TEAM MOMTAZ

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.	v.	**The Federal Republic of Mekar**
CLAIMANT		RESPONDENT

COUNTER-MEMORIAL FOR RESPONDENT

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

Table of Contents

List of abbreviations

§/§§	Line/Lines
¶/¶¶	Paragraph/Paragraphs
1994 BIT	1994 Bonooru - Mekar BIT

Amici	External Advisors to the Committee on Reform of Public Utilities
Arrakis	Kingdom of Arrakis
Bonooru	Commonwealth of Bonooru
BPB	Bonoorian People's Bank
CAA	Commercial Arbitration Act
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CRPU	Committee on Reform of Public Utilities
Hawthorne	Hawthorne Group LLP
HCCM	High Commercial Court of Mekar
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investor Disputes
Lapras	Lapras Legal Capital
Mekar/RESPONDENT	Federal Republic of Mekar
Memorandum	Memorandum of Association of Vemma Holdings Inc.
MON	Mekar's currency
Mr. Cavanaugh	Mr. Rett Eichel Cavanaugh
MRTPA	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
MTT	Bonooru's Ministry of Transport and Tourism

p./pp.	Page/Pages
Phenac Airport/ Phenac	Phenac International Airport
SOE/s	State Owned Enterprise/s
UNCITRAL RT	UNCITRAL Rules on Transparency in Investor-State Arbitration
Vemma/CLAIMANT	Vemma Holdings Inc.

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2012 US Model BIT	2012 U.S. Model Bilateral Investment Treaty
ARSIWA	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Supplement No 10 (A/56/10).
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, OJ. L 11 (2016)
ICSID	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, (1965)
ICSID AFR	ICSID Additional Facility Rules
IICRA	Investment Information and Credit Rating Agency

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Statement of Facts

Parties of the Dispute

1. **Vemma Holdings** (**"Vemma"**) is an airline holding company incorporated in Bonooru. Shareholders in Vemma include the State of Bonooru, and also private and institutional shareholders. It has 100% ownership in Royal Narnian, which is a leading global airline, and part of the Moon Alliance. On 5 January 2011, Vemma acquired an 85% stake in Caeli Airways (**"Caeli"**), a privatised airline from Mekar.
2. **The Federal Republic of Mekar** (**"Mekar"**) is a small developed state. High regulatory intervention and late economic reforms starting in 1994 affected Mekar's post-independence growth. In April 2014, Mekar signed the Comprehensive Economic Partnership and Trade Agreement (**"CEPTA"**) with Bonooru. The agreement entered into force on 15 October 2014.

Relevant Facts

3. On 23 November 2010, Vemma Holdings submitted its bid for the purchase of Caeli. On 5 March 2011, Competition Commission of Mekar ("**CCM**") approved Vemma's acquisition of an 85% stake in Caeli and the airline's participation in the Moon Alliance. On 29 March, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. Simultaneously Vemma and Mekar Airservices entered into a Shareholder's Agreement.
4. In 2012 Vemma started to increase its operations, threatening its competitors. Consequently, in September, the CCM launched a press release on its intention to investigate Caeli, and Airfare caps were imposed on Caeli.
5. In late 2016, MON began to nosedive, starting a currency crisis in March 2017.
6. As a measure to protect the consumers from the crisis, on 30 January 2018, Mekar issued a Decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON.
7. On 8 March 2018, Caeli's board voted to seek judicial review of the CMM's airfare caps.
8. In August 2018, The CCM concluded its first investigation into Caeli. It imposed Caeli a penalty of MON 150 Million, for incurring in predatory pricing, and decided to keep the caps in place pending the Second Investigation.

9. On 1 January 2019, CCM completed its Second Investigation and a fine of MON 200 million was imposed on caeli. It also decided to maintain the airfare caps until Caeli market share were to fall below 40%. Its market share stood at 43% at the time.

10. In November, Vemma announced its intention to sell their stake in Caeli. Vemma secured an offer from Hawthorne Group LLP (**"Hawthorne"**) and communicated the terms to Mekar Airservices, who rejected the offer because the price was inflated and not an arm's length commercial price.

11. On 11 February 2020, after failed negotiations, Mekar Airservices filed a request for arbitration. The award was favourable for Mekar on 9 May 2020. The High Commercial Court of Mekar issued a ruling recognizing and enforcing the award in Mekar on 23 August 2020. Vemma appealed the judgement before the Superior Court of Mekar, which was dismissed.

12. On October 8 2020, Vemma sold its stake in Caeli to Mekar Airservices, and on November 15 filed a Notice of Arbitration against Mekar.

Summary of Arguments

I. *RATIONE PERSONAE*

13. This Tribunal lacks jurisdiction *ratione personae* since Vemma cannot be considered a protected investor neither under the CEPTA nor under the ICSID regime. Otherwise, these proceedings would constitute State to State arbitration, which was neither consented nor allowed under the legal framework.

II. AMICUS CURIAE

14. RESPONDENT request the rejection of CBFI's submission due to the fact that the participation of Lapras Legal Capital (**"Lapras"**) raises a conflict of interest; CBFI's application does not fulfill the prerequisites of ICSID AFR, and it does not file its application in pursuit of any public interest. On the contrary, the Amici's submission should be accepted since it would address a matter that does fall within the scope of this dispute without disrupting the proceeding or unfairly prejudicing either Party.

III. FET

15. RESPONDENT did not violate the FET Standard. First, the RESPONDENT did not frustrate CLAIMANT's legitimate expectations. Second, the measures adopted by the Host State were not arbitrary and they were conducted in accordance with Mekari law. Third, RESPONDENT did not incur in discriminatory treatment because the investor was not in like circumstances with other airlines operating in Mekar. Last, Vemma was never denied justice, it had every opportunity to be heard in front of Mekari courts and the HCCM has wide discretion to enforce awards that had been set aside.

IV. COMPENSATION

16. RESPONDENT did not violate Article 9.9 of CEPTA. Consequently, RESPONDENT does not owe any compensation to CLAIMANT. In case the Tribunal considers the opposite, it should determine that Mekar has already purchased Vemma's investment at "market value". Alternatively, the Tribunal should take into account CLAIMANT'S contribution to its own injury at 63%, and also the ongoing economic crisis in Mekar.

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE PERSONAE*

17. In March 2011, Vemma acquired 85% stake in Caeli, a civil aviation State-owned enterprise ("**SOE**"), which Mekar decided to privatize.[1]

18. Despite Vemma's initial success[2] in Caeli, its controversial policy of over expanding the airline led to negative results.[3] In 2019, Vemma's representatives announced their intention to sell their stake in Caeli given the burgeoning liabilities of the enterprise[4] and Mekar Airservices purchased the airline.[5]

19. On 17 November 2020, trying to take advantage of the CEPTA, Vemma filed a Notice of Arbitration alleging that Mekar treated its investment unfairly and inequitably and seeking compensation.[6]

20. Nonetheless, this Tribunal lacks jurisdiction *ratione personae* since Vemma cannot be considered a protected investor neither under the CEPTA (**A**) nor under the ICSID regime (**B**). Otherwise, these proceedings would constitute State to State arbitration, which was neither consented nor allowed under the legal framework.

A. Vemma is not a protected investor as the CEPTA does not permit State to State arbitration

21. Historically, Bonooru has been the largest shareholder in Vemma, and the only governmental one.[7] From the company's incorporation until March 2020, the State retained a shareholding that ranged between 31% to 38%.[8] As of March 2021, it increased to a majority of 55%[9] while no other shareholder owns more than a 7% stake.[10] Therefore, Vemma is an extension of Bonooru's government.

22. CLAIMANT cannot argue that States are protected under the CEPTA. According to Article 9.16, disputes must arise between a State and an investor who is a national of the other State. "Investor" is a natural person or an enterprise with the nationality of a Party or seated in the territory of a Party, according to Article 9.1. States are not included in that definition.

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[1] Record §1045.
[2] Record §1941.
[3] Record §1955.
[4] Record §1339.
[5] Record §1391.
[6] Record §10.
[7] Record §3273.
[8] Record §933.
[9] Record §1410.
[10] Record §3274.

23. According to Article 31 of the Vienna Convention on the Law of Treaties, which both States are Parties to, "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms…".* Interpreting this article, it has been stated that:

> *"There is no warrant in this provision for reading into a treaty* ***words that are not there****. It is not open to a court, when it is performing its function, to expand the limits which the language of the treaty itself has set for it".*[11]

24. CLAIMANT also cannot argue that it is a protected investor under the CEPTA because it is a SOE, since the context, which is another element to be considered when interpreting a treaty,[12] indicates that Mekar and Bonooru have agreed to leave State entities outside the scope of the CEPTA. While the 1994-BIT expressly protected SOEs, it was replaced and abrogated by the CEPTA which does not. The will of the State has changed and Vemma does not have *jus standi* before this Tribunal.

25. In any event, if the Tribunal considers that SOEs are protected pursuant to Article 1.6 (1) CEPTA, Vemma's investment would still not be because it does not overcome the Broches Test, and therefore, this would also constitute State to State arbitration.

B. In any event, Vemma does not have standing to initiate an arbitration under the ICSID regime since it does not overcome the Broches Test

26. Aron Broches, the first ICSID secretary-general, elaborated a test in order to distinguish SOEs which legitimately qualify as nationals of another State, from those so tightly linked to the State that cannot be considered as a separate entity. Several ICSID tribunals[13] have applied this test when analyzing SOEs standing in investment arbitration.

27. Notwithstanding that it is typically used in cases under the ICSID Convention, it can also be applied under the ICSID AFR. CLAIMANT chose those rules to institute these proceedings because the CEPTA provides that option under article 9.16, since Mekar is not a contracting state of the ICSID Convention.[14] Nevertheless, both under the ICSID AFR and the ICSID Convention, the nature of the Parties is the same: a State and a national of another State. Therefore, this test is applicable under any of them.[15]

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[11] Brown.
[12] Gardiner.
[13] *CSOB; BUCG; Flughafen*.
[14] Record §25.
[15] Kovács, pp. 275-288.

28. Broches proposes that:

> "*... a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."*[16]

29. Its two elements mirror the customary international law rules on attribution of internationally wrongful acts to States, codified in Articles 5 and 8 of the International Law Commission's Articles on State Responsibility ("**ARSIWA**").[17] Upon an affirmative finding on either limb of the test, an ICSID tribunal is duty-bound to decline jurisdiction and deny the SOEs access.[18]

30. CLAIMANT argues that Vemma qualifies as an investor of another State and therefore has standing in these proceedings.[19] However, RESPONDENT will demonstrate that it does not since it acts as an agency of Bonooru (**1**) and discharges an essentially governmental function (**2**).

1. Vemma acts as an agency of Bonooru

31. The first leg of the Broches Test indicates that when an investor is not distinguishable from the State in terms of operational management, it does not have standing as CLAIMANT before an ICSID tribunal.[20] This is because it would mean that the acts of the agency are, indeed, executed by the State behind it. Consequently, a conflict would give rise to State to State arbitration rather than an investor-State dispute.

32. This limb of the test is based on Article 8 ARSIWA, which indicates that what has to be analyzed is whether "*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.*"[21]

33. In this line, RESPONDENT will demonstrate that the background leading to the establishment of Vemma (*a*); its ownership and corporate framework (*b*) and the financial aid it received from Bonooru (*c*) indicate that it acts under the instructions and control of the government.

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[16] Broches ¶¶331, 354-355.
[17] Feldman p. 27; BUCG ¶34.
[18] Chijioke p. 318.
[19] Record §11
[20] Nalbandian.
[21] Brown.

a. The background leading to the establishment of Vemma shows that it is an agency of Bonooru

34. In *Maffezini*,[22] as in several other ICSID cases,[23] the tribunal considered the context that led to the creation of the company under analysis to conclude that it acted on behalf of the State.

35. CLAIMANT cannot affirm that Vemma's origin indicates that it is an arm's-length enterprise. RESPONDENT will demonstrate that Vemma´s creation context indicates that it is a Bonoori agency.

36. Vemma's predecessor was BA Holdings, a Bonooru SOE, parent company to the State's national carrier and monopoly civil airline, Bonooru Air.[24] Both were managed by the Civil Aviation Authority (**"CAA"**), an arm of Bonooru's Ministry of Transport and Tourism ("**MTT**"),[25] in order to ensure provision of essential transportation to the population living in remote areas, which is a positive obligation of the State.[26]

37. After the 1973 and 1979 oil shocks, the CAA restructured BA Holdings into an arms-length enterprise in an effort to enhance its profitability.[27] It planned to sell up to a 70% stake of the company to a long-term investor and keep a 30% stake[28], which is precisely how Vemma was incorporated.[29]

38. The intended privatisation of Bonooru Air was not well-received as protesters were concerned about their mobility rights.[30] In response, the Prime Minister declared that the airline's successor would be *"directed to ensure that it operates routes to our most remote islands, regardless of profitability.*"[31]

39. The Constitutional Court of Bonooru rejected a challenge to the privatisation's constitutionality because it was satisfied that the government had ensured protections for the citizens' access to mobility. It considered that the provisional Memorandum of Association of Vemma ensured that Royal Narnian - Vemma's airline - would continue to operate routes to remote

[22] *Maffezini.*¶ 85.
[23] See *CSOB*; *BUCG*; *Maffezini; Salini; Hamester; Flughafen.*
[24] Record §912.
[25] Record §908.
[26] Record §900.
[27] Record §911.
[28] Record §914.
[29] Record §1553.
[30] Record §918.
[31] Record §923.

communities. The Court concluded that this, combined with Bonooru's continued participation in Vemma, ensured mobility rights.[32]

40. All things considered, Vemma functions under the instructions and direction of the government, which enables it to use Vemma on its behalf. Therefore, Vemma is an agent of Bonooru.

b. Vemma's ownership and corporate framework indicate that it is a State agency

41. Another criteria used to determine whether an enterprise is a representative of the State or not is to consider its shareholding and corporate structure.[33]

42. CLAIMANT cannot assert that Vemma operates as a private commercial company. RESPONDENT argues that its ownership and structure indicate that it acts under the instructions and control of Bonooru.

43. Regarding ownership, Bonooru has always maintained a sizable stake in Vemma, which ranged from 31% to 38% from its incorporation date to March 2020.[34] Although this did not make it a majority holder by itself, it has to be considered together with the fact that no other shareholder owned more than a 7% stake.[35] This means that Bonooru has always been the largest shareholder in the company and this, together with the corporate structure, gave it the means to control it.

44. Vemma's corporate structure is established in its Articles of Association, which indicate that the decision-making organ is the Board of Directors. It "*shall consist of eight (8) directors, including five (5) executive directors, one (1) non-executive director, one (1) independent director and one (1) director representing the employees*".[36]

45. The MTT is entitled to nominate one of its officials for the non-executive director position, which is a "*non-independent director who does not hold any other position in the Company other than a director position.*"[37] Non-Executive Directors are Board members who are responsible for the supervision of the Executive Directors' performance and the general affairs of the Company.[38]

[32] Record §1490.
[33] *Salini* ¶32.
[34] Record §933.
[35] Record §3274.
[36] Record §1569.
[37] Record §1575.
[38] Lawinsider.

46. Despite the fact that the other members of the Board are elected in regular meetings,[39] as Vemma's Articles of Association require 50% of voting shares for quorum[40] and Bonooru has always been the largest shareholder in Vemma, the State can easily form a majority of members present and voting when not all other shareholders attend.[41] Bonooru's representatives in Vemma are present for every meeting,[42] which enables them to choose Board members easily.
47. This ownership stake and corporate framework allows Bonooru to control Vemma and, consequently, to use it as a vehicle to execute governmental functions in the State's interest.

c. Vemma was financially controlled by Bonooru

48. Not only do CLAIMANT's creation's background, ownership and corporate framework indicate that Vemma is a Bonoori agency but the fact that it is financially controlled by the State also does.
49. Vemma has always received financial support from Bonooru to execute its activities. Historically, the Royal Narnian received subsidies for flights offered on routes of significance to mobility of disparate communities in Bonooru.[43] In 2011, Vemma´s bid to acquire Caeli included refinancing of the airline's remaining debt liability by the Bonoorian People's Bank ("**BPB**") a nationalized bank of Bonooru.[44] Lastly, under the "Horizon 2020" Scheme, Vemma received subsidies from Bonooru for 5 years which enabled it to fly non-profitable routes.[45]
50. This shows Bonooru's constant financial aid to Vemma, which enabled the company to operate in accordance with the government's objectives.

2. Vemma discharges an essentially governmental function

51. Even if the Tribunal considers that Vemma did not act as an agency of Bonooru, RESPONDENT will demonstrate that it still does not overcome the Broches Test as it discharges an essentially governmental function.
52. CLAIMANT may argue that the nature of its activities was commercial. However, RESPONDENT will demonstrate that they were governmental in nature. This can be seen

[39] Record §3156.
[40] *Ibid.*
[41] Record §3160.
[42] Record §3158.
[43] Record §1485.
[44] Record §1025.
[45] Record §§§1080, 3295; 1867.

analyzing the Vemma's establishment (*a*), as well as its objectives (*b*) and functioning track record (*c*).

a. Vemma was established to exert governmental functions

53. The *Maffezini*[46] tribunal examined the background leading to the establishment of the company under analysis to determine that it was exercising governmental functions. RESPONDENT shall apply that logic to the present case.

54. To clearly understand Vemma's goals, it is important to stress that Bonooru is an archipelagic State comprising 109 islands, of which only four are 'major islands' where services such as healthcare and educational institutions are concentrated.[47] Therefore, its Constitution specially protects mobility rights of its population[48], and in 1964, the Constitutional Court found that it is a positive obligation of the State to assist and ensure provision of essential transportation to the population living in remote areas.[49]

55. Historically, populations were connected solely through waterways, but with the increased viability of commercial aviation, Bonooru developed a robust network of domestic airways.[50] As already mentioned, The Civil Aviation Authority ("CAA"), an arm of Bonooru's MTT, managed Bonooru's national carrier and monopoly civil airline, Bonooru Air, until it decided to privatize its parent company - BA Holdings - due to financial reasons.[51]

56. The privatisation was not well-received and the process was stayed until the Constitutional Court of Bonooru concluded that it did not impede the achievement of the State's positive obligation[52]. It considered that the government had ensured that mobility rights were protected in light of the fact that the provisional Memorandum of Association of Vemma, which was the primary successor to BA Holdings, ensured that *"Royal Narnian will continue to operate routes to remote communities"*.

57. This shows that providing air services within Bonooru has always been a governmental function in nature, since ensuring mobility rights is a positive obligation of the State, firstly guaranteed by Bonooru Air and later by Vemma.

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[46] *Maffezini* ¶86.
[47] Record §895.
[48] Record §1425.
[49] Record §1454.
[50] Record §903.
[51] Record §908.
[52] Record §927.

b. Vemma's objectives indicate that it exercises governmental functions

58. Another criteria utilized by the tribunal in *Maffezini* was the analysis of the enterprise's purposes.[53] In the present case, Vemma's objectives are clearly defined in its Memorandum of Association.[54]

59. Subclause (h) of the document expressly establishes that one of the company's purposes is to

> "***assist in developing*** *the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities*".[55]

60. In *Hamester*, the tribunal found that the objective of an entity established *"**To assist in the development** of the cocoa, coffee and sheanuts industries of Ghana"*[56] was public in nature. The same conclusion was reached by the *Maffezini* tribunal, a case in which the entity was created with the purpose of enhancing the industrustrial development of Galicia.[57] This shows that Vemma exerts functions that are governmental in nature.

61. CLAIMANT may argue that this purpose is auxiliary to the commercial ones but the Memorandum itself clarifies that each objective shall be construed independently, and none of them is subsidiary to or limited by the others.[58] Therefore, that argument is invalid.

c. Vemma's functioning track record shows that it is an instrument of State action

62. As it has been explained, Vemma exerted governmental functions through the Royal Narian by ensuring mobility rights in Bonooru, which is an obligation of the State.

63. CLAIMANT may however argue that the focus should be on Vemma´s investment in Caeli, in which its activities were purely commercial. In that regard, RESPONDENT will explain how, even in the fact-specific context of Vemma's investment[59] the company exerted governmental functions as the investment was made to achieve Bonooru's goals in relation to the "Caspian Project".

64. In 2010, Bonooru's government launched the "Caspian Project", an initiative to facilitate the movement of goods, people, services, and knowledge amongst its neighbours.[60] Bonooru

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[53] *Maffezini* ¶86.
[54] Record §1506.
[55] Record §1519 (**Emphasis** added).
[56] *Hamester* ¶189 (**Emphasis** added).
[57] *Maffezini* ¶86 (**Emphasis** added).
[58] Record §1536.
[59] *BUCG* ¶35; *CSOB* ¶86.
[60] Record §889.

planned to build infrastructure in Narnian States.[61] Some of them have welcomed the initiative, while others have accused Bonooru of using economic leverage as a tool of diplomacy.[62]

65. As part of that project,[63] on 23 November 2010, Vemma submitted its bid to purchase an 85% stake in Caeli. That same day, Ms. Sabrina Blue, erstwhile head of Vemma's board of directors, was appointed as the Secretary of Transport and Tourism in Bonooru.[64]

66. In 2011, she unveiled the "Horizon 2020" Scheme as part of the Caspian Project to "*optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures*".[65] An important feature of this Scheme was to offer recurring subsidies to companies that invested in tourism-related infrastructure in Bonooru.[66]

67. As one of the pillars of Caeli Airways' business model at that time was catering to customers travelling from Mekar to Bonooru,[67] Vemma received subsidies under that scheme from October 2011 to June 2016.[68] Ms. Sabrina Blue, when pressed on the rationale behind these subsidies by opposition party members, stated that Vemma's expansion into Mekar would benefit Bonooru, enhancing the aviation network and boosting the tourism infrastructure.[69]

68. What is of utmost importance is that the flights between Mekar and Bonooru were actually not profitable for Caeli.[70] There were no real commercial reasons to fly those routes. They were sustained with the financial aid of Bonooru, for its own benefit.[71]

69. The subsidies received were not the only financial benefits that Vemma enjoyed. The company was able to refinance Caeli's inherited debt liability from BPB, a nationalised bank in Bonooru in which the government holds a 58.96% stake, with soft-loans kindly given without apparent requirements.[72]

70. Moreover, in January 2012, after Vemma made its investment in Caeli, which included large repair and storage facilities in Mekar's Phenac International Airport, Bonooru unveiled it would deploy part of a USD 30 Billion fund of the Caspian Project to update the airport.[73]

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[61] Record §892.
[62] Record §893.
[63] Record §1832.
[64] Record §1018.
[65] Record §1076.
[66] Record §1079.
[67] Record §1073.
[68] Record §1080.
[69] Record §1086.
[70] Record §1867.
[71] Record §1086.
[72] Record §1103.
[73] Record §3265.

71. This all shows that the Vemma's activities during its investment in Caeli were not commercial in nature but rather governmental, made in order to achieve Bonooru´s goals in line with the "Caspian Project".

72. In conclusion, even if SOEs are considered protected investors under the CEPTA, Vemma is so tightly linked to the State that it cannot be regarded as a separate entity and, therefore, this would constitute State to State arbitration, which is precluded by the legal framework.

II. REGARDING THE SUBMISSIONS ON AMICUS CURIAE

73. Arbitral tribunals have increasingly accepted written submissions of *amicus curiae*. This trend is already reflected in most arbitral rules.[74]

74. In the case at hand, both the CEPTA and the ICSID AFR accept the possibility of a non-disputing party (**"NDP"**) participating as an *amicus*. Notwithstanding the particular formalities the CEPTA establishes, which have been satisfied by both applicants and not contested by any party, Article 41 (3) ICSID AFR and Article 9.19.3 CEPTA state analogous criterions: that it assists the Tribunal with a perspective, particular knowledge or insight different from that of the parties, address a matter within the scope of the dispute, and have a significant interest in the proceeding. Additionally, the Tribunal must guarantee *amicus* submissions do not disrupt the proceeding or unduly burden or unfairly prejudice either party.

75. *In casu*, two applications were brought before the Tribunal for leave to file *amicus curiae* submissions: on one hand, the CBFI, an association that represents Bonoori investors. CBFI filed the application alleging that it pursue to assist the Tribunal with its knowledge on Bonoori corporate framework and the nature of its aviation industry.

76. On the other hand, the Amici, a serious civil-society association of professionals that were external advisors to Mekar's Committee on Reform of Public Utilities in the process that led to Vemma's acquisition of an 85% stake in Caeli. In their application for leave to file an *amicus curiae* brief they claim to be able to provide information that might endanger this Tribunal's jurisdiction *ratione materiae*.

77. In analysing whether or not the *amicus curiae* submissions should be allowed, the parties must be consulted, yet it is up to the Tribunal to decide about its allowance.[75] While CLAIMANT is asking this Tribunal to accept CBFI's submission and to reject The Amici's submission, RESPONDENT requests otherwise. The amicus submission by CBFI should be rejected since it fails to meet the prerequisites of the ICSID AFR, the CEPTA and the UNCITRAL Rules on Transparency in Investor-State Arbitration (**"UNCITRAL RT"**) **(A)**. On the contrary, the *amicus* submission by the Amici should be accepted as it reflects valuable perspectives **(B)**.

A. CBFI should be rejected as an Amicus Curiae by the Tribunal

78. CBFI is an industry association that represents Bonoori investors. The size of CBFI could be illustrated by the amount of the inversions of its members: In 2014, they cumulatively invested

[74] Epaminontas.
[75] Andrew.

USD 59 billion solely in the Greater Narnian region.[76] It provides its members, as a benefit for their membership fee, collective advocacy

79. Mekar supports openness and transparency in arbitration proceedings under Chapter 9 of the CEPTA, including through the appropriate participation of *amicus curiae*. Pursuant to Article 9.20(6) of the CEPTA, Mekar asks for this Tribunal to apply the UNCITRAL RT to these proceedings.

80. CLAIMANT cannot argue that CBFI's submission fulfills the requisites of the legal framework. RESPONDENT request the rejection of CBFI's submission due to the fact that the participation of Lapras raises a conflict of interest (**1**); CBFI's application does not fulfill the prerequisites of ICSID AFR (**2**), and it does not file its application in pursuit of any public interest (**3**).

1.The participation of Lapras Legal Capital raises a conflict of interest

81. The circumstances of the case raise legitimate doubts as to the independence of CBFI, warranting the rejection of the submission.

82. Article 41 (3) (a) ICSID AFR, that requires from the *amicus* a perspective different from that of the disputing parties, necessarily implies the requisite of indepence of the parties to the dispute. The *Von Pezold* tribunal stated that the "*apparent lack of independence or neutrality of the Petitioners is a sufficient ground to deny the NDP Application*."[77] This criteria was also applied in *Suez* as a ground to deny an *amicus* application.[78]

83. *In casu,* Lapras is advising Vemma with respect to its claim against Mekar.[79] This is remarkable since Lapras's CFO, Horatio Velveteen, is an Executive Committee member of CBFI.[80] In fact, under CBFI's "Amicus Brief Submission Guidelines" he should not participate in discussions or votes in relation to this dispute, since it has a conflict of interest: a direct financial interest in the outcome of the case. [81]

84. Thus, given the fact that Lapras CFO is also a member of the Executive Committee of CBIF, this application for *amicus* should not be granted. Accepting it would be against the prerequisite of independence of Article 41 (3) ICSID AFR.

[76] Record, §3201, 3202.
[77] *Von Pezold* ¶56. While this is a case under the ICSID Rules, the same logic should be applied *in casu*, since the wording of Article 37 (2) ICSID Rules and 41 (3) ICSID AFR is exactly the same.
[78] *Suez Amicus* ¶24.
[79] Record §520.
[80] Record §3208.
[81] Record §3203.

2. CBFI does not meet the criteria from CEPTA, ICSID AFR or UNCITRAL RT

85. RESPONDENT asserts that CBFI does not fulfil the criteria set in Article 41 (3) (a) ICSID AFR, which requires the *amicus* to provide a perspective, particular knowledge or insight that diverges from that of the parties. CBFI's perspectives, knowledge and insight do not diverge from that of CLAIMANT since it lacks independence.

86. The fact that CBFI has asserted expertise in boonori economic climate is irrelevant. Policy and political issues of this nature do not bear on the factual and legal issues in this dispute. CLAIMANT strongly states that there is nothing CBFI can add to the arbitration which cannot be argued by either party and, due to the fact that this is a clear requirement of Rule 41(3) (a) ICSID AFR, the sole consideration of this circumstance should be enough for the Tribunal to reject the submission.

87. The application not only fails to meet the prerequisite of Article 41 (3) (a), but also that of Article 41 (3) (c), which requires the *amicus* to demonstrate it has a direct interest in the proceedings. Since the CBFI lacks independence from the Parties, it has no genuine interest in the proceedings. The only interest shown is the financial interest of Lapras. The *Von Pezold* tribunal examined this latent tension in requiring an *amicus* to be independent yet also to possess a significant interest in the proceedings.[82] Nevertheless, the participation of Lapras denies the possibility of any interest outside those of CLAIMANT.

88. Moreover, under the CEPTA, the ICSID AFR and the UNCITRAL RT, the acceptance of an *amicus* should not disrupt the proceeding or unduly burden or unfairly prejudice either party.[83] On this logic, in *von Pezold*, it was stated that the tribunal must ensure that the submission is compatible with the rights of the Parties and the fairness of the process.[84] Lacking independence, the acceptance of this *amicus* would have the effect of a double persecution for RESPONDENT: on one hand, it will defend from CLAIMANT, and on the other, from the CBFI's allegations.

3. CBFI does not file its application in pursuit of any public interest

89. Even in the case CBFIs' would be considered to be independent, it does not bring matters in pursuit of any public interest. Although this is not a pre-established requisite, the criteria set both in the CEPTA and the ICSID AFR are non-exhaustive, and the Tribunal has discretion to

[82] Von Pezold ¶62.
[83] *UPS* ¶69.
[84] *Piero Foresti.*

consider other matters. As the investment arbitration protects not only the investor's individual interest but also the public interest,[85] the *amicus* submission should pursue public interest in order to fully assist the tribunal.

90. In *Methanex* the tribunal emphasized that the case concerned a matter of public interest not merely because one of the parties were a State, but also because it concerned provision of public service, and the amicus could bring a new perspective on the issues.[86] *In casu*, the concerns CBFI brings seem factually and legally irrelevant to the issues to be decided by this Tribunal. It only pursues the interest of Bonooris private investors, more specifically the interest of Lapras and those of CLAIMANT. Hence, CBFI has not demonstrated any sufficient pursuit of any public interest in these proceedings to justify accepting it as *amicus curiae.*

91. To summarise, the CBFI's submission should be rejected since it is not independent from the parties, and does not comply with the criteria of the CEPTA, the ICSID AFR, nor the UNCITRAL RT.

B. The Tribunal should grant the leave sought by the Amici to submit an amicus curiae brief

92. The Amici, who were engaged as external advisors to the CRPU in the process that led to Vemma's acquisition of an 85% stake in Caeli,[87] have submitted an application for leave to file an amicus curiae brief in this proceeding.[88] Through it, they intend to offer insights related to the allegations that the rights received by Vemma in the aforementioned process were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the CRPU.[89]

93. CLAIMANT alleges that the Amici's submission fails to meet the prerequisite established by Article 41 (3) (b) ICSID AFR and Article 9.19.3 CEPTA since it would address a matter that falls outside the scope of the dispute.[90] It might also contend that, in consequence, its admission would disrupt the proceeding or unduly burden or unfairly prejudice the Parties.

94. RESPONDENT will demonstrate that, on the contrary, the Amici's submission would address a matter that does fall within the scope of this dispute (**1**) and that it would not disrupt the proceeding or unfairly prejudice either Party (**2**).

[85] Saravanan, page 1.
[86] Levine.
[87] Record §617.
[88] Record §595.
[89] Record §635.
[90] Record §714.

1. The Amici's submission would address a matter within the scope of the dispute

95. The Amici's submission would adduce unbiased facts related to the allegations made against Mr. Dorian Umbridge, the Chairperson of the CRPU.[91] He is said to have accepted bribes in order to choose Vemma in the bidding process that led to its acquisition of an 85% stake in Caeli.[92] This would constitute a case of corruption.

96. Despite the fact that this issue has not been raised by the Parties themselves, it falls inside the scope of this dispute since the Tribunal has *ex officio* powers to examine corruption allegations.[93]

97. ICSID tribunals and commentators have increasingly classified corruption as contrary to and in violation of international and transnational public policy.[94] The *World Duty Free* tribunal further explained that, as regards public policy, "*the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens…*"[95] Hence, conscious of the seriousness of corruption offenses, some tribunals have on their own initiative examined alleged acts of bribery and corruption without being restricted by specific allegations of one the parties.

98. In light of this, the Tribunal has the power to accept the Amici's amicus curiae submission in order to analyze the allegations of corruption made against Mr. Umbridge. If they were proved to be true, that would mean that Vemma's investment in Caeli was made illegally, and therefore it would not be protected by the CEPTA. Hence, this Tribunal's jurisdiction *ratione materiae* over the present case would be at risk.

99. In this line, CLAIMANT cannot state that there is no express legality requirement in the CEPTA. However, several ICSID tribunals[96] have found that, even if not expressly established in the applicable BIT, the legality of the investment is still a prerequisite for its protection.

100. As explained by the *Phoenix Action* tribunal, the purpose of international protection through ICSID arbitration is *"to protect legal and bona fide investments*" and not to protect investments obtained through corruption.[97] Most importantly, the tribunal stated that "*this condition - the*

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[91] Record §638.
[92] Record §635.
[93] *Infinito Gold PO2* ¶137, *Niko Resources* ¶7, *F-W Oil*¶212.
[94] *Union Fenosa Gas* ¶48, *Kim* ¶593, *Churchill Mining* ¶493, *Metal-Tech* ¶ 292, *Niko* ¶ 9, *F-W Oil* ¶212, *Siag* ¶17, *World Duty Free*¶157, *Inceysa* ¶249; Llamzon, L. and Sinclair, A.C. p. 462; Lalive ¶62.
[95] *World Duty Free* ¶181.
[96] *Fraport ¶ 332; Phoenix Action ¶ 101; Hamester ¶ 124; Minnotte and Lewis ¶ 131; Mamidoil ¶ 359; Blusun ¶ 264; Krederi ¶ 385; Álvarez y Marín ¶ 155; Cortec Mining ¶ 260; Plama ¶ 138.*
[97] *Phoenix Action* ¶100.

conformity of the establishment of the investment with the national laws - is implicit even when not expressly stated in the relevant BIT."[98]

101. Therefore, granting leave to the Amici to file an amicus curiae submission that would allow analyzing the legality of Vemma's investment in Caeli is within this Tribunal's powers and duties despite the fact that the Parties have not raised that issue.

102. In any event, even if the Tribunal finds that concerns related to its *ratione materiae* jurisdiction fall outside the scope of the dispute, the Amici's submission would also provide valuable information regarding an issue that has indeed been raised by the Parties: fair and equitable treatment of Vemma's investment in Caeli.[99] In this view, some international tribunals have reasoned that if proven, corruption would constitute a grave violation of the fair and equitable standard.[100] Hence, the facts that the Amici could provide regarding the alleged payment of bribes to Mr. Umbidge could even benefit CLAIMANT's case on the merits.

2. The Amici's submission would not disrupt the proceeding or unduly burden or unfairly prejudice either Party

103. As CLAIMANT considers that the Amici's submission would deal with a matter that falls outside the scope of the dispute,[101] it may in consequence argue that it would disrupt the proceeding or unduly burden or unfairly prejudice the parties.

104. As explained by the *Methanex* tribunal, that burden is indeed a potential risk which is "*inherent in any adversarial procedure which admits representations by a non-party third person.*"[102] However, considering the importance of the issue that would be addressed in the Amici's submission, *i.e.* corruption in the investment, such burden could not be considered unduly or unfair. On the contrary, it is of utmost importance in order to confirm this Tribunal's jurisdiction over the dispute.

105. Moreover, tribunals have a 'gate-keeping role'[103] when admitting *amicus* submissions, which means that they have a duty to ensure fairness and efficiency. In order to do that, the Tribunal may utilize procedural mechanisms such as: limiting *amicus* participation to written submissions,[104] limiting the length of the submissions and subjecting them to deadlines[105] and

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[98] *Phoenix Action* ¶101.
[99] Record §160.
[100] *Caspian Oil* ¶422, *EDF* ¶221, *ECE* ¶738.
[101] Record §714.
[102] *Methanex* ¶35.
[103] UNCITRAL Report ¶47.
[104] *UPS* ¶70, *Suez Amicus*¶8, *Biwater* ¶50, *Methanex* ¶36, *Pac Rim Cayman* ¶(i).
[105] *Electrabel PO4* ¶26; *Infinito Gold* ¶49, *Ioan Micula* ¶3, *Suez Amicus* ¶27.

confining the scope of the submission to specific issues. Additionally, the Tribunal could reserve the right to make an order for costs to be paid by the amicus if either party claimed costs resulting from its submission[106] and even sanction procedural misconduct by the amicus curiae.[107] Therefore, the Tribunal can ensure that the Amici's participation does not disrupt the arbitral proceedings or adversely affect the disputing parties.

106. In conclusion, the Amici should be granted leave to file an amicus curiae submission since it would fulfil every prerequisite established by the CEPTA and the ICSID AFR in this matter.

[106] *Philip Morris* PO3¶31.
[107] Gary Born.

III. RESPONDENT DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD UNDER ARTICLE 9.9 OF THE CEPTA

107. The CEPTA provides that a party shall accord FET to the foreign investor. Such protection is encapsulated in Article 9.9 CEPTA in accordance with paragraphs 2 through 7.[108] However, this Article has to be interpreted in balance with the Right to Regulate of the States that the CEPTA also recognizes in its Article 9.8,[109] which has been widely accepted as a current trend in modern treaties.[110]

108. CLAIMANT wrongly alleges that RESPONDENT breached the FET when it never made any specific promises and legitimely exercised its regulatory powers. Additionally, CLAIMANT questions, the investigations, the fines and the airfare caps imposed by the Competition Commission of Mekar (**"CCM"**) by portraying its measures as arbitrary, disregarding that this entity conducted any single action in accordance with the Mekar's legislation. Further, CLAIMANT claim that Mekar's refusal to grant subsidies was discriminatory, ignoring that there were legitimate reasons to deny it. Lastly, CLAIMANT argues that Mekar denied justice even when it clearly had access to Mekar's courts.

109. Therefore, RESPONDENT will demonstrate that the actions taken by Mekar did not breach the FET as CLAIMANT contends. First, RESPONDENT did not frustrate CLAIMANT'S legitimate expectations, if any **(A)**. The actions taken by Mekar were not arbitrary **(B)** nor discriminatory **(C)**. Furthermore, Vemma was never denied justice **(D)**.

A. RESPONDENT did not frustrate CLAIMANT'S legitimate expectations, if any

110. In *casu*, the damage suffered by Vemma's investment can not be attributable to RESPONDENT because Mekar's actions in order to protect social and national interest can not be challenged by Vemma **(1)** and CLAIMANT failed to exercise due diligence regarding Mekar's socio economic instability **(2).**

[108] CEPTA, Article 9.9.
[109] Article 9.8 CEPTA; *Saluka* ¶305; *Electrabel* ¶165; *Lemire* ¶273; *EDF* ¶1005.
[110] CETA; 2012 US Model BIT.

1. The measures taken by Mekar in order to satisfy public interests cannot be challenged by Vemma

111. CLAIMANT states that Mekar actions such as the alteration of the monetary policy constituted a breach of FET.[111] Although,, as explained above, those measures are sovereign acts, included under the regulatory powers of the state.[112]

112. CLAIMANT must demonstrate that Mekar's actions exceed the regulatory authority secured by CEPTA. However, due to the facts of this case, CLAIMANT can not possibly do so.[113]

113. The *Parkerings* tribunal stressed: *"It is each State's undeniable right and privilege to exercise its sovereign legislative power..[...]. As a matter of fact, any businessman or investor knows that laws will evolve over time."*[114]

114. A state can change or adapt its laws and policies in the public interest without violating the FET standard depending on how tribunals balance the notion of stability against other factors, e.g. the investor's due diligence.[115]

115. Mekar regulatory power was used in a reasonable manner, in order to protect the integrity of its citizens from the prejudices that the economic crisis could cause. The denomination of the air fares in MON was one of them. In times of currency fluctuation, Mekar priority was to protect the consumer rights. The investor should know that what would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis.[116]

116. The tribunal's opinion in *Sea-Land Service*, stressed that: *"it is well recognized that, in comparable situations of crisis, governmental authorities are entitled to have recourse to very broad powers without incurring international responsibility.*"[117] What is more, the tribunal in *Dickson* followed the same line: *"States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for claims."*[118]

117. Therefore, Mekar governmental measures in order to satisfy public interests in times of crisis, cannot amount to a FET breach.

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[111] Record §85-87.
[112] Article 9.9 CEPTA.
[113] Record §218-221.
[114] *Parkerings* ¶332.
[115] Yulia Levashova.
[116] *National Grid* ¶180.
[117] *Sea Land Service* ¶48.
[118] *Dickson* p. 681.

2. CLAIMANT failed to exercise due diligence regarding Mekar's socio-economic instability

118. Due diligence is a prerequisite for an investor to have its legitimate expectations protected under FET. Arbitral tribunals have increasingly referred to the necessity for an investor to conduct a due diligence investigation before investing in a host state.[119]

119. CLAIMANT argues that the depreciation of its investment was caused by RESPONDENT actions.[120] On the contrary, it was Vemma's lack of due diligence the main reason for the harm caused to its investment.

120. In *Stadtwerke München*, the tribunal held that for an investor's expectation to be reasonable, it *"must also arise from a rigorous due diligence process carried out by the investor."*[121] Also, in *Antaris* the tribunal denied the investor's claim for the protection of legitimate expectations, as there was *"no evidence of any real due diligence."*[122]

121. Likewise, on several occasions representatives from Mekar expressed their uncomfortability with the strategy followed by Vemma. CLAIMANT was cautioned that it's proposal was overly optimistic and that it did not take into account the volatility of fuel prices and potential take over of the long-distance routes by competitors. The decisions taken by Vemma were too risky and that they did not take into account the volatility of demand during fall and winter months.[123]

122. Indeed, Misty Kasumi, former employee within the Bonoor's Ministry of Tourism, stressed that Caeli can't afford to keep its profit margins on each customer so low because if the numbers of consumers were to drop, or if its costs of operating were to rise, financial trouble would come.[124]

123. Finally,the Investment Information and Credit Rating Agency assigned Caeli a CCC+ rating because of its risky investment choices, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM.[125]

124. Vemma was duly advised of the risks of its strategy. Due diligence was not well exercised by CLAIMANT, consequently, its legitimate expectations can not be protected under FET.

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[119] Yulia Levashova.
[120] Record §104.
[121] *Stadtwerke Munchen* ¶264.
[122] *Antaris* ¶432; *Belenergia* ¶585.
[123] Record §§1035-1037, 1097-1098, 1125.
[124] Record §§1892,1893.
[125] Record §§1300-1307.

B. Mekar's actions were not arbitrary

125. CLAIMANT contends that the investigations conducted by the CCM, the interim measures and the fines subsequently imposed were arbitrary. Nevertheless, these measures were always taken in accordance with Mekari law and facts, respected due process rights and were reasonably adopted by the competent authorities to address a relevant problem.

126. Arbitrariness is a high standard which has been defined as *"not so much something opposed to a rule of law, as something opposed to the rule of law. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."*[126]

127. As CLAIMANT fails to note, arbitrariness requires more than a showing of illegality under domestic law. Other elements, sufficient to elevate it to the level of an international wrong, must be present.[127] In sum, *"the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law".*[128]

128. In the same vein, arbitral tribunals *"are not appellate courts vis-à-vis decisions of the domestic law by the courts of the host State".*[129] Their role is not to review sovereign decisions, but to sanction decisions that amount to an abuse of power, or are taken in manifest disregard of the applicable legal rules.[130]

129. Hence, CLAIMANT has to prove that the challenged measures, not only were against Mekari law but also that they *"manifestly lack of reasons"* or seek an *"ulterior motive",*[131] something that they cannot possibly due as the CCM investigations were far from being arbitrary and were conducted in accordance to Mekari law **(1)**; and the airfare caps imposed were a reasonable measure taken by the CCM in the legitimate use of its faculties **(2).**

1. The CCM investigations were not arbitrary and were conducted in accordance to Mekari law

130. The CCM investigated Caeli Airways because of its sudden expansion which drew its attention and worried its competitors. Contrary to CLAIMANT'S allegations the First Investigation (*a***)** and the Second Investigation (*b*) conducted by the CCM, and fines consequently imposed, were

[126] *ELSI* ¶128; *Mobil* ¶873; *Crystallex* ¶577; *Azurix* ¶392; *Duke* ¶378; *Noble Ventures* ¶176; *Glencore* ¶ 1448; *Siemens* ¶318.
[127] *ELSI* ¶124; *Alghanim* ¶216; *Enron* ¶¶281-282; *AES* ¶312.
[128] *Lemire* ¶263; *Lauder* ¶221; *Glencore* ¶1450.
[129] *Alghanim* ¶216; *Caspian Oil* ¶274*; Mondev* ¶237.
[130] *TECO* ¶493; *Lemire* ¶283; *Croatian Courier* ¶889; *AES* ¶¶306-307.
[131] *Nelson* ¶325.

merely proper applications of the domestic laws of Mekar, which were in force when CLAIMANT made its investment.[132]

a. The first investigation

131. The CCM launched a *suo moto* investigation on Caeli's activities in 2016.[133] Contrary to CLAIMANT's allegations, this investigation was not arbitrary and was legally commenced in accordance with Mekari law. The MRTPA establishes that for the CCM to launch a *suo moto* investigation into behaviour that *prima facie* appears to be anticompetitive a corporation must obtain a market share greater than 50%.[134]

132. *In casu*, when considered in conjunction with it´s Moon Alliance partner, Royal Narnian, Caeli´s market share exceeded 54%.[135] CLAIMANT contends that this form of composite market share was arbitrary.[136] However this measure was reasonable and necessary to protect competition, given the evidence of preferential secondary slot-trading between these companies, both owned by Vemma.[137] Moreover, even if Caeli didn't have a market share of above 50%, the investigation cannot be deemed to be arbitrary as the discretion granted by the MRTPA and the seriousness of the facts reasonably justify the CCM´s intervention.

133. While CLAIMANT's contention that airline alliances and slot-trading are common in the airline industry[138] is true, this fact does not imply that Caeli can use the Moon Alliance in an anti-competitive manner. In particular the Moon Alliance was acting as an agreement or arrangement which prevented or lessened competition substantially and allowed Caeli to wipe out it´s competitors.[139]

134. In this respect, the MRTPA specifically lists as an anti-competitive act the *"preemption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market"*.[140] By incurring in preferential slot-trading, Vemma and Royal Narnian, were preventing competitors from accessing slots. Slots are a bundle of rights that allow airlines to take off, land and use other infrastructure at a given airport and as such they are a key input in air travel services and a particularly valuable

[132] Record §231-232.
[133] Record §1147-1149.
[134] MRTPA, Chapter III (2)(a).
[135] Record §1152-1153.
[136] Record §69-70.
[137] Record §1153-1155.
[138] Record §73-75.
[139] MRTPA Chapter IV.
[140] MRTPA.

asset, especially at congested airports. Without slots there is no way a competitor could enter and operate in Mekar´s airline market. [141]

135. This investigation concluded in August 2018 found a breach in the form of predatory pricing. It found that Vemma used the subsidies received from Bonooru under the Horizon 2020 programme to drastically reduce it's airfare below its average avoidable costs.[142]

136. The investigation was reasonably conducted, in accordance with the MRTPA, and Vemma did not dispute such findings.

b. The second investigation

137. In December 2016, a complaint was brought before the CCM, alleging that Caeli *"launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalising on its undercutting policies and the privileges it enjoyed at Phenac International Airport"*.[143]

138. Fulfilling the mandates of the MRTPA, the CCM launched another investigation into Caeli which concluded with a finding that Caeli had abused its dominant position in Phenac Airport to extract additional privileges in terms of airport service fees, which allowed it to undercut ticket fares and eventually push other competitors off the market consisting of routes to and from Phenac. The CCM consequently imposed a fine of MON 200 million.[144]

139. CLAIMANT contends that the consequences of this investigation were arbitrary.[145] However, the CCM always acted in compliance with Mekari law and its findings and the measures taken were reasonable and in accordance with the facts.

140. *In casu*, all of the conditions required by the MRTPA for finding abuse of dominant position were met.[146] Firstly, CLAIMANT cannot deny the fact that Caeli enjoyed a dominant position in Phenac Airport, substantially controlling the market, as it is not disputed that in 2016, Caeli, without consider its partners in the Moon Alliance, enjoyed 43% of the market share of all flights, both domestic and international, flying from Phenac[147], and in the same year became the only consistently profitable carrier on over half the routes to and from Phenac.[148]

[141] Slot-trading in the EU p.30.
[142] Record §1245-1247.
[143] Record §1171-1174.
[144] Record §1176-1178, §§1277- 1282, 1286.
[145] Record §76-78.
[146] MRTPA Chapter IV.
[147] Record §3171-3172.
[148] Record §1144-1146.

141. In this regard, CLAIMANT´s argument that it was competing with other means of transport is baseless. The relevant market concept is based on a test of "reasonable interchangeability by consumers"[149] and significant differences exist between the airline industry and the other means of transport. As such, CLAIMANT is trying to compare kittens with puppies, both of them are domestic animals, however they are not the same. In the same vein, airplanes, trains, cars and buses are all means of transport, but should we set them side by side? If so, should we also equate planes with bicycles or scooters?

142. Secondly, the CCM found that Caeli engaged in anti-competitive acts, they squeezed out additional concessions from Phenac Airport by threatening to shift its traffic to other airports and used these concessions to undercut fares below its costs in order to eliminate competitors.[150] This exclusionary intent was reasonably inferred from the fact that Caeli only had introduced excessively low prices on routes to and from Phenac and that strategy could only run competitors out of the market, without helping to create new customers or increase revenues.[151] Furthermore, the fact that the privatisation package included some of the concessions does not allow Caeli to use them in an anti-competitive manner against Mekari law.

143. Lastly, it should be stressed that this investigation was commenced by a complaint brought by small regional airlines which were competing with a giant like Caeli. They were the ones who stepped forward and denounced the damage Caeli´s actions were inflicting on them and on free competition in Mekar.

2. The airfare caps imposed were reasonable

144. As an interim measure, and in the rightful and legitimate use of its faculties, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits.

145. CLAIMANT contends that the maintenance of these caps in the context of Mekar´s economic situation was unreasonable. However the economic context of Mekar cannot deprive the CCM from taking appropriate measures that fall in its sphere of competence and rationally address a public issue such as the protection of competition.

146. Contrary to Vemma´s allegations the caps were kept in place until 2019, not in order to damage its investment but only due to clear evidence of anti-competitive behaviour, including abuse of dominant position, predatory pricing, and unfair subsidization. As indicated, Mekar lifted the

[149] Pitofsky p. 1805, 1813-1817; Warden p. 123,130.
[150] Record §3175-3177.
[151] Record §1282-1285.

airfare caps as soon as Caeli's market share (when considered in conjunction with Royal Narnian) fell below 40%.[152]

147. The CCM could not remove the caps until the investigations were complete,[153] given the serious risk of irreparable damage to competition[154] and in order to protect freedom of trade in Mekar. Further, the interference with inflation rates was beyond the CCM competence.[155]

C. The actions taken by Mekar were not discriminatory

148. CLAIMANT contends that the denial of subsidies granted under Executive Order 9-2018 discriminated against Vemma. However, discrimination only occurs when investors in like circumstances receive less favorable treatment without justification[156] and is typically invoked if the foreign national in question is exposed to an unreasonable distinction on the basis of a specific racial, religious, cultural, ethnic or national group.[157]

149. Accordingly, in order to determine if there is discrimination one has to make a comparison with another investor in a similar position or "like circumstances".[158]

150. In this case Caeli was not in like circumstances with other airline companies that received subsidies under Executive order 9-2018, because several differences can be made. Firstly, subsidies were given to strategic companies operating important domestic routes. Secondly, beneficiaries were mostly small companies, with less than a 5% market share. And lastly, those companies did not receive subsidies from their home States on a regular basis.[159]

151. The only similarity that CLAIMANT has been able to show is that all companies were operating in Mekar´s airline market. This is not enough to establish like circumstances as there must be a broad coincidence of similarities covering a range of factors. In this regard, the *Investmart* tribunal ruled that whether "*Union Banka was similarly situated to other banks requires more than an identification of single points of similarity, such as size, origin or private ownership".*[160] The comparators must be similarly placed in the market and the circumstances of the request for state aid must be similar.[161]

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[152] Record §243-245.
[153] Record §1227-1229.
[154] MRTPA Chapter III (4) (e).
[155] Record §1228-1229.
[156] *Bayindir* ¶399; *Saluka* ¶ 313.
[157] *ELSI* ¶72-73.
[158] *Parkerings* ¶ 288; *Nykomb* ¶ 63.
[159] Record §3299- 3303.
[160] *Investmart* ¶415.
[161] *Ibid.*

152. As stated in *Metalpar: "a State's power to create its legal system allows it to establish different rules to govern different subjects".*[162] For example, the *Rusoro* tribunal agreed that Venezuela had adopted an official policy, differentiating between small scale miners and large mining companies, offering additional support and less stringent requirements to small miners, and that as such Rusoro (and other large miners) and small scale miners were not "in like circumstances".[163]

153. Additionally, non-discrimination requires that any different treatment is rationally justified.[164] In this sense, the Secretary of Civil Aviation was vested with discretion with respect to the grant of subsidies, but such discretion was tied to the requirements of the Executive Order 9-2018[165], which required that, among other conditions, the intended obligation would not skew market conditions in favour of one or more enterprises.

154. That is why the predominant recipients of these subsidies were airlines with less than 5% market share,[166] in contrast with Caeli Airways which enjoyed a market share of above 50%, consider its partner Royal Narnian.

155. Furthermore, one month before the passing of Executive Order 9-2018, the CCM concluded the first investigation addressed *ut supra* which found that the subsidies received by Vemma under the Horizon 2020 Scheme were the instruments that helped Caeli incur in predatory prices.

156. CLAIMANT cannot argue discriminatory treatment because of the fact that other airlines also received subsidies from their home countries. Such airlines were not using the subsidies to drive their prices down and push competitors out of the market.

157. Thus, Mekar's denial of subsidies was justified and does not constitute discriminatory treatment.

D. Vemma was never denied justice

158. Acts that give rise to a FET breach are those that "fall below the internationally acceptable levels and which, when weighed against the given factual context, amount to *manifest arbitrariness, discrimination, a gross denial of justice, or a lack of due process leading to an*

[162] *Metalpar* ¶ 161.
[163] *Rusoro* ¶563.
[164] *Sempra* ¶319; *Saluka* ¶307, 460; *Lauder* ¶232.
[165] Executive Order Sec 3101 c).
[166] Record §2299-3300.

outcome which offends judicial propriety."[167] RESPONDENT asserts that none of the acts described by CLAIMANT rise to this level.

159. CLAIMANT contends that it was denied justice, that Mekar's Courts were underfunded, leading to significant delays in hearing urgent matters, and that Caeli's claims were dismissed prematurely.[168] It also alleges that Mekar's courts enforced an award that had been set aside, violating international conventions and agreements to which Mekar is party, as well as Mekar's own domestic law.[169]

160. However, RESPONDENT will demonstrate that despite being overwhelmed by cases, Mekari courts gave CLAIMANT every opportunity to voice its grievances before the appropriate judicial authority **(1)**. Furthermore, Mekari Courts enjoy wide discretion to recognize and enforce an arbitral award that has been set aside **(2)**.

1. Vemma had every opportunity to be heard before Mekaris courts

161. The standard for denial of justice under international law is a demanding one:[170] it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal.[171] A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.[172]

162. In the case at hand, CLAIMANT not only had every chance to be appropriately heard by the judicial authorities, but the Courts even managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters.[173]

163. Under Mekari Courts, the average time taken from commencing an action to receiving a final decision rose from 9 months in 1980 to 22 months in 2015. This is because Mekar's judicial system failed to expand at the same rate as its population. The delays are even higher in commercial matters, up to 27 months, as Mekar prioritizes criminal cases to avoid prolonged detentions.[174]

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[167] *S.D. Myers* ¶ 263; *Saluka* ¶ 297; *Suez* ¶ 231; *Loewen* ¶132; *Cervin and Rhône* ¶655; *Thunderbird* ¶200; *ECE* ¶4.805; *Waste Management* ¶98; *ADF* ¶179; *Mondev* ¶127; Paulsson, p.60.
[168] Record §100-103.
[169] Record §140-142.
[170] Paulsson Report II, ¶¶ 6- 8; Schwebel ¶ 11; Schrijver Second Opinion ¶¶ 4-5; *Philip Morris* ¶499-500; *Mondev* ¶126; *Agility* ¶¶210, 216; *EBO* ¶472; *Krederi* ¶447-449; *Al Warraq* ¶620; *H&H* ¶400; *Vannessa Ventures* ¶227; *Oostergetel* ¶273; *White Industries* ¶10.4.8; *Chevron (I)* ¶244; Mr. Arko.
[171] *Oostergetel* ¶273; De Visscher p.376; *Paulsson* ¶130; *Jan de Nul* ¶209; *Mondev* ¶126; *Philip Morris* ¶500; *Generation Ukraine* ¶20.33; *Azinian* ¶¶83-84, 97; *Iberdrola* ¶371-372; *Pantechniki* ¶94; *Caspian Oil* ¶274; *Alps Finance* ¶250; *Roussalis* ¶315; *Arif* ¶453-454; *Bridgestone* ¶¶222-223,409; Mr. Arko.
[172] *Ibid.*
[173] Record §260-263.
[174] Record §950-953.

164. Therefore, Vemma cannot allegue a FET breach because of the "undue delay" of Mekaris Courts. The delays of the hearings and the decisions were not against Vemma for being a foreign investor, but because of Mekar's judicial system itself which still lacks dynamism and sufficient resources,[175] and which Vemma already knew or should have known as a diligent investor.

165. Still, Vemma was never denied access to justice and was granted every opportunity to voice its grievances before the appropriate judicial authority. The fact that Vemma was not content with the judicial outcomes does not imply that there was a FET breach.[176] International Tribunals are not courts of appeal, but they rather have the authority to determine whether the actions or inaction of national courts transgress the standards applicable in international law.[177]

166. In the case at hand, Mekari Courts clearly comply with the international law standards as Vemma could always be heard and enjoyed due process according to the Mekari laws, with well-founded decisions, even if Vemma did not like them. Therefore, it could never amount to a denial of justice and a FET breach.[178]

167. All things considered, there was no manifest injustice, arbitrary decisions or unfair proceedings: the CCM Investigations were initiated and conducted according to the MRTP Act and due process of law, Caeli's claims were taken in and properly considered, and obtained a final answer. Slowly but surely, Mekar's judicial system grants fair proceedings and motivated decisions from the judicial authorities.

2. Mekar's High Commercial Court enjoys wide discretion to recognize and enforce arbitral awards.

168. HCCM appropriately exercised its discretion to recognize and enforce the commercial arbitral award, considering the evidence on record and the public policy of Mekar.

169. CLAIMANT'S only argument to set aside the award is the alleged bribery of the arbitrator Mr. Cavanaugh based on the CILS Report. The CILS is an entity funded by foreign donations to interfere in Mekar's domestic affairs.[179] Indeed, the Ministry of Home Affairs has frozen CILS' bank accounts until investigations into suspicious foreign funding are complete and designated

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[175] Record §1240.
[176] *Azinian*, ¶¶83-84, 97; *Generation Ukraine*, ¶20.33; *Iberdrola*, ¶371-372.
[177] Paulsson Opinion at Chevron, ¶16; De Visscher, p 376; *ELSI* ¶128; *Mondev* ¶127; *Chevron* ¶8.38; *Philip Morris* ¶500.
[178] *Marvin Feldman*, ¶140; *Iberdrola*, ¶430.
[179] Record *§2286-2287.*

activities of the organisation illicit under Mekari Law in the interim. It is against Mekar's public policy to give credence to the reports prepared by such an organisation.[180]

170. Even the Supreme Arbitrazh Court stated that it *"does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place"*.[181] In light of this, the HCCM affirmed that the award cannot be set aside since there are no sufficiently serious, specific and consistent indicia of corruption.[182]

171. In any event, to meet the standard of denial of justice it is not enough to claim that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or *that the actions of the judge in question were probably motivated by corruption.*[183]

172. CLAIMANT alleges that the award could not be enforced once it was set aside at the seat of the arbitration.[184] However, Article V(1)(e) of the New York Convention and Section 36(2) CAA provides that the recognition of an award can [but not must] be denied where an award is annulled in the country where it was issued.[185] The use of "may" in both legal instruments provides an enforcing court with discretion to recognize an award that has been set aside at its seat.[186]

173. Therefore, after determining that the Supreme Arbitrazh Court of Sinnograd ignored Mekar Airservices' concerns regarding the veracity of the evidence suggesting corruption, the Superior Court of Mekar 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.[187]

174. Furthermore, in countries like France and the Netherlands, the dominant view is that arbitral tribunals need not operate like national courts. The decisions of the national court at the place of the arbitration have no (or very little) bearing on the validity of the underlying award.[188]

175. For instance, in the *Hilmarton* case, the French Court of Cassation ruled that a Swiss arbitral award was of an international nature, meaning that it was not attached to the Swiss legal order and thus continued to exist despite its annulment at the seat of arbitration.[189] Also, in the

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[180] Record §2287-2290.
[181] Record §2185-2186.
[182] Record §2291-2292.
[183] *Oostergetel* ¶273; De Visscher p.376; *Paulsson* ¶130; *Jan de Nul* ¶209; *Philip Morris* ¶500.
[184] Record §140-141, §1387-1388.
[185] Record §2346-2348.
[186] Record §2373-2374; R. P. Paulsson; Zghibarta.
[187] Record §2378-2380.
[188] McClure; R. P. Paulsson; Zghibarta
[189] *Hilmarton* ¶663-665.

subsequent *Putrabali* case, the Court of Cassation affirmed the Hilmarton principle and stated that an international arbitral award is an international decision grounded in a non-national, arbitral legal order and, therefore, its annulment by a state court has no bearing on its enforcement in another state.[190] The same reasoning was applied in many other cases.[191]

176. Thus, Mekaris Courts clearly enjoy wide discretion to enforce the 9 of May award, even though it was set aside at Sinnograd. Regarding the public policy of Mekar, under Section 36 CAA, the Superior Court of Mekar has previously affirmed that a high standard must be met for refusing enforcement of an arbitral award on this basis,[192] which the present commercial arbitral award does not reach, as the arbitrator considered both parties' submissions equitably, applied his mind, and arrived at a well-reasoned decision.[193]

[190] *Putrabali.*
[191] US Courts: *Chromalloy* ¶1001-1012*; Baker Marine* ¶909-914*; Termo Rio* ¶955-969*; Pemex* ¶537-541*; Energoalliance*; Amsterdam C.A: *Yukos Capital* ¶703-714*;* Russian Court: *Ciments.*
[192] Record §2255-2256.
[193] Record §2274-2275.

IV. IN CASE THE TRIBUNAL FINDS MEKAR DID VIOLATE ARTICLE 9.9, THEN IT SHOULD CONCLUDE MEKAR HAS ALREADY PURCHASED CLAIMANT'S INVESTMENT AT "MARKET VALUE"

177. CLAIMANT alleges that it is entitled to compensation and requests 700 Million USD corresponding to the "fair market value", based on the principles of international law and the most favoured nation obligation contained in CEPTA[194] but ignoring the standard provided under the CEPTA.

178. However, RESPONDENT has not breached the FET, and therefore owes no compensation to CLAIMANT. Still, in the hypothetical event that this Tribunal considers that Mekar has violated Article 9.9 CEPTA, the Tribunal should conclude that Mekar has already purchased CLAIMANT'S investment at "market value", as required by Article 9.21 of the CEPTA, and award CLAIMANT no compensation **(A)**. Alternatively, the Tribunal should reduce any compensation awarded considering CLAIMANT'S contributory fault **(B)** and the ongoing economic crisis in Mekar **(C)**.

A. The Tribunal should apply the "market value" standard contained in Article 9.21 of the CEPTA

179. CLAIMANT cannot avail the "FMV" compensation standard in respect of any alleged damage suffered. Neither under international law (*1*) nor by relying upon the MFN clause in the CEPTA (*2*) allows CLAIMANT to derogate from the standard expressly prescribed in the CEPTA.[195]

1. International law

180. CLAIMANT contends that the Tribunal should grant, for the alleged damages suffered compensation in accordance with the customary international law principle of "full reparation".[196] By applying this principle CLAIMANT requests that the Tribunal order RESPONDENT to compensate damages at FMV, such as many arbitral tribunals have done.[197] However, it should be highlighted that opposingly to those cases where arbitral tribunals followed this path, the case at hand presents a significant difference, because CEPTA

[194] Record §154-156.
[195] Record §288-29.
[196] *Chorzów Factory* ¶47
[197] *Vivendi* ¶¶8.2.3- 8.2.11 ; *Enron* ¶¶359-363; *Sempra* ¶¶400-404 ; *Crystallex* ¶¶845-850; *El Paso* ¶¶700-703; *Azurix* ¶¶417-424; *CMS* ¶¶399-402, 410; *Gold Reserve* ¶¶678-681; *Siemens* ¶¶349-353

specifically provides for a standard of compensation not only for expropriation but also for other breaches of the treaty.

181. In this sense, the standard for compensation for a breach of the FET is contained in Article 9.21 CEPTA which expressly provides *"Where a tribunal makes a final award against a respondent, the tribunal may award [..]: (a) monetary damages at a market value [...]".*[198]

182. The wording of the article is perfectly clear: the standard of compensation set out by the CEPTA for a breach of the treaty other than expropriation is "market value". No other interpretation can be made as *"the first general maxim of interpretation is that it is not allowed to interpret what has no need of interpretation. When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents"*[199].

183. It's clear that CLAIMANT's contention that the customary standard should be applied has no basis, as there is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law[200]. *In casu*, the CEPTA constitutes *lex specialis* and therefore derogates the customary international standard invoked by CLAIMANT. Hence, market value is the applicable standard and no compensation is owed, as RESPONDENT has already purchased Vemma´s investment according to the applicable standard.

2. MFN Clause

184. CLAIMANT'S contention that FMV should be applied according to the MFN clause is baseless. Firstly, because as explained *ut supra*, article 9.21 CEPTA specifically provides for compensation at a market value.[201] Mekar concluded the CEPTA in order to replace the 1994 BIT for a more comprehensive trade and investment agreement which adequately balanced investors' and host States' rights.[202] In this sense, if the parties to this treaty had wanted to provide compensation at FMV they would have agreed upon it as they did in regards to expropriation.[203]

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198 CEPTA Article 9.21
199 Vattel at 17; *AAPL* ¶ 40
200 *ADC* ¶481 ; *Phillips Petroleum at 121; AAPL* ¶¶ 19-20; Kishoiyian, p. 329; Sornarajah, p. 79, 82; Caliskan, p. 52
201 CEPTA article 9.21.
202 Record §999-1002; §3223-3226.
203 CEPTA article 9.12.

185. Secondly, the MFN clause contained in CEPTA does not apply to compensation as Article 9.7 clearly provides that the MFN treatment only encompasses substantive protections.

186. Lastly, there is virtually no precedent for the application of MFN to compensation. CLAIMANT may rely on *CME*, one of the single cases that enabled this.[204] However, the dissenting arbitrator in that case explained that the application of the MFN clause to incorporate different compensation provision was an *"unattractive hypothesis"*, and that "*the express choice of a compensation clause becomes nugatory if the MFN clause applies in this form"*[205].

187. Therefore, the MFN clause cannot be used to import another compensation standard from other treaties signed by Mekar as CLAIMANT intends.

B. The Tribunal should reduce any compensation considering CLAIMANT'S contributory fault

188. In the unlikely case that the Tribunal decides that CLAIMANT is entitled to compensation, it should be reduced considering its own contributory fault. CLAIMANT alleges that RESPONDENT damaged its investment in Mekar.[206] However, the evidence shows that Vemma contributed to the depreciation of its own investment. The risky choices taken by the investor, that were duly warned by officials of the Mekari government on several times, helped the investment to depreciate its value.

189. Article 39 of ASR recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation.[207] The relevance of the injured State's contribution (in *casu*, the investor's) to the damage in determining the appropriate reparation is widely recognized in the literature.[208]

190. Commentary (5) to the article notes further that it allows to be taken into account

> *"only those actions or omissions which can be considered as wilful or negligent, i.e. which manifests a lack of due care on the part of the victim of the breach for his or her own property or rights.*"[209]

191. Mekar has identified a number of instances where it considers Vemma contributed to the damages which it has suffered.

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[204] *CME.*
[205] *CME (Separate Opinion)* ¶11.
[206] Record §104.
[207] ARSIWA, Article 39.
[208] B. Graefrath, and B. Bollecker-Stern.
[209] ARSIWA, Article 39 (5)*;Perenco* ¶344.

192. The measures already explained above were taken by Vemma on its own discretion, demonstrating a clear lack of due care concerning its own property rights. Considering this, the State is not responsible for the destruction of the investment. In *MTD,* the tribunal stressed: *"the State is not responsible for the consequences of unwise business decisions or for the lack of diligence of the investor."* [210] The tribunal reduced by 50 per cent the damages awarded to MTD on account of business risk. It noted: "*BITs are not an insurance against business risk and the claimants should bear the consequences of their own actions as experienced businessmen"*.[211]

193. Following this line, the *Yukos* Tribunal decided that CLAIMANTs had contributed to the extent of 25% to the prejudice which they had suffered as a result of RESPONDENT State's destruction of their investments.[212]

194. Also, in *Copper Mesa,* "*owing to the Claimant's contributory negligence under international law, the Tribunal assesses the Claimant's contribution to its own injury at 30% regarding the Junín concessions*."[213]

195. In the cases above, the contributory fault of the investors was not as serious as it is at hand. Vemma contributed to the depreciation of the entire investment, consequently, the reduction of the compensation should be more significant.

196. In conclusion, the Tribunal should consider that Vemma was the main responsible of the damage suffered. It should assess CLAIMANT'S contribution to its own harm at 63%.

C. The Tribunal should also consider the ongoing economic crisis in Mekar

197. CLAIMANT has requested an exorbitant amount in compensation corresponding to the FMV, which is disproportionate and inadequate according to CEPTA and does not even consider Mekar's economic situation.

198. It is widely accepted that States are responsible for full reparations in most Inter-States conflicts.[214] However, in Investor-State disputes due consideration should be given to the financial crisis and economic circumstances of the host State,[215] where the investor has the duty to be aware of the economic context of the country where its investment is settled.

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[210] *MTD* ¶167.
[211] *MTD* ¶178.
[212] *Yukos* ¶1637.
[213] *Copper Mesa* ¶6.133.
[214] ARSIWA.
[215] Paparinskis; *CME* ¶562; *National Grid*, ¶180.

199. Even though the traditional position has been the one adopted by the 2001 ARSIWA which does not foresee the economic situation of the responsible State,[216] twenty years have passed since the drafting of the ILC Articles and the situation has changed since then. For instance, Professor Paparinskis challenges the ILC position and the principle of full reparation for cases where compensation is crippling,[217] just like the present case.

200. Certainly, Investor-State dispute settlement mechanisms have rendered USD 1 billion-plus awards in 2014 against Russia,[218] 2015 against Ecuador,[219] 2016 against Venezuela,[220] 2018 against Egypt,[221] and 2019 against Pakistan[222].

201. Even in *ConoccoPhillips*, Venezuela was deemed to pay compensation of around USD 8.7 BILLION.[223] On the same day, Venezuela was hit by a major blackout and was facing one of the most complex social and economic situations that the IMF has ever seen.[224]

202. Considering Mekar's tumultuous path to economic recovery, its prolonged political instability and economic crisis,[225] this is a situation RESPONDENT is not willing to experience and would not be able to resist. With its economy in freefall from 2016 the macroeconomic situation in Mekar continued to deteriorate.[226]

203. In 2019 a IMF Report predicted four consecutive quarters of negative growth for Mekar, an 8% fall in GDP, and a 2600% average inflation rate in 2020. Also, the report noted that Mekar was facing a potential third debt default in as many decades. According to a Mekari official, "*to pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma*."[227]. Moreover, a study released by Mekar's Ministry of Commerce acknowledged that bank loan defaults in Mekar had increased by 23% in the first three months of 2020 as opposed to the same period in 2019.[228]

204. An award of compensation of the magnitude sought by CLAIMANT would impose crippling burdens upon the economy and population of Mekar.

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[216] ARSIWA, Article 31 and 36.
[217] Paparinskis, p. 1248-1286.
[218] *Yukos* (USD 50 billion in three parallel cases); IAReporter, 16/04/19.
[219] *Occidental* (USD 1.8 billion, reduced to 1 billion on annulment).
[220] *OI Europea*n (USD 0.37 billion); *Crystallex* (USD 1.2 billion); *Rusoro* (close to USD 1 billion); *Valores Mundiales* (close to USD 0.5 billion); *Koch Minerals* (USD 0.3 billion), among others.
[221] *Unión Fenosa Gas.*
[222] *Tethyan.*
[223] *ConoccoPhillips*, ¶1109-1110.
[224] The Guardian 8/03/19 & 14/03/19; 'Transcript of IMF Press Briefing'.
[225] Record §208-213, §943-945, §1183-1190.
[226] Record §§1183, 1200.
[227] Record §3161-3165.
[228] Record §3166-3168.

205. In the Eritrea-Ethiopia conflict, Ethiopia urged the Commission not to be concerned with the impact of very large adverse awards on the affected country's population, because the obligation to pay would fall on the government, not the people. However, the Commission *did not* agree, because huge awards of compensation would require large national resources from the paying country—and its citizens needing health care, education and other public services—to the recipient.[229]

206. Also, the *CME* Tribunal, in line with the Iran-US Claims Tribunal, has held that a general deterioration of the economic situation of the country where the investment was made or the general circumstances of an ongoing development must *not* be compensated to the investor.[230]

207. Furthermore, the *National Grid* Tribunal took into account and could not ignore in its conclusion and determination on Respondent's breach of the Treaty the context in which the Measures were taken, and stated that *"the Tribunal must take into account all the circumstances and in so doing cannot be oblivious to the crisis that the Argentine Republic endured at that time."*[231]

208. The investor may not be totally insulated from situations such as the ones Argentina underwent in December 2001 and the months that followed,[232] such as Mekar in the present dispute. During an economic and social crisis, a breach of the FET standard may not be so as in normal circumstances.[233]

209. Therefore, RESPONDENT requests this Tribunal to take into account the ongoing economic crisis that Mekar has been going through since 2016 with its historical instability,[234] a context which CLAIMANT was already aware of and therefore cannot pretend to be compensated for what would be unfair and inequitable in normal circumstances.[235]

[229] *Eritrea-Ethiopia CC* ¶21.
[230] *CME*, ¶562; *Ebrahimi; Sola Tiles*.
[231] *National Grid* ¶180.
[232] *Ibid.*
[233] *Ibid.*
[234] Record §943-946, §1183-1190.
[235] *National Grid* ¶180.

PRAYER FOR RELIEF

210. RESPONDENT respectfully requests the Tribunal to adjudicate and declare that:

I. The Tribunal lacks jurisdiction over the dispute due to CLAIMANT'S status as a State-owned enterprise;

II. RESPONDENT'S measures did not violate the FET standard under Article 9.9 of the CEPTA;

III. In case the Tribunal finds Mekar did violate Article 9.9, then the tribunal should conclude Mekar has already purchased CLAIMANT'S investment at "market value" and award CLAIMANT no compensation; Alternatively, the Tribunal should reduce compensation at 63% considering CLAIMANT'S contributory fault and the tumultuous economic situation in Mekar.