INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

VEMMA HOLDINGS INC.

– Claimant –

and

THE FEDERAL REPUBLIC OF MEKAR

– Respondent –

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

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

MEMORANDUM FOR RESPONDENT

23 September 2021

CONTENT

LIST OF AUTHORITIES

Aghababyan	Aghababyan, N., Standard for Interim Injunctions in Judicial Review, *SSRN 3248241*, 2012.
Alvarez-Jimenez	Alvarez-Jimenez, A., International Investment Law, Time, and Economics: Fixing the Length of Economic Crises at a Costs-Allocation Tool between Host States and Foreign Investors, *World Trade Review*, 2020.
ARSIWA Commentary	UN. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.
Badia	Badia, A. "State-Owned Enterprises" in *Jus Mundi*, 2021.
Baumann	Baumann, P., When State Enterprises Have Deeper Pockets: Ensuring Competitive Neutrality in Cross-Border M&A, *European Yearbook of International Economic Law: International Investment Law and Competition Law*, *Springer*, 2020.
Bird	Bird, R., Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a "New" New York Convention. *N.C. J. Int'l L. & Com. Reg.*, 2012, vol. 37, 1013.
Born and Forrest	Born, G., Forrest, S., "Amicus Curiae Participation in Investment Arbitration" *in ICSID Review*, vol. 34 No. 3, 2019.
Breton	Breton, C., "Damages: General Concept" in *Jus Mundi*, 2021.
Chen, Wang	Chen, M.; Wang, C., Vanishing Set-Aside Authority in International Commercial Arbitration, *International and Comparative Law Review*, 2018, Vol. 18, No. 1.
Farchakh	Farchakh, M. "Sovereign Investor" in *Jus Mundi*, 2021.
Junita	Junita, F., Pro Enforcement Bias under Article V of the New York Convention in International Commercial

	Arbitration: Comparative Overview, *Indon. L. Rev.*, 2015, 5: 140.
Kaplow	Kaplow L., Recoupment and Predatory Pricing Analysis, *Journal of Legal Analysis*, Volume 10, 2018, p. 46-112.
Kläger	Kläger, R., 'Fair and Equitable Treatment'in International Investment Law, Cambridge University Press, 2011.
Levashova	Levashova, Y., The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment, *Kluwer Law International*, 2019.
Loube	Loube, R., Price Cap Regulation: Problems and Solutions, *Land Economics*, Aug., 1995, Vol. 71, No. 3, Social Control of Private Power: The Past and Future of Public Utility Regulation (Aug., 1995), p. 286-298.
Marcoux & Bjorklund	Marcoux, J., & Bjorklund, A., Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration. *International and Comparative Law Quarterly*, 2020.
McKean	McKean, F. G., *The Balance of Convenience Doctrine*, Dickinson Law Review, Issue 4, Volume 39, 1934-1935.
Muñoz	Muñoz, J. G. P. The Review of National Competition Authorities' Acts in Investment Arbitration: Setting Limits to 'Economic Lawfare' in the 21st Century, *European Yearbook of International Economic Law: International Investment Law and Competition Law*, *Springer*, 2020.
Nalbandian	Nalbandian, B., State capitalists as claimants in international Investor-State arbitration. *Questions of International Law*, 2021.
Ostrowsky, Shany	Ostrowsky, S. T.; Shany. Y., Chromalloy: United States Law and International Arbitration at the Crossroads. *NYUL Rev.*, 1998, 73: 1650.

Paulsson	Paulsson, J., Enforcing arbitral awards notwithstanding local standard annulments. *Asia Pacific Law Review*, 1998, 6.2: 1-28.
Ranjah	Ranjah Z. "Jurisdiction of Arbitral Tribunals" in *Jus Mundi*, 2021.
Schreuer	Schreuer C., The ICSID Convention: Commentary, Cambridge University Press, 2009.
Shirlow	Shirlow, E., "Most Favoured Nation Treatment" in *Jus Mundi*, 2021.
Terrien	Terrien, A. "Jurisdiction Ratione Temporis" in *Jus Mundi*, 2021.
Tujakowska	Tujakowska, A., "Valuation Methods" in *Jus Mundi,* 2021.
Wang	Wang, L., Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements*?*, *ICSID Review - Foreign Investment Law Journal*, Volume 31, Issue 1, Winter 2016, p. 45–57.
Weber	Weber, S. "Jurisdiction Ratione Materiae" in *Jus Mundi*, 2021.
Weiss	Weiss, F., Quest for a Sustainable International Investment Regime: Leveling Up Through Competition (Policy) Rules?, *European Yearbook of International Economic Law: International Investment Law and Competition Law*, *Springer*, 2020.

MISCELLANEOUS

India TV	Indiatvnews.com (2020) Aviation ministry classifies flight routes into 7 bands to set fare limit: Here's all you need to know.
Joint Interpretative Instrument	Council of the European Union, 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States' 13541/16 (Brussels, 27 October 2016) 3.
Parsons	United States / 23 December 1974 / U.S. Court of Appeals, Second Circuit / Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) / 74-1642, 74-1676
Thestraightpost	Thestraightpost.com (2021) Air Travel Will Be Expensive: Government Hikes Minimum Fare Limit By 10% And Maximum By 13%.

LIST OF CASES AND ABRITRAL AWARDS

Alicia Grace	Alicia Grace and others v. United Mexican States, ICSID Case No. UNCT/18/4
Ambatielos	Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), Award, 6 March 1956.
Cengiz	*Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018.
Chevron	Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018.
CSM	CSM Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8
EDF-1	*EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009.
EDF-2	EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23
El Paso	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011.
Frontier	*Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010.
Gabčíkovo-Nagymaros Project	*Gabčíkovo-Nagymaros Project, ICJ*
Jan De Nul	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13.

Krederi	*Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018.
Maffezini	Emilio Agustín Maffezini v. The Kingdom of Spain,ICSID Case No. ARB/97/7
Marion	*Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012.
Middle East Cement	Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6
Olin	*Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018.
Oostergetel	Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, Final Award, 23 April 2012.
Philip	*Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Procedural Order No. 3
Philip Morris	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016.
Reinhard	Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, 16 May 2012.
Resolute	*Resolute Forest Products Inc. v. Canada,* PCA Case No. 2016-13, Procedural Order No. 6
Rumeli	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic

	of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008.
Suez	Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in response to a petition for participation as amicus curiae
Total S.A.	*Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010.
United	*United Parcel Service of America, Inc. (UPS) v. Government of Canada,* Decision of the Tribunal on petitions for intervention and participation as amici curiae
Vivendi	Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae
Von Pezold	Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2
White industries	White Industries Australia Limited v. The Republic of India, Final Award, 30 November 2011.

LIST OF ABBREVIATIONS

Advisors	External advisors to the committee on reform of public utilities
AM BIT	ARRAKIS-MEKKAR BIT
ARSIWA	International Law Commission Draft Articles on Responsibility of States for International Wrongful Acts
BIT	1994 Bonooru-Mekar Bilaateral Investment Treaty
Bonooru	Commonwealth of Bonooru
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement
CETA	EU – Canada Comprehensive Economic and Trade Agreement
Claimant	Vemma Holdings Inc.
FET	Fair and equitable treatment
ICSID	International Centre for Settlement of Investment Disputes
ICSID AFR	ICSID Additional Facility Rules
ILC	International Law Commission
ISDS	Investment-State Dispute Settlement
LPM	Labourers' Party of Mekar
Mekar	Federal Republic of Mekar
MFN	Most-favoured nation
Memorandum of Association	Memorandum of Association of Vemma Holdings Inc. (Annex IV)
Ministry of the Transport and Tourism	Bonoori Ministry of the Transport and Tourism
Monopoly Act	The Monopoly and Restrictive Trade Practice Act

NYC	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Respondent	Federal Republic of Mekar
SOE(s)	State-owned enterprise(s)
Uncontested Facts	Statement of Uncontested Facts (Appendix)
US	United States of America
Vemma	Vemma Holdings Inc.
Vienna Convention	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

1. In 2009, Mekar approved Caeli, a state-owned enterprise, as appropriate for privatisation. Claimant, based in Bonooru, participated in the tendering process and proposed a business model that was by some considered attractive, and overly optimistic by others. However, the Respondent saw the Claimant's investment as a prospective encouragement for future foreign investors.

2. In 2011, following an approval of the CCM, the Claimant and Mekar Airservices Ltd. entered into Share Purchase Agreement. Before the approval, the Claimant duly submitted to the CCM that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members. After the acquisition, the Claimant owned an 85 % stake in Caeli, while the remaining shares were beneficially owned by the Mekari State through Mekar Airservices.

3. Bonooru perceives the Claimant as a subject that enhances constitutional mobility rights of Bonoori citizens.[1] Thanks to Caeli, the Claimant and Bonooru benefited from the geographic positioning of Phenac International Airport, Caeli catered to Bonoori customers, and the tourism infrastructure in Bonooru was enhanced.

4. Meanwhile, Mekar and Bonooru signed the CEPTA. On 15 October 2014, the pre-existing BIT was terminated and CEPTA entered into force.

5. In September 2016, the CCM opened an investigation into Caeli as it was suspected of adopting predatory pricing strategies ("The First investigation"). The CCM decided to place airfare caps as a preventive interim measure. In December 2016, a complaint was brought before the CCM that launched another investigation ("The Second investigation").

6. It was not only the antitrust conduct, but also favourable economic conditions that ensured the Claimant could enjoy its initial success. However, when the currency crisis ensued in December 2016, it became apparent that Caeli's business model was irrational. It ignored volatility of oil prices, Caeli did not focus on repaying outstanding debt or improving and stabilising its financial health and kept slashing prices.

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[1] Procedural Order No. 4, ¶ 6.

7. The investigations and the imposition of airfare caps coincided with the economic crisis. The airfare caps and Caeli's request for temporary injunction were judicially reviewed. In its decision from 15 June 2019, the court concluded the lawfulness of the airfare caps and declined to remove them. Meanwhile, both investigations were completed. The CCM's reports concluded Caeli had engaged in anti-competitive behaviour, namely abuse of dominant position and adopting predatory pricing strategies. The airfare caps were kept in place until the domestic market share of Caeli and Royal Narnian, an airline owned fully by the Claimant, fell below 40 %.

8. In November 2019, the Claimant announced its intention to sell its stake in Caeli and communicated to Mekar Airservices that it had secured an offer of a third party. However, Mekar Airservices deemed the price was not "proposed by a *bona fide* third-party purchaser". After failed negotiations, a private arbitration with the SCC Arbitration Institute followed. The arbitral award declared the offer could not be considered as one received from a "*bona fide* third party". The Claimant failed to yield another buyer, and later sold its stake in Caeli to Mekar Airservices.

9. In the end, the Claimant's notion that it would be able to run super-profitable business without any setback, while enhancing Bonoori tourism and mobility rights of Bonoori citizens, turned out to be unrealistic. The Claimant failed to understand that it is stability and strategic planning what allows businesses to overcome unexpected and unfavourable development. It was not the crisis or the Respondent's measures that are to blame for the Claimant's failure, but the Claimant's ill-judged vision of enthusiastic overexpansion.

A. THE TRIBUNAL HAS NO JURISDICTION OVER THE PRESENT DISPUTE

10. An investment dispute may only be brought before a tribunal with jurisdiction over the relevant matter. The following requirements must be met concurrently so a tribunal can exercise its jurisdiction: (i) jurisdiction *ratione personae*; (ii) jurisdiction *ratione materiae*; (iii) jurisdiction *ratione temporis* and (iv) jurisdiction *ratione voluntatis*.[2] In its submission on jurisdiction, the Respondent rationalizes that the current dispute does not fulfil these criteria in conjunction and thus the Tribunal does not have jurisdiction over the present dispute.

11. Jurisdiction *ratione materiae* refers to the features and characteristics of the subject-matter of a dispute falling under the jurisdiction of an arbitral tribunal.[3] The arbitral tribunal needs to examine both the existence of an investment under the relevant definition of an investment and the existence of a dispute related to the investment, in order for the case in question to constitute an investment arbitration. The respective definition in CEPTA is contained in its Article 9.1,[4] as

> *"forms that an investment may take include [amongst others]: b) shares, stock, and other forms of equity participation in an enterprise".*

12. Jurisdiction *ratione temporis* refers to the effect of time on the jurisdiction of a tribunal, as defined in a treaty.[5] This condition is specified by CEPTA in its Article 1.6,[6] which states that:

> *„1. Investments made under the 1994 Bilateral Investment Treaty shall be governed by this Agreement starting from the date of entry into force of this Agreement.*
>
> *2. No investor has the right to bring a claim under the Bilateral Investment Agreement following the entry into force of this Agreement."*

13. Neither the requirements of jurisdiction *ratione materiae* nor those of jurisdiction *ratione temporis* are disputed by the Parties. In the lines that follow, the Respondent demonstrates why the Tribunal lacks jurisdiction *ratione personae* as the Claimant cannot be considered

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[2] Waibel.
[3] Weber.
[4] CEPTA, Article 9.1.
[5] Terrien.
[6] CEPTA, Article 1.6.

as an investor, while also showing the lack of jurisdiction *ratione voluntatis* when it comes to the Respondent's consent with a State-to-State arbitration, or rather an absence thereof.

14. Pursuant to Article 9.16 of the CEPTA[7]:

> *"2. A claim may be submitted under the following rules:*
>
> *(a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;*
>
> *(b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; or*
>
> *(c) any other rules on agreement of the disputing parties."*

15. Since Bonooru has signed and ratified the ICSID Convention,[8] while Mekar has not,[9] the ICSID Convention would not apply in this case. Neither have the Parties agreed upon any other rules pursuant to subparagraph (c). The Claimant, therefore, submitted the dispute to arbitration under the ICSID AFR.[10]

16. As the Respondent explains below, the Tribunal does not have jurisdiction to hear the Claimant's case, as **(1)** the Claimant does not fall within the definition of an investor set out in CEPTA, and **(2)** the present dispute constitutes State-to-State arbitration, which the Respondent has not consented to neither under Chapter 9 of CEPTA nor it is possible under the ICSID AFR.

1) The Claimant does not fall within the definition of an investor

17. Article 9.1 of the CEPTA[11] defines an investor as

> *"a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party",*

while defining an enterprise of a Party as

> *"(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party;*

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[7] CEPTA, Article 9.16.
[8] Notice of Arbitration, ¶ 28.
[9] Uncontested Facts, ¶ 999.
[10] Notice of Arbitration, ¶ 28.
[11] CEPTA, Article 9.1.

or (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)."

18. As the Respondent shows below, the Claimant shall be considered a State-owned enterprise. The Respondent submits the reasons for this claim, while also explaining that it is precisely the Claimant's status as such that constitutes a serious obstacle to falling within the definition of an investor as set out by Article 9.1 of CEPTA.

i. The Claimant is a State-owned enterprise

19. State-owned enterprises are undertakings owned or controlled by States and designed to pursue financial objectives by commercial means.[12] The Respondent will address both issues of state ownership and control separately, emphasizing that fulfilment of either one of these conditions is sufficient to consider Vemma to be a State-owned company owing to the usage of the conjunction 'or'.

20. In *Maffezini* the tribunal, followed the 'structural' and 'functional' tests for attribution set out in ARSIWA, concluded that the Spanish SOE named SODIGA was an entity of the Spanish state, because it was created by a state decree, was majority-owned by the government (structural test), and carried out governmental functions for promoting regional development (functional test).[13] Regarding the present case the Respondent provides in the following paragraphs the evidence that the fulfilment of structural and functional test is similar as in *Maffezini* case.

21. After the 1973 and 1979 oil shocks, Bonoori state-owned BA Holdings was privatized under the Privatisation of Enterprises Act 1972.[14] Its successor, Vemma, is an airline holding company incorporated in Bonooru.[15]

22. Since the inception of Vemma, during the course of the whole investment, and up until the present moment, the state of Bonooru has always preserved a sizable stake in the company. To be specific, Bonooru's ownership in Vemma varied between 31 and 38 per cent,[16] rising up to 55 per cent from March 2021 onwards.[17]

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[12] Badia.
[13] Maffezini, ¶ 74-5, 89.
[14] Uncontested Facts, ¶ 911.
[15] Ibid, ¶ 932.
[16] Ibid.
[17] Ibid, ¶ 1404.

23. Although the shareholding of Bonooru in Vemma seems to only be minority, the Respondent submits that the actual ties between the Claimant and the state of Bonooru are indeed substantial enough to meet the standard of the Claimant operating under the control or direction of the Bonoori government, as well as discharging an essentially governmental function. To further clarify, the Respondent uses tests set out by ARSIWA and the ICSID tribunal, respectively, particularly considering said ties and demonstrating their impact on the matter at hand.

24. According to Article 5 of ARSIWA,[18] a provision concerned with attributing the acts of bodies, that are not State organs, to the State, states that:

> *"[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."*

25. When considering the attributability pursuant to Article 5, Article 8 of ARSIWA[19] also has to be mentioned, since it states that:

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

26. First and foremost, the Respondent wishes to address the issue of state ownership. As previously stated, Bonooru's stake in Vemma did not form full nor majority shareholding throughout the reference period. However, according to the ARSIWA Commentary, ownership alone is not the most significant factor when determining the conduct's attributability to the State:

> *"[…] the existence of a greater or lesser State participation in capital [of the entity], […] the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State."*[20]

27. Furthermore, not even the minority stake prevented Bonooru's representatives from wielding significant influence on Vemma's Board of Directors, as Bonooru's

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[18] ARSIWA, Article 5.
[19] ARSIWA, Article 8.
[20] ARSIWA Commentary, p. 43.

representatives are present for every meeting, while for some meetings they even form a majority of members present. For a quorum at regular board meetings, 50 per cent of voting shares is required to pass a decision,[21] which stems from Vemma's articles of incorporation. In conclusion, despite having a minority stake, it is apparent that Bonooru holds a controlling position in the company, since a simple majority vote, capable of electing directors, is rather realistic for Bonoori officials alone to fulfil.

28. In addition, the Respondent also highlights the importance of considering the appointment of Ms. Sabrina Blue, head of Vemma's Board of Directors at the very beginning of Vemma's investment in Caeli, as the Secretary of Transport and Tourism.[22] In 2011, she even said the following when pressed: *"Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal."*[23] As a result, it is evident that the Bonoori government has had a strong presence in Vemma since the outset of the disputed investment, even though its ownership percentage did not indicate it *per se*.

29. In order for Vemma's conduct to pass the ARSIWA test and for its conduct to 'be attributable to the State, the condition of the exercise of specified elements of governmental authority must be met. The Respondent will further elaborate on said exercise of governmental authority.

30. In one of the accompanying examples mentioned by the ARSIWA Commentary, it is explicitly said that *"situations where former State corporations have been privatized but retain certain public or regulatory functions"* are included within the scope of Article 5.[24] The abovementioned shall also be taken in conjunction with the fact, that ARSIWA commentary employs the notion of *history and tradition* in identifying the scope of governmental authority. The Respondent therefore submits that despite the privatization and decrease in shares held by the government of Bonooru, Vemma still managed to retain the predecessor's public functions of its state-owned predecessor, BA Holdings, that the Respondent elaborates on below.

31. The Prime Minister of Bonooru addressed the protests amongst concerned Bonoori people regarding the privatisation of Bonooru Air and the airline no longer being "kept

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[21] Procedural Order No. 3, ¶ 3156.
[22] Uncontested Facts, ¶ 1018.
[23] Ibid, ¶ 1083.
[24] ARSIWA Commentary, p. 42.

for the people"[25] by saying that *[the] government plans to maintain a significant interest" in Vemma and that the privatisation will allow the routes "to become more efficient and offer better sevices to [Bonoori] citizens than ever before".*[26] This was confirmed in the Memorandum of Association, as one of its objectives in subparagraph h)[27] is explained to be to assist in developing the aviation industry for the benefit of its population pursuant to the Article 70 of the Constitution Act 1957.

32. One of the Company's other objectives mentioned in the Memorandum of Association, specifically under subparagraph q)[28] seeks

> *"[t]o establish or promote the establishment or promotion of any other company whose objectives have been calculated to advance directly or indirectly the objectives or interests of this Company and to acquire and hold shares, stocks, securities, or any other obligations of any such company."*

33. The Respondent shall state that the abovementioned subparagraph g) was indeed realized by investing in Caeli and exercising a governmental function through the investment. This was done particularly by fulfilling the positive obligation of securing Bonooru's citizens their mobility rights, as will be explained further.

34. The mobility rights of the Bonoori population are enshrined in Article 70 of the Constitution of Bonooru. The Respondent, submits that the positive obligation of the State recognized by Bonooru's Constitutional Court to assist and ensure provision of essential transportation of the population living in remote areas,[29] is largely performed by the Claimant through its investment in Caeli airline, yet, pursuant to Article 5 of ARSIWA, attributable to Bonooru.

35. The Broches test is a measure formed by Aaron Broches, the first ICSID Secretary General. It contends that a state-owned enterprise should not be automatically barred from being an investor unless it is acting as an agent for the government or is discharging an essentially governmental function.[30] However, if it is found that the SOE is acting on behalf

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[25] Uncontested Facts, ¶ 918.
[26] Ibid.
[27] Memorandum of Association, ¶ 1519.
[28] Ibid, ¶ 1532.
[29] Uncontested Facts, ¶ 895.
[30] Nalbandian.

of the State, it should be considered as such.[31] As this test mirrors the ARSIWA test to a certain extent, the previously mentioned facts of the case will apply in the same manner.

ii. The Parties did not intend to include a State-owned enterprise in the definition of an investor in CEPTA

36. Starting in early 2010, the composition of the BIT was no longer reflecting the preferences of the Parties sufficiently, therefore, it had been necessary to begin negotiations to change it. The main rationale was the change in public sentiment and increasing economic interdependence between Bonooru and Mekar , which deemed the erstwhile agreement as no longer suitable to govern further economic co-operation of the Parties. Particularly the imbalance between the rights of the investors and the host State was so severe, the treaty was even dubbed as "the worst BIT in the history of BITs".[32]

37. The great contracting efforts made by both of the Parties in the period between 2010 and 2014 led to the creation of CEPTA. Replacing the BIT, CEPTA became the new investment agreement that mirrored the existing situation better, as well as the true will of the states, terminating the pre-existing BIT on 15th October 2014.[33] Amongst the adaptations of the definitions' wordings, it is the definition of an investor that has undergone some significant changes. Thus, the Respondent will further explain their significance for the present dispute.

38. According to Article I of the BIT[34], an investor

> *"means a natural person possessing the citizenship of or permanently residing in one State in accordance with its laws, or any enterprise incorporated or duly constituted in accordance with applicable laws in that State, who makes the investment in the territory of the other State."*

In addition, an enterprise is defined as

> *"any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or* ***government-owned****, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association; and a branch of any such entity."*

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[31] Farchakh.
[32] Uncontested Facts, ¶ 3218
[33] Ibid, ¶ 895.
[34] BIT, Article 1.

39. Hence, the Respondent would like to draw the attention of the Tribunal to the difference in the scope of each of the respective definitions. While the definition contained in the BIT was clearly meant to be understood broadly, including amongst others both privately and governmentally-owned enterprises in the very definition, the same conclusion cannot be made about the CEPTA.

40. The Respondent submits that the Parties manifestly intended to narrow the extent of the definition of an investor by concluding CEPTA, excluding the incorporation of a governmentally-owned entity. Since the will of the Parties contained in the applicable agreement must be respected and followed, as well as the treaty must be interpreted as stated in the Vienna Convention[35] to which both states are the Parties to,[36] the Respondent concludes that a State-owned enterprise does not fall within the scope of an investor as defined by CEPTA.

2) The present dispute constitutes State-to-State arbitration

41. The Respondent emphasizes that by submitting the present dispute to an investment arbitration, the state of Bonooru is attempting to abuse the protection provided to covered investors only, as well as to undermine the very purpose of the ISDS mechanism, which was designed to depoliticize disputes between foreign investors and host states and move away from inter-State approaches.[37] Furthermore, building on its previous claim concerning the criteria of the Tribunal's jurisdiction as stated in paragraph 10 of this memorandum, the Respondent briefly elaborates on the requirement of jurisdiction *ratione voluntatis* to a State-to-State arbitration not being met.

42. Caspian Project is an initiative to facilitate the movement of goods, people, services, and knowledge amongst Bonooru's neighbours.[38] Since its launch in 2010, there were mixed feelings present amongst said neighbours. While some States have welcomed the initiative, others have accused Bonooru of using economic leverage as a tool of diplomacy.[39] The Horizon 2020 Scheme forms a part of this project, promoting tourism in the state of Bonooru while also offering recurring subsidies to companies investing in tourism-related infrastructure in Bonooru, as one of its key parts.[40] Vemma is one of the companies

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[35] Vienna Convention, Article 31.
[36] Uncontested Facts, ¶ 1415.
[37] Nalbandian.
[38] Uncontested Facts, ¶ 887.
[39] Ibid.
[40] Ibid, ¶ 1073

receiving said subsidies, as Bonooru's Ministry of Transport and Tourism recorded recurring payments made between October 2011 and June 2016.[41]

43. A Caspian Project-related expansion consisting of updating Mekar's port and the Phenac International Airport in Mekar's capital have not been finished yet, even though it has been long due.[42] The respondent submits that this is because the funding from the Caspian Project has been withdrawn in 2019 as a reaction to inter-State issues between the respective countries of Bonooru and Mekar, as it was also discussed in Aviation Analytics[43]:

> *„it has been reported widely that behind-the-scenes, Bonoori officials are putting pressure on Mekar, especially by holding the Caspian Project-related expansion hostage."*

44. The Respondent concludes that the issue in question is certainly that of an inter-State fashion which should not be dealt with through the ISDS. It further adds that no consent has been given by the Respondent to a State-to-State arbitration between Bonooru and Mekar neither under CEPTA nor under ICSID AFR and, therefore, the Tribunal shall find that it does not have jurisdiction over the present dispute.

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[41] Uncontested Facts, ¶ 3292.
[42] Ibid, ¶ 3265.
[43] Aviation Analytics June 7, 2019 (Annex IX), ¶ 1951.

B. RESPONDENT'S POSITION ON THE *AMICI* SUBMISSIONS

45. The Respondent shall present comments on admissibility of the amicus submission. Firstly, the Respondent will focus on the CBFI's submission. In the second part, the Respondent shall address the submission of the advisors.

46. To determine whether the amicus submission is admissible, it must be put to the test as stipulated in Article 9.19(3) of the CEPTA and Article 41 of the ICSID AFR. In this case, the wording of the CEPTA regarding amicus submissions was inspired by the ICSID AFR. However, the wording of the CEPTA is more benevolent as it contains fewer requirements to be satisfied in order to pass the test. The Respondent deems it more appropriate for the applications for leave to be tested under the ICSID AFR. The Respondent shall put the submissions under the test as contained in Article 41 of the ICSID AFR, which goes as follows:

> *"After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:*
>
> *a. the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
>
> *b. the non-disputing party submission would address a matter within the scope of the dispute;*
>
> *c. the non-disputing party has a significant interest in the proceeding.*
>
> *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."*[44]

[44] ICSID AFR, p. 62, article 41.

1) Comments on the admissibility of the Amicus Submission by the CBFI

47. The Respondent submits that the CBFI's interest in this proceeding does not satisfy the requirement contained in Article 41 (c) of the ICSID AFR. It requires the non-disputing party to have *a significant interest in the proceeding.*[45] However, the CBFI's interest in this proceeding is purely private, professional and by no means significant or public.

48. The Respondent contends that the traditional role of amicus curiae is to help the court with decision on the issue at hand. "The participation of amici is often justified on the basis that amici are 'friends of the court' who can assist a tribunal by providing a special perspective or expertise on an issue in dispute."[46] Historically, submissions of non-disputing parties have been accepted because even in private litigation cases interests of third parties were at stake, which justified that the Tribunals sought an outside help.[47] Therefore, the significant interest in the proceeding cannot be satisfied only with private, professional interest.

49. Moreover, the CBFI did not prove a significant interest, as its interest are too general, and they address jurisdictional questions. In its application, the CBFI puts emphasis on issues such as collective growth, greater prosperity, access to an independent and impartial judicial system and interpretation of investor-state dispute settlement provisions. [48] The case law[49] suggests those interests in maintaining rule of law, honouring the contracts, collective growth, greater prosperity are merely general interests and do not amount to the "significant interest". As the Tribunal in *Resolute* reasoned,

> *"the applicant's goal of 'maintain[ing] respect [for] the rule of law' and upholding 'the principle of pacta sunt servanda' under NAFTA was considered to be insufficient and the Applicant lacked a "significant interest."*[50]

Therefore, these interests do not amount to the significant interest described under Article 41 (c) of the ICSID AFR.

50. Interpretation of the investor-state dispute settlement provisions is a jurisdictional question, and it is not appropriate for the CBFI to address it. Firstly, the CBFI argues

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[45] Ibid.
[46] Born and Forrest, p. 627
[47] Vivendi ¶ 19
[48] The CBFI'S Application, ¶ 525
[49] Resolute ¶ 4.6
[50] Resolute ¶ 4.6

for interpretation of investor-state dispute settlement provisions that is favourable to them. Secondly, even if this question was not addressed by the disputing parties, and it would be appropriate for the CBFI to address such issue, the Respondent contends the CBFI does not possess any legal expertise to be of use in the matter of interpretation of investor-state dispute settlement provisions. Addressing the jurisdictional questions is of the disputing parties' concern. Amici curiae are non-disputing parties and as such, they must not overstep their boundaries and act as a disputing party. The Tribunal in *United* stated that:

> *"The Tribunal does not consider that among the matters on which it is appropriate for the Petitioners to make submissions are questions of jurisdiction and the place of arbitration. On both, the parties are fully able to present the competing contentions and in significant degree have already made so."*[51]

51. Amicus curiae should be independent and impartial of the disputing parties, but the Respondent has reason to believe the CBFI is not independent from the disputing parties. Although it is not expressly stated in the ICSID AFR, the Respondent submits that the independence of the non-disputing parties is implicit in (a) of the aforesaid rule.[52] This position was taken by the Tribunal in *von Pezold:*

> *"The Arbitral Tribunals agree with the Claimants' observation that an NDP should also be independent of the Parties. This is implicit in Rule 37(2)(a), which requires that the NDP bring a perspective, particular knowledge or insight that is different from that of the Parties."*[53]

Similarly, the Tribunal in *Suez* stated that:

> *"[t]he purpose of amicus submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided. The Tribunal will therefore only accept amicus submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case."*[54]

52. Although the Advisors have disclosed that Vemma and Lapras Legal Capital are members of the CBFI in good standing, the Advisors have conveniently left out that Executive Committee member Horatio Velveteen, CFO of Lapras Legal Capital had voted

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[51] United ¶ 71
[52] ICSID AFR, Article 41 (a)
[53] von Pezold, ¶ 49
[54] Suez ¶ 23

in the matter of amicus submission in the present case. However, according to the CBFI's "Amicus Brief Submission Guidelines", he had to be excluded from the vote due to the conflict of interest. The Respondent has serious concerns about independence of the CBFI and believes that the CBFI failed to satisfy the implicit requirement, to be independent of the disputing parties, arising from Article 41 (a) of the ICSID AFR.

i. Summary of Petition and Order Sought

53. Accordingly, the Respondent respectfully requests the Tribunal to issue an order that renders the amicus submission made by the CBFI **inadmissible**.

2) Comments on the admissibility of the Amicus Submission by the Advisors

54. For this submission, the Respondent shall apply the test set by Article 41 of the ICSID AFR as described above. However, it must be noted the above-mentioned rule lists non-exhaustive list of requirements, not conditions. As the tribunals in Born and Forrest stated:

> *"[i]n exercising this discretion, tribunals must ordinarily consider a non-exhaustive list of factors, but no obligations are imposed on tribunals regarding the weight they must accord these criteria, the other factors the tribunal may consider relevant or the standard of proof for each criterion."*[55]

55. The Respondent shall address the requirement under Article 41(a) of the ICSID AFR, which goes as follows:

> *"the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;"*[56]

The Advisors are renowned experts in investment banking in Mekar. They have profound knowledge regarding the process of privatisation, restructuralization and liquidation of an entity, thus they can point out any inconsistencies or unreasonable conduct. Moreover, it is worth noting that they were selected through a transparent and competitive process, based on criteria of competence, to aid Mekar with difficult operations regarding Caeli under the Law on Privatisation of State Property.[57] Therefore, they have extensive

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[55] Born and Forrest, p. 656
[56] ICSID AFR, p. 62, article 41
[57] The Applicant's application, ¶ 620

and detailed information to present to the Tribunal. Undoubtedly, granting the leave sought by the Advisors would help the Tribunal with the issues at hand while it would simultaneously support the transparency of the proceeding. The Respondent refers to the decision of the arbitral tribunal in *Philip Morris* which stated as follows:

> *"The Tribunal believes that the Submission may be beneficial to its decision-making process in this case considering the contribution of the particular knowledge and expertise of two qualified entities regarding the matters in dispute. It considers that in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding."*[58]

56. To satisfy the requirement under Article 41(b) of the ICSID AFR the Advisors will limit their submission on the issues that are directly related to the subject matter of this arbitration. Specifically, issues regarding:

> *Privatization, liquidation, and/or restructuring of Caeli Airways, including all the internal information about the process, which is one of the central issues of this arbitration.*
>
> *Information about the general practice in this field in similar cases and whether there was anything unusual or out of the ordinary.*

57. As to the requirement under Article 41(c) of the ICSID AFR of the above-mentioned rule, there is a great interest in the subject matter of this arbitration. There is a shadow of doubt from the Mekari civil society as the corruption allegations and the Mekar's history do not lessen the gravity of the situation. The Advisors understand that corruption allegations are undesirable to potential investors and they perceive the negative effect that this uncertainty has on the Mekari market. As the Advisors' name is associated with the Vemma transaction, which is tainted by the corruption allegations, it is also of their best interest to fight the corruption, clear the Mekari market and cleanse their own name. Moreover, as a subject promoting fair business practices, the Advisors regularly act as an intervener before federal courts in Mekar. Therefore, this significant and public interest is enshrined in their tangible anti-corruption efforts, as well as their interest in enhancing investment activities in Mekar. [59]

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[58] Philip, ¶ 28
[59] The Applicant's application, ¶ 635, 640, 645

58. The Advisors have demonstrated the benefits they would bring to the Tribunal in this proceeding, and that their interest is significant both from the view of a private entity and from the view of someone who has the best interests of Mekar and Mekari citizens at heart. The Advisors efforts with fighting corruption and expertise in investment banking were demonstrated at great length above. The Advisors will address only the issues directly related to the proceeding. It is evident that even though the ICSID AFR are non-exhaustive requirements, and the Tribunal may use its discretion and decide based on another factors or requirements that may not be expressly stated in the abovementioned rule, the Advisors have sufficiently demonstrated they have satisfied the ICSID AFR, that their submission would be of great benefit to the Tribunal, that he would address only the issues within the scope of the dispute and that his interest in this proceeding is significant.

i. Summary of Petition and Order Sought

59. Accordingly, the Respondent respectfully requests the Tribunal in the present arbitration issues an order that renders the amicus submission made by the Advisors **admissible.**

C. THE RESPONDENT'S CONDUCT DID NOT AMOUNT TO BREACH OF ARTICLE 9.9. OF THE CEPTA

1) The scope of Article 9.9 of the CEPTA

60. The CEPTA's Minimum Standard of Treatment consists of two elements – fair and equitable treatment and full protection and security. As the Claimant expressed that *Mekari State organs pursued acts and omissions that taken together and individually constituted unfair and inequitable treatment,*[60] the alleged breach of Article 9.9 will concern solely the element of FET.

61. To demonstrate a violation of FET, the Claimant must identify a *specific* measure or measures that constitute one of the elements described under Article 9.9.(2)(a) - (e) of the CEPTA. Generally, definition and content of FET has been a controversial issue due to its inconsistent interpretation. Therefore, the parties to the CEPTA have agreed on a clear and straightforward wording and structure of the Article 9.9.(2) of the CEPTA. The structure, as well as a lack of a phrase "*such as*", confirm the existence of an exhaustive list and provide a guide on how to assess an overall situation.

62. The exhaustive list in Article 9.9(2) (a) - (e) prevents measures, otherwise not reaching the threshold necessary for establishing a violation of FET, from being considered cumulatively. It was the intention of the parties to the CEPTA to prevent interpretation of measures as a *creeping violation of FET*. Majority of tribunals that acknowledged the existence of *creeping violation of FET* interpreted treaties that did not specify either elements of FET or did not provide any additional guide to its interpretation.[61] However, parties to the CEPTA have been thorough and opted for a narrow concept of the FET standard.

63. To conclude, to demonstrate a breach of FET, the Claimant must identify a *specific* measure or measures that would amount to a breach of one of paragraphs (a) – (e) of Article 9.9(2) of the CEPTA, rather than label the overall situation as a breach of FET. Only after

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[60] Notice of Arbitration, ¶ 12.

[61] The Tribunal in El Paso interpreted ARTICLE II(2)(a) of the USA - Argentine Treaty: *Investment shall at all times be accorded fair and equitable treatment, [...];* The Tribunal in Alicia Grace interpreted Article 1105: Minimum Standard of Treatment 1.: Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

that a measure can be analysed to determine whether it reached the threshold necessary to constitute a violation of FET.

2) The CCM did not act arbitrarily

64. The CCM initiated two investigations into Caeli. The CCM placed airfare caps as an interim measure at the time of initiation of the First investigation in September 2016[62] that was concluded at the end of August 2018, and kept them in place until Caeli's market share with Royal Narnian fell below 40% in October 2019.[63] The airfare caps had a preventive function and aimed at competition and consumer protection.

65. The Respondent shall prove the CCM did not act arbitrarily within the meaning of Article 9.9 of the CEPTA. The CCM carried out its legal obligations in accordance with the Monopoly Act and its measures pursued its legitimate aim.

Firstly, the Respondent shall explain the legal basis for initiation of the investigations to prove the initiation was *founded in reason and fact, not on caprice, prejudice, or personal preference*.

Secondly, the Respondent shall explain the purpose of airfare caps as a preventive interim measure to prove the existence of *correlation between the policy objective and the measure adopted to achieve it.*[64] To be more precise, *the issue of arbitrariness does not examine whether the measures taken were or were not the best, but simply whether they were based on a reasoned scheme that was itself reasonably connected to the aim pursued.*[65]

Finally, to show the maintenance of airfare caps remained proportional over time, the Respondent shall balance state's right to regulate with investor's rights.

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[62] Uncontested facts, ¶ 36 – 37.
[63] Ibid, ¶ 56.
[64] *Eskosol*, ¶ 385.
[65] Ibid.

i. The requirements for initiating the investigations were met

66. The First investigation was commenced *suo moto* by discretion exercised by the CCM in accordance with CHAPTER III (2) of the Monopoly Act:

> *The CCM may open an investigation into behaviour it deems anti-competitive, suo moto if the following circumstances are met:*
>
> *(a) 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. The use of discretion should be exceptionally rare;*
>
> *(b) the corporation poses* ***a unique threat to the competition*** *in a particular market; and*
>
> *(c) there is* ***evidence*** *the corporation's actions have, or are likely to in the near future, push competitors out of the market.*

The CCM **exercised its discretion** to open the investigation. Aviation is an **industry requiring special attention** which is deducible at least from the fact that acquisition of Caeli had to be approved by the CCM.

The position of Caeli on the market allowed it to **pose a unique threat to the competition**. Its market share of 43%, and 54% in conjunction with Royal Narnian, a leading global airline, gives Caeli capability to adopt predatory pricing strategies. To clarify, Royal Narnian was not subject to the investigation. However, the common share was seen as a relevant factor because Royal Narnian is fully owned by Vemma. Therefore, Vemma is one entity controlling two subjects operating on the domestic market in Mekar. This connection to Royal Narnian further strengthens Caeli's capability to engage in anti-competitive behaviour and gives it possibilities of abusing their dominant position.

Finally, the investigation was initiated **on the basis of evidence** of preferential secondary slot-trading, cooperation and Caeli's capability of pushing competitors out of the domestic market.[66]

67. The Second investigation was opened in accordance with CHAPTER III (3) of the Monopoly Act. It was the CCM's obligation to open the investigations,

[66] Uncontested facts, ¶ 36.

as a complaint was brought before the CCM by a consortium of small regional airlines in Greater Narnia,[67] and other legal requirements were met.

68. As explained above, the both investigations were founded in *reason and fact* as they were based on evidence, while the aim was pursued within the Respondent's consistent legal framework. Overall, the CCM pursued the objective of protecting the competition through legal means provided by the Monopoly Act.

ii. The imposition of the airfare caps was a preventive measure that followed a legitimate objective

69. The legal requirements for ordering an interim measure are high. The Respondent shall explain the requirements were met, as well as the fact this particular measure had a preventive function that was *reasonably connected to the aim pursued.*

iii. The CCM met the high requirements set by law to order interim measures

70. CHAPTER III (4) (e) Of Monopoly Act states:

> *"In cases of urgency due to the risk of* ***serious and irreparable damage to competition****, the Tribunal, acting on its own initiative may by decision,* ***on the basis of a prima facie finding of infringement****, order interim measures for* ***preventive purposes****. Such a decision shall apply for a specified period of time and may be renewed insofar this is necessary and proportionate."*

71. Engaging in predatory pricing strategies is a serious violation of antitrust legislation. If successful, it results in driving out smaller competitors from the domestic market. This would have resulted in **serious and irreparable damage to competition**. It is therefore the role of the CCM to take necessary proactive action.

The CCM was in a position to conclude it had ***prima facie*** **findings of infringement**, as the First investigation was based on existing evidence.

Airfare caps are not a sanction, but a measure with **a preventive purpose**. It is used to address predatory pricing strategies that aim to eliminate the competition by discouraging anticompetitive pricing by setting an upper limit of a fare.[68] If a competitor seeks to expand its consumer base by setting excessively low prices and simultaneously

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[67] Uncontested facts, ¶ 38.
[68] Loube, p. 287.

driving out other competitors, it expects to generate long-term supra-competitive profits and use its monopolistic market position to regain losses that occurred in the predatory phase.[69]

iv. The preventive function of airfare caps was reasonably connected to the aim pursued

72. As explained above, the purpose of the air caps was to prevent Caeli from earning supra-competitive profits in the future.[70] They were set reasonably above the rates Caeli charged on set routes.[71] In the notice of arbitration, the Claimant recognized the airfare caps were reasonable when implemented, and there was no evidence the caps hurt Caeli's profitability in 2016.[72] Moreover, airfare caps are a standard measure used by governments to achieve legitimate objectives. For example, amid the first wave of COVID, the Indian government set a minimum and a maximum fare limit and classified flight routes into 7 bands.[73] "*The lower cap i.e. the minimum rent limit imposed by the government was aimed at helping the companies. The purpose of the maximum fare limit was to help the passengers.*"[74]

73. Therefore, the imposition of this measure is *based on a reasoned scheme.*[75] It is *reasonable and consistent with the aim pursued.*[76] The relationship between the imposition and the CCM's objective of preventing Caeli causing serious and irreparable damage to the competition by engaging in predatory pricing strategies corroborates that the measure *cannot be considered as tainted by arbitrariness.*[77]

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[69] Kaplow, p. 47.
[70] Uncontested facts, ¶ 37.
[71] Ibid.
[72] Ibid.
[73] India TV
[74] Thestraightpost
[75] El Paso ¶ 325
[76] Ibid.
[77] Ibid.

3) The maintenance of airfare caps was well-balanced

74. The Parties to the CEPTA recognize their right to regulate in the preamble, as well in Article 9.8. Generally, right to regulate provisions "*constitute the most common tool for states to safeguard their right to regulate*."[78] The parties inserted this general exception in *attempt to preserve regulatory flexibility in designated policy areas.*[79]

75. Article 9.8 recognizes consumer protection explicitly as a legitimate objective that invokes parties' right to regulate, while phrase "*such as*" allows states to exercise their right in legal areas that are not explicitly mentioned. CETA has identical wording[80] and it is as well interpreted as providing a demonstrative list and preserving *ability of the states to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as social or consumer protection.*[81]

76. The Respondent submits it acted within its right to regulate concerning the maintenance of the airfare caps. The measure was aimed at both consumer and competition protection. However, the Respondent argues the maintenance of the airfare caps did not interfere with the Claimant's rights to extend that could have reached the threshold necessary for a violation of FET. Therefore, the Respondent will prove the measure remained reasonable and well-balanced in spite of concurring circumstances.

i. Reasonableness of the airfare caps

77. As explained above, there is a correlation between the aim of the airfare caps and the pursued objective. In addition to this, the Respondent admits that there needs to be *a reasonable relationship of proportionality between the means employed and the aim sought to be realized.*[82] To demonstrate the measure remained well-balanced, the Respondent shall explain that neither Caeli nor the Claimant *bore an individual and excessive burden.*[83]

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[78] Levashova, p. 31 .
[79] Ibid.
[80] Article 8.9(2) of the CETA is identical to 9.8(2) of the CEPTA.
[81] Joint Interpretative Instrument.
[82] *EDF-1* ¶ 293.
[83] Ibid.

ii. The measure's concurrence with inflation did not put an excessive burden on Caeli

78. The Claimant's economic failure throughout the crisis is to be attributed to Claimant's poor business decisions that relied on unrealistic prospects, and on unexpected events that were beyond the Respondent's reach of influence.

79. The Respondent stresses that before MON began to nosedive in late 2016,[84] Caeli engaged in low pricing that did not allow it to turn as large a profit on each passenger as compared to its competitors.[85] Despite advice of board representatives from Mekar Airservices, it slashed airfares and preferred fleet expansion over repaying outstanding debt and improving its financial health.[86] The board representatives from Vemma had decided to adopt an approach that blatantly ignored any possibility of future unfavourable economic conditions or any setback. The Respondent submits that maintenance of airfare caps in spite of inflation was not an excessive burden on Caeli. It was Caeli's previous business decisions that predominantly affected the way Caeli was able to handle the crisis.

80. Moreover, the airfare caps are pegged to Mekar's official inflation rate calculated by the Central Bank, released each year in December,[87] therefore they were adjusted yearly. Even though Caeli had felt that by the end of 2018 the inflation could be much higher than anticipated by the December 2017 statistic,[88] the Respondent stresses that yearly adjustments were sufficient. Moreover, pegging the airfare caps to inflation ensured the objectivity of this measure.

81. Furthermore, the economic crisis is not a sole negative circumstance that could have affected Caeli. In 2018, previously historically low oil prices rose to the highest since 2013,[89] and all Boeing 737 MAX aircraft had to be grounded following a deadly accident.[90]

82. The Respondent understands that Caeli suffered financially, but it was not due to Respondent's conduct, but due to a series of unexpected events that only Caeli could

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[84] Uncontested facts, ¶ 39.
[85] Ibid, ¶ 34.
[86] Uncontested facts, ¶ 35.
[87] Ibid, ¶ 43.
[88] Ibid.
[89] Ibid, ¶ 48.
[90] Ibid.

have prepared for by cautious and thought-through decisions. Therefore, in spite of concurring inflation, airfare caps did not put an excessive burden on Caeli.

iii. The Respondent's decision to denominate exclusively in MON aims at supporting and stabilising currency.

83. With the aim of supporting and stabilising currency, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON on 30 January 2018.[91] In Enron, the tribunal found that Argentina's measures to address its economic crisis were not arbitrary because they were based on *"what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place."*

84. The Respondent submits that its effort to stabilise currency by denomination occurred when the airfare caps were pegged to a new, only a month-old inflation rate. Moreover, the purpose of the measure was to recover favourable economic conditions that even the Claimant would have eventually benefited from.

iv. Maintenance of the airfare caps pending the Second investigation and until the market share dropped was proportional

85. The Second investigation was completed on 1 January, 2019, four months after the First one. The CCM made a decision to keep the airfare caps in place until the end of the Second investigation, and later decided on maintaining them until the market share of Caeli and Royal Narnian drops below 40%. The reasoning behind this measure remains identical to reasoning for placing the caps in the first place, as well as the fact that the Respondent used its right to regulate to combat the threat monopolies pose to the competition. Moreover, as the inflation rate was adjusted again and the economy began to stabilize, the caps could not have placed an excessive burden on Caeli.

86. With the objective of consumer and competition protection, the Respondent submits that implementation of airfare caps was an adequate measure to address conduct Caeli had been suspected of and later found to have engaged in. The relationship between the rationale of the measure and the goals confirms it did not amount to arbitrary conduct.

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[91] Uncontested facts, ¶ 42.

Even though the implementation of the caps concurred with the economic crisis and measures the Respondent needed to take to address the crisis, the Respondent's conduct cannot be seen and understood as a sole or main reason that had or could have had an adverse effect on the investment. The damage to the competition that uncontrolled conduct of Caeli could have caused, if it was not for the interference of the CCM, is the main reason why it remained necessary for the CCM to pursue its legitimate objective. All respective measures of the Respondent were based on a reasoned scheme and reasonably connected to the aim pursued.

4) The Claimant has not been denied justice

87. The economic crisis of 2018 caused Mekari courts to be overwhelmed with a high volume of cases.[92] As a result, Caeli's hearing, registered on 27 March 2018, was scheduled for April 2019. The Court Registrar dismissed Caeli's subsequent demand for a separate hearing and immediate redress, as the court did not have resources to comply with such request of any other subject.[93] The decision was delivered on 15 June 2019, where the Court declined to grant an interim removal and dismissed the merits. The justice was administered in accordance with international standards and the Claimant has not suffered a violation of FET as a result of *fundamental breach of due process* or *denial of justice*.

88. The standard of denial of justice is of procedural nature, yet the Respondent admits that the substance of the decision may be relevant, though only under exceptional circumstances.[94]

89. Therefore, the Respondent shall address the element of *fundamental breach of due process* as a part of the procedural nature of *denial of justice*, proving that the court procedure complied with fundamental aspects of *due process* and *procedural fairness*. The Respondent stresses that the threshold for breach is even higher than in cases involving simply the standard of *due process*, because the CEPTA states the breach must be *fundamental*.

90. Subsequently, the Respondent shall address the substantive nature of *denial of justice*. The Respondent will prove the substance was not *so patently arbitrary, unjust or idiosyncratic that it would demonstrate bad faith,*[95] and that this is not one of the "*extreme cases where the proof*

[92] Uncontested facts, ¶ 44
[93] Ibid.
[94] *Rumeli*, ¶ 653; *Reinhard*, ¶ 273
[95] *Rumeli*, ¶ 653

of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it."[96]

5) Procedural nature of denial of justice and fundamental breach of due process

91. The Claimant has not been denied justice *as the national system as a whole has satisfied minimum standards for a fair procedure.*[97] The gravity of a charge condemning the State's judicial system as such requires an elevated standard of proof.[98] Only actions that 'shock' an independent observer can amount to denial of justice.[99] However, the Respondent ensured the ruling was delivered within reasonable time, Caeli had access to justice and its right to be heard was fulfilled.

i. The Claimant was not subjected to undue delay

92. The Respondent acknowledges that judicial rulings in Mekar might not come as swiftly as one would consider ideal. Yet,

> *"investment tribunals should be very reluctant to impose their own views on swift and efficient judicial proceedings on domestic courts. Rather, they ought to be willing to concede that various factors may contribute to delays which are not thus to be considered unreasonable."*[100]

93. Taking into consideration the economic crisis and its further negative effect on the judiciary occupancy, the Respondent strongly believes Mekar has not subjected the Claimant to undue delay in administration of justice.

94. In White industries, the Tribunal concluded that the case based on a denial of justice must have failed, even though the proceedings lasted for 9 years. Similarly, in *Jan de Nul*, it took the court ten years to deliver a first instance judgement. Both tribunals considered the duration of proceedings, as well as delay, to be *certainly unsatisfactory in terms of efficient administration of justice.*[101] However, the Tribunal recognized reasons for which the duration or delay did not reach to the stage of constituting denial of justice.

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[96] *Reinhard*, ¶ 273
[97] *Oostergetel*, ¶ 225; *Olin*, ¶ 349
[98] Philip Morris, ¶ 499
[99] *Muñoz*,, p. 107
[100] *Krederi*, ¶ 457
[101] White Industries, ¶ 10.4.22

95. The factors that tribunals consider are various circumstances that contributed to the delay, or even the development status of the country.[102] In Frontier, the tribunal acknowledged the courts were experiencing at once a high volume of cases and a shortage of judges[103] and the fact that the claimant failed to establish that its investment suffered as a result of the delay.[104]

96. Mekar's judicial system is prone to being overwhelmed, as its expansion is slower than the rise in the population. Combined with the high volume of cases stemming from the economic crisis, the courts were not able to schedule a sooner hearing. Given the circumstances, the Respondent submits the matter was heard and the judgement was delivered in a timely manner.

ii. Caeli's access to court and justice was ensured by the Respondent

97. Numerous subjects unsuccessfully sought immediate redressal amid the economic crisis. In spite of the court not being able to grant the immediate redressal to Caeli, its right to be heard was fulfilled and the justice had been *administered on a footing of equality with nationals of the country*.[105] Caeli enjoyed *full freedom to appear before the court for the protection of its rights, was able to bring any action provided by law and deliver any pleading by way of defence, set off or counterclaim, to engage Counsel and to adduce documentary and oral evidence*.[106] Moreover, the justice had been *administered on a footing of equality with nationals of the country*,[107] as the court abided by its procedural rules and did not provide any other person with a more favourable treatment.

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[102] Ibid, ¶ 10.4.18
[103] *Frontier*, ¶ 336
[104] Ibid, ¶ 331
[105] Ambatielos, p. 111
[106] Ibid, p. 111
[107] Ibid, p. 111

6) Substantive nature of denial of justice

98. Denial of justice addresses procedural unfairness. However, so far as a judgement is concerned, denial of justice can be established only if the Claimant can prove that the court was guilty of bias, fraud, dishonesty, or a lack of impartiality. Bona fide error of the court does not entail responsibility.[108] The Respondent shall explain the reasoning of the court to prove the claim for violation of substantive denial of justice is unsubstantiated.

99. The decision was reached on a balance of convenience. As the case concerns a temporary injunction, it is not unusual the court uses this approach to base its decision on. The balance of convenience helps to preserve the status quo pending a trial.[109] Injunction is granted only when an applicant proves it will suffer an irreparable harm,[110] and the harm caused by refusal is greater than the harm caused by the measure.[111] Therefore, the Court cautiously balanced the possible economic setback that Caeli might have had to face with the harm its conduct could have had caused to the competition. On the balance of convenience, the court concluded Caeli would not have suffered irreparable loss. However, the objective of protecting the competition and consumers would have been jeopardized. Therefore, the balance of convenience did not favour granting the injunction.

100. Summary judgments without appeal are possible under the Executive order 5-2014. In this case, the Court considered the *prima facie* case after Caeli properly exercised its rights. When a court considers *prima facie* case, it determines whether a threshold of applicants chance to succeed on merits is greater than a chance to fail.[112] Therefore, the court reasoned its conclusions accordingly.

101. The Respondent submits that even in cases where the conclusion appears to be demonstrably wrong in substance, denial of justice is not established. The adjudicator must be impelled to conclude that the conclusions could not have been reached by an impartial judicial body worthy of that name.[113] However, the decision is not peculiar or unusual, therefore the Claimant has not been denied justice.

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[108] Chevron ¶8.37
[109] *McKean*, p. 214
[110] Aghababyan, p. 4; *McKean*, p. 212
[111] Ibid, p. 4
[112] Ibid, p. 3
[113] Kläger, p. 215

7) The enforcement of the arbitral award does not amount to denial of justice.

102. On 9 May 2020 an award was rendered in favour of Mekar Airservices regarding a dispute between them and the Claimant regarding its failure to secure a *bona fide* third party offer under Article 39 of the Shareholders' Agreement.

103. The Respondent will prove the enforcement does not amount to denial of justice. The Respondent will focus on substantive nature of *denial of justice*. Firstly, by analysing applicable provisions of the NYC, it will lay out the basis for their interpretation. Secondly, it will show the Mekari interpretation of the NYC is consistent with its international interpretation. Thus, the enforcement did not amount to denial of justice.

8) The interplay between Article V and Article III of the NYC is the basis of Mekari courts' understanding of judicial discretion regarding the refusal of enforcement.

104. It is worth noting that despite an award having been set aside, it does not cease to exist in terms of both Mekari[114] and international jurisprudence, as the

> *"discretionary application of Article V(1)(e) not only conforms with its plain language, its history, and judicial interpretation, but also fully conforms with the approach that nullification of an award at the situs does not destroy the award's independent existence. This increasingly common view advocates that once final, arbitral awards are deemed to have taken on an independent international existence separate from the judicial system of the state in which they were rendered. With the award detached from the law of the situs, courts in foreign jurisdictions may enforce it whether or not it has been nullified."*[115]

105. The Respondent submits the NYC's distinction between provisions containing "*shall*" and "*may*" are a salient point for understanding Mekari courts' application of discretion. This is a basis on which a *pro-enforcement bias*, as formed for example in *Parsons* when addressing Article V,[116] that was adopted by Mekari courts. Therefore, Mekari courts have analysed the interplay between Article III and Article V to review the reasons for denying the recognition.

106. Article III forms a central obligation of the NYC, while the nature of Article V inherently allows the states to apply discretion. The interplay between these articles demonstrates

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[114] Superior Court of Mekar ruling - 25 September 2020
[115] Ostrowsky, Shany, p. 1684
[116] Ostrowsky, Shany, p. 1660

a foreign arbitral award's superior status while indicating a strong presumption in favour of an arbitral award.[117] Therefore, the presumption in favour of recognition and higher deference given to an arbitral award is based on language of the treaty and presented approach. Mekari courts have not ignored the decision of a Sinnoh national court, but they have chosen to give a higher deference to an arbitral award when applying their discretion.

107. Overall, Mekari courts used their degree of discretion in the light of the *pro-enforcement bias* that comes from the interplay between these articles. As a result, both the award and the decision setting it aside were carefully examined, as the inherently discretionary nature of Article V is well suited to such an evaluation. From this standpoint, it is understandable that the approach of Mekari courts was to focus on the content of the award more closely than on the content of the decision setting it aside.

9) An analysis of both the arbitral award and decision setting it aside showed the enforcement of the award would not have contradicted public policy of Mekar.

108. The New York Convention neither compels enforcement courts to refuse set-aside arbitral awards nor provides grounds for such refusal.[118] Paulsson considers one may "*fairly conclude (unless the national implementing statute provides to the contrary) that enforcement notwithstanding annulment is a matter of judicial discretion*"[119] and that "*[t]he fact is that courts cannot violate the Convention by enforcing a foreign award.*"[120] Therefore, the court *"may consider jointly both the award and the foreign judgment, as well as the pertinent interests and policies, before deciding which decision should be given effect.*"[121]

109. When setting aside the award, the court in Sinnoh deliberated whether it would be against public policy of Sinnoh to not to set aside an award was tainted by corruption. It concluded the evidence of corruption was circumstantial, and admitted it was not in in a position to rule on whether the act of bribery had in fact taken place.[122]

110. Similarly, Mekari courts expressed they had needed to determine whether enforcement of the award would result in giving effect to corruption.[123] However, Sinnoh and Mekari

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[117] Ostrowsky, Shany, p.1658
[118] Bird, p. 1029; Chen, Wang, p. 131.
[119] Paulsson, p. 7
[120] Ibid, pp. 6-7
[121] Ostrowsky, Shany, p. 1693
[122] Ibid.
[123] High Commercial Court of Mekar ruling - 23 August 2020, ¶ 9

courts differed in evaluating how high standard must be met to constitute a public policy defence. While the Sinnoh court was satisfied with *circumstantial evidence*, Mekari courts, in accordance with their jurisprudence, considered the evidence to be *circumstantial at best*. Therefore, Mekari courts held that the recognition of an award that had been set aside for unsubstantiated reasons at the seat was not contrary to the Mekari conception of international public policy.[124]

111. Mekari restrictive approach to public policy is based on case law of Mekari Supreme Court that upholds an award should only be set *aside if it would violate the most basic notions of morality and justice.*[125] Other jurisdictions adopted similar approach, such as the US. Its "*courts also applied a restrictive approach to the public policy exception. In this case, the meaning of public policy is construed narrowly and applied only where enforcement would violate the most basic notions of morality and justice.*"[126]

112. Therefore, Mekari courts' concluded that the evidence that was "circumstantial at best" did not constitute a public policy exception that could justify non-enforcement.

10) The enforcement did not amount to denial of justice.

113. The national system as a whole satisfied minimum standards by providing due process and procedural fairness. More importantly, the substance of decision was not "is so egregiously wrong that no honest or competent court could possibly have given it,"[127]as the interpretation adopted by Mekari courts is consistent with the international interpretation of the NYC. Hence, the decision of Mekari courts is fully compatible with the NYC.

[124] Superior Court of Mekar ruling - 25 September 2020, ¶ 18
[125] High Commercial Court of Mekar ruling - 23 August 2020, ¶ 18
[126] Junita, p. 145
[127] *Reinhard*, ¶ 273

11) Refusal of Caeli's application for subsidies under Executive Order 9-2018 does not amount to a discriminatory conduct.

114. Mekar responded to the consequences of the economic crisis of 2017 by providing emergency assistance and health care to individuals, families, and businesses through Executive Order 9-2018. Under the Order, airlines were eligible for subsidies, but their grant was conditioned by an application and subsequent approval of the Secretary of Civil Aviation. The Respondent submits that even though Caeli's application was dismissed, this conduct does not amount to discrimination under Article 9.9 of the CEPTA.

115. Discriminatory conduct under Article 9.9(2)(c) of the CEPTA is neither equal to nor interchangeable with *Non-Discriminatory Treatment* provisions under SECTION C. The Respondent submits that potential Claimant's claim on discrimination based on nationality does not fall under the FET standard. Therefore, the Respondent will not address the issue as if it had been based on nationality.

116. To prove the existence of discrimination, the Claimant must first identify an appropriate comparator, i.e. an investor which is in a situation similar to its investment in Mekar. Secondly, the Claimant must prove Mekar has applied to this comparator a treatment more favourable than that accorded to Caeli. Third, there must be a lack of a reasonable or objective justification for the difference of treatment.[128]

12) An appropriate comparator is another government-owned entity.

117. It is necessary to compare the treatment challenged with the treatment of persons or in a comparable situation.[129] The Respondent submits that in this case, the basis for differentiation is ownership of the affected businesses. As Mekar's deputy Minister of Transportation reasoned, "*State-owned companies have unique advantages over other companies that enable them to outcompete privately-owned firms.*"

118. Therefore, it must be carefully considered which group must be looked to for this comparison.[130] Given the inherent, merely government created, undue competitive advantages, such as preferential financing from state-backed institutions, preferential regulatory treatment, or a privileged market position conferred

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[128] *Cengiz*, ¶. 525
[129] *Total S.A.*, ¶ 210; *Reinhard*, ¶ 262
[130] *Marion*, ¶ 263

by the government, that are available to state-owned enterprises,[131] the privately-owned enterprises and state-owned enterprises are not in like situation. An appropriate comparator is Larry Air, another state-owned enterprise.

13) Caeli was accorded the same treatment as the comparator

119. As explained above, the Respondent made a reasonable distinction between the businesses to determine whether they should or should not be granted the subsidies. All competitors in like circumstances were accorded the same treatment. Neither Caeli nor Larry Air were eligible to be granted subsidies.

14) The distinction between state-owned and privately-owned enterprises is justified by economic and functional aspects arising from their ownership

120. The ownership is a relevant criterion for assessing like circumstances and an appropriate comparator.

> *"Regardless of whether the 'in like circumstances' requirement is expressly stated or implied, it may restrict the application of NDT to SOEs to a certain context. In other words, the 'in like circumstances' requirement may provide a safeguard to host States to exclude SOE investors from NDT protections on the basis of different ownership."*[132]

121. After identifying an appropriate comparator, the Respondent proved subjects in similar situation were accorded the same treatment. The justification for differentiating the enterprises is reasonable and objective. Therefore, Claimant has not been denied justice.

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[131] Baumann, p. 72
[132] Wang, p. 49

D. THE COMPENSATION

122. Even if the Tribunal concludes that the CEPTA has been violated and the Claimant is owed compensation, the standard for calculating damages expressly prescribed in Article 9.21 of the CEPTA should be applied. Since the Claimant may not invoke the MFN clause contained in Article 9.7 of CEPTA and replace the "market value" standard contained in Article 9.21 of the CEPTA by the "fair market value" compensation standard contained in AM BIT, the Tribunal should find that the Respondent already paid the "market value" for Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million. Therefore, the Claimant is owed no compensation.

1) The MFN clause cannot import the "fair market value" standard for calculating damages from AM BIT

123. The extent of the damages caused shall correspond to the amount of damages calculated on the basis of the value of the investment. When an international investment treaty does not indicate to the valuation standard which should be used by the tribunal in assessing the damages, tribunals determine the measure of compensation appropriate to the specific circumstances of the case. By doing so, tribunals should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.[133] However, contracting parties to the CEPTA precisely defined the method to be adopted in order to evaluate the exact amount of damages.

124. Article 9.21 of the CEPTA reads as follows:

> *"Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination: (a) monetary damages at a market value, except as otherwise provided for in Article 9.12; […]."*

An express wording of Article 9.21 should be understood as the intention of the contracting parties to the CEPTA not to apply the "fair market value" method. It is worth noting that the application of the "market value" standard for calculating damages in cases of a breach of a treaty other than unlawful expropriation is in line with the Respondent's investment policy reflected in its Model BIT.[134]

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[133] Tujakowska.
[134] Procedural Order No. 3, ¶ 15.

125. The Claimant aims to rely upon the MFN clause contained in Article 9.7 of the CEPTA to import the "fair market value" standard for calculating damages from AM BIT. However, in order to determine whether the MFN clause allows investors to import more favourable provisions with respect to the standard for calculating damages, it is necessary to first interpret the treaty provisions.

126. Interpretation and effect of the MFN clause is impacted by its wording and, as well as express and/or implied exceptions or limitations. In this context, in *Plama*, the tribunal concluded that:

> *"an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them".*[135]

More specifically, the tribunal held that the decision upon an analysis of the wording of the MFN clause should be based, *inter alia,* on the exceptions to MFN treatment contained therein; the context of the clause; the object and purpose of the treaty; the states parties' treaty practice; and the circumstances surrounding the conclusion of the treaty, alongside other considerations.[136]

127. Paragraph 1 of Article 9.7 of CEPTA reads as follows:

> *"Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."*

128. The Respondent contends that the MFN clause cannot import the "fair market value" standard for calculating damages from AM BIT since the application of the MFN clause is strictly limited to *the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of investments.*[137] The use of the "the fair market value" standard for calculating damages by the tribunal in cases of a breach of a treaty does not fall under the exhaustive list of situations specified by the MFN clause. In addition, the use of "the fair market value" standard for calculating damages does not constitute

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[135] Plama,¶ 223.
[136] Shirlow.
[137] CEPTA, Article 9.7.

a treatment to be accorded to investors. Article 9.13 of AM BIT does not in any way affect the state's treatment it accords to foreign investors.

129. Even if the Tribunal found that the calculation of damages by the tribunal constitutes a treatment (substantive obligation), the MFN clause cannot import the "fair market value" standard for calculating damages from AM BIT since the application of the MFN clause is further limited by paragraph 2 of Article 9.7 of CEPTA. This provision reads as follows:

> *"For greater certainty, […]. 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, absent measures adopted or maintained by a Party pursuant to those obligations."*

Having said that, the standard for calculating damages does not in itself constitute a "treatment", and thus cannot give rise to a breach of Article 9.7 of CEPTA, absent measures adopted or maintained by a Party pursuant to those obligations. In other words, the mere reference to the provision contained in other investment treaty considered to be more favourable, cannot give rise to a breach of Article 9.7 of CEPTA. In the case at hand, the Claimant did not identify any measures adopted or maintained by the Respondent.

130. It is the Respondent's submission that the Tribunal should apply the standard expressly prescribed in Article 9.21 of CEPTA. Since the Claimant sold its stake in Caeli to the Respondent represented by Mekar Airservices on 8 October 2020 for the "market value" USD 400 million, the Claimant is owed no compensation.

2) Any compensation awarded to the Claimant should be reduced

131. The assessment of damages should involve complex legal and economic considerations. It is generally understood that the responsible state is not (or not fully) liable for damages that the investor could reasonably have mitigated, or that occurred in the context of a crisis or exceptional circumstances.[138] Therefore, even if the Tribunal finds that the Claimant is owed compensation, it should be calculated against the background of a) the Claimant's responsibility for the losses it has incurred, and b) the ongoing economic crisis in Mekar.

[138] Breton.

132. Pursuant to Article 39 ARSIWA,

> *"[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."*

The duty to mitigate damages was also considered by the International Court of Justice obiter in the case concerning the Gabčíkovo-Nagymaros Project.[139]

133. The Respondent asserts that the Claimant has contributed to its own loss and should accordingly receive less compensation. The duty to mitigate damages is a well-established principle in investment arbitration.[140] The tribunal in *Middle East Cement* in this context held:

> *"The duty to mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the general principles of law […]."*[141]

134. Whether the aggrieved party has taken reasonable steps to reduce the loss is a question of facts. It is worth noting that Caeli engaged in low pricing that did not allow it to turn as large a profit on each passenger as compared to its competitors.[142] Despite advice of board representatives from Mekar Airservices, it slashed airfares and preferred fleet expansion over repaying outstanding debt and improving its financial health.[143] In other words, the Claimant adopted an approach focused on rapid expansion and ill-strategised business plans instead of tending to long-term financial health. Since the Claimant blatantly ignored any possibility of future unfavourable economic conditions or any setback, it was its previous business decisions that predominantly affected the way Caeli was able to handle the crisis.

135. The Respondent contends that damages that occurred in the context of a crisis should be accordingly mitigated. More specifically, the Tribunal should take into consideration an ongoing economic crisis in Mekar in the valuation of the quantum of compensation.[144] It is worth noting that tribunals have taken the context of crisis when calculating the compensation to be paid to the claimant also in cases in which states failed to base

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[139] Gabčíkovo-Nagymaros Project, ¶ 80.
[140] EDF-2, ¶ 1302; Marcoux & Bjorklund.
[141] Middle East Cement, ¶ 167.
[142] Uncontested facts, ¶ 34.
[143] Ibid, ¶ 35.
[144] Breton.

their defence on the NPM clause or customary international law.[145] More specifically, the CMS Tribunal stated:

> *"The factual situation […] allows the Tribunal to take into account different situations at distinct periods in time. The crisis had in itself a severe impact on the Claimant's business, but this impact must to some extent be attributed to the business risk the Claimant took on when investing in Argentina, this being particularly the case as it related to decrease in demand. Such effects cannot be ignored as if business had continued as usual. Otherwise, both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, and outcome that, as the Respondent has rightly argued, would not be justified. On the other hand, a number of the measures adopted did indeed contribute to such hardship and the burden ought not to be placed on the Claimant alone."*[146]

136. The economic crises in Mekar started in late 2016, when the MON began to nosedive. The shaky investor sentiment, state interference with the central bank, and tariff threats from trading partners are the most often cited reasons of the MON's fall. High foreign-currency debt also resulted in Mekar running deficits in both its fiscal and current accounts. Simultaneously, increasing inflation led to a surge in costs of everyday items and reduced consumer spending power. In response to the economic crisis, the IMF emphasised "the need to establish credibility in the [local] currency to avoid a debilitating economic situation".[147]

137. In conclusion, if the Tribunal finds that the Claimant is owed compensation, the Claimant's responsibility for the losses it has incurred as well as the ongoing economic crisis in Mekar should be taken into consideration. Hence, the Tribunal should reduce any compensation awarded to the Claimant.

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[145] Alberto Alvarez-Jimenez p. 8; CSM ¶ 315-331, 353 – 378.
[146] CSM, ¶ 248.
[147] Uncontested facts, ¶ 39.

E. RESPONDENT'S RELIEF SOUGHT

139. For all the reasons set out above, the Respondent respectfully requests the Arbitral Tribunal:

a. To find that it does not hold jurisdiction over the present dispute.
b. To decide that the amicus submission made by Consortium of Bonoori Foreign Investors is not granted and that the amicus submission made by External advisors to the committee on reform of public utilities is granted.
c. Declare that Respondent did not violate Article 9.9(1) of the CEPTA.
d. In case the Tribunal finds Mekar did violate Article 9.9, then the tribunal should conclude Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.