tribunal decides to award compensation to the Claimant, the compensation sought by the claimant should be reduced due to the presence of mitigating factors.

i. The Claimant has Failed to Carry out its Duty of Due Diligence and thus Cannot Legitimately Make Claims for Breach of FET, especially to the Degree Which it Seeks.

31. The investor state apparently neglected its duty of due diligence. In the case of *Saluka v Czech Republic*,[25] the tribunal enunciated limitations to the protection of the legitimate expectations of the investor state. It provided that *'expectations, in order to be protected, must rise to the level and reasonableness, in light of circumstances'*. Subsequently,

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[22] Article 9.9 (7), CEPTA, lines 2759 -2761, pp 77.
[23] 1.6, CEPTA, ¶ 2547 – 2554, pp 72.
[24] Pp.76, ¶ 2759 - 2761
[25] Saluka Investments BV v. Czech Republic (2006), UNCITRAL, Arbitration Partial Award,17 March 2006, par 304.

numerous other tribunals have followed the same line of reasoning and established that to ascertain the legitimacy and reasonableness of an investor's expectations, it is important to consider the extent of its efforts in performing its due diligence before investing. This position was adopted by the tribunal in deciding the cases of *Mamidoil v. Albania*[26] and *Biwater v Tanzania*.[27] The tribunal in the *Mamidoil* case noted that for an investor to rely on the stability and transparency of legal framework

it has to understand the content and context of the law and the administrative practice…Fairness and equitableness cannot be established adequately without an adequate and balanced appraisal of both parties conduct.

32. The investor state has failed to carry out its due diligence in that:

a) It should have been able to reasonably predict, considering Mekar's pre-existing economic precedents, the volatility of the economy of Mekar – and taken caution accordingly.

b) Even if its failure to do (a) above was negligible, it engaged in wild expansion activities, despite being cautioned by the Respondent state's officials. Twice, officials of Mekar cautioned Vemma Holdings as to its extravagant approach to expansion. Vemma consistently disregarded both warnings.[28]

Consequently, it would be unjust for Mekar to bear the brunt of the bad investment decisions which Vemma has made, especially to the degree which the claimant seeks to claim compensation (fair market value).

iii. Paying the Fair Market Value would hurt the already poor economy of Mekar

33. The Federal Republic of Mekar is in an economic mess. Paying compensation to Claimant would plunge it further into poverty. A Mekari official observes that "to pay the

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[26] Mamidoil Jetoil Greek Petroleum Products Societe SA v. The Republic of Albania, ICSID case no ARB/11/24, Award, 30 March 2015, para 634.
[27] Biwater v Tanzania (2008), ICSID case no. ARB/05/22, Final Award, 25 July 2008, para 601.
[28] Para 29 and 31, Statement of Uncontested Facts, pp 33, ¶ 1095 – 1099 and 1108- 1116, respectively.

USD 700 Million that Vemma demands, Mekar would have to transfer about twice its consolidated annual spending to Vemma.[29] Accordingly, Respondent urges this tribunal to reduce the amount of damages to be paid to the Claimant.

[29] Para 4, Procedural Order 3, p 86, lines 3161 – 3168.

REQUEST FOR RELIEF

1. For the reasons stated herein, Respondent , the Federal republic of Mekar requests that the Tribunal:

A. DECLARE that the tribunal does not have the Jurisdiction to entertain the matter between Venma Holding Incorporated and The Federal Republic of Mekar.

B. GRANT The Leave Sought for Filing the Amicus Submission by The *Amici Curiae* presented by the external advisers to Mekar's Committee on Reform on Public Utilities (CRPU) and REJECT the Submission by The Consortium of Bonoori Foreign Investors (CBFI).

C. DECLARE that the Respondent did not breach Article 9.9 of the CEPTA; and

D. DECLARE that Mekar is not liable to pay compensation to the claimant in line with the 'market value' of the Claimant's investment.

Respectfully Submitted,

Counsel for Respondent .