INTERNATIONAL CENTRE FOR SETTLEMENT OF INTERNATIONAL DISPUTES

Vemma Holdings Inc.

(Claimant)

Vs

Federal Republic of Mekar

(Respondent)

ICSID Case No. ARB/21/78

Team Alias: Moreno G

MEMORIAL FOR THE RESPONDENT

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ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
VCLT	Vienna Convention on the Law of Treaties.

New York Convention	The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Rules

Additional Facility Rules	International Centre for Settlement of Investment Disputes Additional Facility Rules.

LIST OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts (2001).
CBFI	Consortium of Bonoorian Foreign Investors.
CCM	Competition Commission of Mekar.
CEPTA	Comprehensive Economic and Partnership Trade Agreement.
CRPU	External Advisors to the Committee on Reform of Public Utilities.
CSOE	Chinese State-Owned Enterprises.
FET	Fair and Equitable Treatment.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968).
ILC	International law Commission.
Inc.	Incorporated.
ISDS	Investor State Dispute Settlement.
Ltd.	Limited.
NAFTA	The North American Free Trade Agreement.
Para	Paragraph.
Paras	Paragraphs.
PO	Procedural Order.
SODIGA	*Sociedad para el Desarrollo Industrial de Galicia*

SOE	State-Owned Enterprise.
SOUF	Statement of Uncontested Facts.
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010).
UNCTAD	United Nations Conference on Trade and Development.
VCLT	Vienna Convention on the Law of Treaties, (1969).

STATEMENT OF FACTS

1. Vemma ("Vemma Holdings" or "the Claimant") is an airline company incorporated in Bonooru with 100% ownership in Royal Narnian. The Commonwealth of Bonooru ("Bonooru"), is a developing country at the northern tip of Greater Narnia. Bonooru retains shareholding in Vemma. Its right to hold such a stake is recognised in Vemma's memorandum of association. Other shareholders in Vemma Holdings include private and institutional shareholders from within and without Bonooru.[1]

2. The Federal Republic of Mekar ("Mekar" or "the Respondent") sits approximately 1,600km to Bonooru's south. Post-colonisation, Mekar witnessed a period of prolonged political instability. High regulatory intervention and late economic reforms affected Mekar's growth.[2]

3. Both Bonooru and Mekar are parties to the Vienna Convention on the Law of Treaties, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The arbitration laws of Bonooru and Mekar are based on UNCITRAL Model Law.[3]

4. Due to Mekar's tumultuous economic growth, Mekar has been cautious with its economic governance, guarding its right to regulate internal affairs despite opening up to foreign investment and provided for the same under the CEPTA.

5. When the Claimant made its investment, it also inherited debt liabilities associated with Caeli Airways.[4] Despite this, the Claimant risked by focusing on rapid expansion and ill-strategized business plans instead of long-term financial health, against the warnings of Mekar.[5] These risks exposed the Claimant to a precarious financial situation when the economic downturn hit Mekar.

6. The rapid expansion of Caeli Airways naturally drew the attention of the Competition Commission of Mekar ("CCM") and Caeli's competitors.[6] Even before the Claimant's

[1]Record, SOUF, para 2, 10.
[2]Record, SOUF, para, 12.
[3]Record, SOUF, para, 66.
[4] Record, SOUF, Para 23, 30.
[5]Record, SOUF, para 29, 31, 35.
[6]Record, SOUF, para, 36.

investment was admitted in Mekar, it was notified that any anti-competitive behaviour would be subject to the review of the CCM. The two investigations conducted by the CCM into Caeli Airways, and consequent fines imposed in application of the domestic laws of Mekar.

7. As an interim measure, the CCM placed airfare caps on Caeli Airways to prevent it from earning supra-competitive profits. Caeli never protested the airfare caps, and the caps did not hurt its profitability in 2016. The caps were kept until 2019 due to clear evidence of anti-competitiveness of Caeli. Mekar lifted caps as soon as Caeli's market share fell below 40%.

8. In 2017, a currency crisis ensued in Mekar that culminated in inflation leading to a surge in costs of items, reduced purchasing power, and subsequently a devastating economic situation. The IMF emphasized the need to establish credibility in the currency to avoid worsening the economic situation.[7] Consequently, Mekar required all companies operating in the country to exclusively use the local currency (MON).[8]

9. Due to the devastating economic situation, Mekar attempted to alleviate some of the airline industry's concerns by granting subsidies on a discretionary basis.[9] Caeli Airways and Larry Air were the only airlines operating in Mekar and owned significantly by a foreign government. Neither received the subsidies because State-owned companies have unique advantages over other companies enables them to outcompete privately-owned firms.[10]

10. Despite being overwhelmed by cases, Mekar gave the Claimant every opportunity to voice its grievances in courts.[11] The courts dispensed justice more speedily, than the time it usually takes Mekari courts to render decisions in commercial matters.[12]

11. At the time the Claimant decided to sell off its stake in Caeli Airways, it still enjoyed a considerable market share in Mekar which would have allowed recover when the crisis abated. Not only did the Claimant run Caeli Airways into the ground, it also abandoned the enterprise wilfully.[13]

[7]Record, SOUF, para 39.
[8]Record, SOUF, para 42.
[9]Record, SOUF, para 46.
[10]Record, SOUF, para 47.
[11]Record, SOUF, para 44
[12]Record, SOUF, para 52, 54.
[13]Record, SOUF, para 53, 54, 56.

SUMMARY OF ARGUMENTS

Jurisdiction

12. The Tribunal lacks jurisdiction to make an award in the arbitration as it is a state v. state arbitration. Mekar has not consented to state v. state arbitration in the CEPTA. Vemma Holdings is a state-owned entity beholden to Bonooru through the significant stake that Bonooru has in its stake. Alternatively, Bonooru is an agent of the Bonoori government and is exercising governmental functions rather than commercial functions.

Amicus submission

13. While the Tribunal should grant leave to External Advisors to the Committee on Reform of Public Utilities (CRPU), the same should not be granted to Consortium of Bonooru Foreign Investors (CBFI). submissions by CRPU meets the three-tier test set out in Article 9.19 of CEPTA and Article 41(3) of Additional Facility Rules, as CRPU brings matters within the scope of dispute, it has significant interest in the dispute and it assists the Tribunal by bringing a new perspective, knowledge or insight that is different from that of disputing parties. Further, CRPU introduces a new matter *ratione legis* which is a public interest matter. On the other hand, the submission by CBFI fails to meet the test as they bring matters which are outside the scope of the dispute, they do not pursue any public interest or advance any novel argument. Further, they raise a conflict of interest through their relation with Lapras Legal Capital.

Fair and Equitable Treatment standard

14. Mekar guaranteed and upheld the Fair and Equitable standard of Treatment owed to Vemma Holdings pursuant to Article 9.9 of the CEPTA. Mekar granted Vemma Holdings justice in civil proceedings. There was no delay in determination of the matters and any delay was justified given the overriding interests in the criminal proceedings. Mekar adhered to due process in her relation with Vemma Holdings acted in a non-arbitrary and non-discriminatory in its relation with Vemma Holdings in accordance with Article 9.9 of the CEPTA. In any case, Mekar has a right to regulate pursuant to Article 9.8 of the CEPTA. Mekar had legitimate grounds to regulate in exercise of consumer protection and the CCM investigation

and imposition of airfare caps were necessary and proportionate to the legitimate aim of protection of consumer protection.

Compensation

15. The Tribunal should apply the market value standard contained in Article 9.21 of the CEPTA. The fair market value standard should not apply because neither the CEPTA nor international law allows the Claimant to derogate from the standard expressly prescribed in the CEPTA. The Tribunal should find that Mekar has 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. If the Tribunal does not agree, any compensation awarded should be reduced because the Claimant bears responsibility for the losses it has incurred through negligent acts. Finally, this Tribunal would have to take the dire economic situation in Mekar into account to prevent awarding crippling compensation.

ARGUMENTS

1.0. The Tribunal lacks Jurisdiction under Article 9.16 of CEPTA read together with Article 2(a) of the ICSID Additional Facility Rules

16. This Tribunal does not have jurisdiction to hear the Claimant's case under Article 9.16 of CEPTA and Article 2(a) of the ICSID Additional Facility Rules. Jurisdiction pertains to the competence of a Tribunal to adjudicate a particular case, whereas questions as to applicable law are concerned with the rules the Tribunal should apply.[14] The consent of the disputing parties is the source of the Tribunal's jurisdiction.[15] The jurisdiction of arbitral Tribunals may be used based on investor-state consent[16] contained in arbitration in an arbitration clause.[17]

17. Further, in the framework of ICSID, "consent must be supplied by a written manifestation of consent." In cases where either of the consenting states has not ratified the ICSID Convention, recourse can be made to the ICSID Additional Facility Rules.[18] Thus the test for ICSID jurisdiction under the Additional Facility Rules is: first, the dispute must arise out of covered investment referring to *jurisdiction ratione materiae*, second, the state party to the dispute or the state whose national is a party to the dispute is not a contracting state referring to *jurisdiction ratione personae*.[19] Accordingly, the Respondent submits that the Tribunal does not have jurisdiction over the present dispute, since it is a state v. state dispute.

1.1. The present dispute constitutes State v. State Arbitration, which Mekar has not consented to in the CEPTA

18. The Respondent submits that this is a state v. state dispute. The ICSID Tribunal's jurisdiction extends only to claims brought by investors against a contracting party, or a non-contracting party under the Additional Facility rules.[20] An investor includes an enterprise with the

[14] *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para.110.
[15] Hanno Wehland, 'Jurisdiction and Admissibility in Proceedings,' pg. 227; *Chevron and TexPet v. Ecuador (II)*, PCA, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para.4.61.
[16] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Dissenting Opinion on Respondent's Second Preliminary Objection and Declaration of Dissent concerning its First and Third Preliminary Objections of Arbitrator Santiago Torres Bernárdez.
[17] *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009.
[18] Additional Facility Rules, Article 2.
[19] Additional Facility Rules, Article 2.
[20] Additional Facility Rules, Article 2.

nationality of a Party or seated in the territory of a Party that has made an investment in the territory of the other Party.[21] ICSID Tribunals lack jurisdiction to arbitrate disputes between states it excludes State v State disputes from its coverage: a State cannot qualify as a "national" of a Contracting Party under ICSID Additional Facility Rules. Thus, for every claim submitted to ICSID arbitration by an SOE that might be engaging in governmental conduct, Tribunals should determine whether the claim gives rise to an investor to State, or a state v. state dispute. For this reason, the Respondent submits that this is a state v state arbitration because Vemma Holdings is a state-owned enterprise.

1.1.1. Vemma Holdings is a state-owned enterprise

19. The Respondent submits that Vemma Holdings is a state-owned enterprise. A state-owned enterprise is a legal entity in which the state has controlling interest, that enables the state to take part in commercial activities separately from its public administrative functions.[22] Subject to statutory restrictions, State-owned enterprises can be undertaken at any level of the State apparatus, from central or federal governments, to regions, provinces or municipalities. In terms of corporate governance, the State can retain managerial powers, or merely hold a number of shares or stocks. Most State-owned enterprises take the form of private limited liability companies and joint stock companies.[23] The ICSID Additional Facility Rules only contemplate proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State.[24] The fact that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a state entity.[25]
20. The legal test in determining whether an entity is a state-owned enterprise was set out by the Tribunal in *Maffezini v. Spain*,[26] and looks to various factors such as: structural test of State creation, capital ownership, and the functional test, which looks to the functions of the entity.[27] Consequently, Vemma Holdings meets the structural test of State creation, capital ownership, and satisfies the functional test which looks to the functions of the entity. The

[21] CEPTA, Article 9.
[22] Muchlinski, P, State Owned Transnational Corporations and the UN Guiding Principles, 2011, p. 3
[23]Organisation for Economic Co-operation and Development, *Corporate Governance of State-owned Enterprises - A Survey of OECD countries*, 2005, pg. 33, 36
[24] Additional Facility Rules, Article 2.
[25] Shixue Hu, 'State Enterprises in International Investment Disputes: Focus on Actor or Actions? pg. 6; *Maffezini v. Spain*, Para. 77.
[26] *Maffezini v. Spain*, para. 77.
[27] *Maffezini v. Spain*, para. 77.

tribunal in *RFCC v. Morocco* cited the *Maffezini* test in its legal analysis of the SE in the question. First under the capital structure test, the tribunal examined the capital sources and the structure of the corporate operations. As for domestic purpose test the tribunal examined the articles of incorporation of the SE, and concluded that since the company was established for public purposes, the SE in question was acting on behalf of Morocco.[28]

21. While the Claimant may argue that the *Maffezini* test is inapplicable, it is applicable because in both cases the aim is to associate parties in order to determine whether the entity is a state-owned enterprise. The *Maffezini* test aims at association to determine whether that an enterprise is a state entity, likewise the present case aims at association of the Claimant to the state. The Claimant in the case argued that the actions and omissions affecting his investment are attributable to "*Sociedad para el Desarrollo Industrial de Galicia*" (SODIGA). SODIGA was not only owned by several State entities, but was also under the control of Spain and operated as her arm, for the purposes of the economic development of the region of Galicia. Accordingly, as a state entity, its wrongful acts or omission may be attributed to the State. Attributability in *Maffezini* proves that SODIGA is a state entity. Similarly, in the present claim the aim is to prove attributability through association of Vemma Holdings and the Bonoorian government.

1.1.2. Vemma Holdings satisfies the structural test

22. Vemma Holdings meets the structural test of state creation, and capital ownership of a State-Owned Enterprise (SOE). The Tribunal in *Maffezini v. Spain* examined the creation and capital ownership of the State Entity (SE). The fact that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a state entity.[29] The fact that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a state entity.[30]

23. The same result will be obtained if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is to carry out functions

[28] Consortium R.F.C.C. v. Morocco, ICSID Case No. ARB/00/6, paras 35-37.
[29] *Maffezini v. Spain*, para. 77.
[30] Shixue Hu, 'State Enterprises in International Investment Disputes: Focus on Actor or Actions?' *Maffezini* v. *Spain*, Para. 77.

which are governmental in nature or which are normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.

24. In spite of the fact in *Maffezini v. Spain* that the government chose to create SODIGA in the form of a private commercial corporation, it did so by providing that the *Instituto Nacional de Industria*, a government entity, would own no less than 51% of the capital. In fact, as of December 31, 1990, the percentage of governmentally owned capital in SODIGA had increased to over 88%, including the stock holdings of the *Xunta de Galicia*, also a state entity in charge of the executive power in Galicia.[31] Similarly in this case Bonooru is a majority shareholder in Vemma Holdings. Until March 2020, Bonooru retained minority shareholding in Vemma, which ranged between 31% to 38%.[32] In March 2021, Bonooru increased its shareholding in Vemma to 55%, following which Vemma underwent large-scale restructuring.[33]

1.1.3. Vemma Holdings satisfies the functional test

25. Vemma Holdings satisfies the functional test which looks to the functions of or role to be performed by the entity. If an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals, then this entity should be regarded as a state in international investment.[34] The Tribunal in *Maffezini v. Spain* applied the functional test in order to establish whether the conduct of SODIGA was governmental rather than commercial in nature and, hence, could be attributed to Spain.[35] Applying the functional test, the Tribunal arrived at the interim conclusion that the conduct of SODIGA was partially governmental and partially commercial in nature. Since only the former were attributable, the Tribunal categorized the various acts and omissions giving rise to the dispute.[36] Likewise in the present claim Vemma Holdings carries out functions typically not exercised by private entities. Pursuant to its Memorandum of Association, one of its objectives includes: To assist in developing the aviation industry as

[31] *Maffezini v. Spain*, Para. 83.
[32]SOUF, para 10.
[33]SOUF, para.65.
[34] *Maffezini v. Spain*, para. 77.
[35] *Maffezini v. Spain*, para 52.
[36] *Maffezini v. Spain*, para 57.

well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, including servicing remote communities.[37] Specifically, the SE in the dispute was established by Spain to promote regional development. In the present claim Vemma Holdings has been empowered by state law to perform its functions. The constitution of Bonooru provides for Mobility Rights pursuant to article 70.[38] In light of the foregoing, Vemma Holdings qualifies as a SOE and this arbitration would be in effect between Mekar and Bonooru essentially ousting the Jurisdiction of this Tribunal.

1.2. In the event that the Tribunal is unpersuaded by the actor focused test in *Maffezini v. Spain*, then the action focused test in *CSOB v. The Slovak Republic* is applicable

26. The Broches test is applicable in determining the status of Vemma Holdings. The action focused methodology looks at the nature of the specific conduct and the activities of the state in a particular investment transaction. The Tribunal in *CSOB v. The Slovak Republic*, applied the Broches test, according to which "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." Employing the Broches test, the Respondent asserts that the Claimant is firstly an agent of the government and secondly it discharges governmental functions even in its ostensible commercial undertakings.

1.2.1. Vemma Holdings is an agent of the Bonoorian government

27. Vemma Holdings was acting as an agent of the Bonoorian government. For a natural or legal persons "acting on the instructions of" the State "in carrying out the conduct," or if persons act "under the direction or control of the state," the persons might have attribution of responsibility.[39] The "agency test" developed by the ICJ to equate a group of individuals with an organ of a State requires a relationship of dependence and control to the degree that it can be qualified as "complete dependence" on the State. Article 8 of the ILC articles, provides a two-tier disjunctive test, that for a State to be held responsible; the entity must be acting on the instructions of, or under the direction or control of, that State in carrying out

[37]Memorandum of Association of Vemma Holdings, ANNEX IV.
[38]Constitution of Bonooru, ANNEX IV
[39]ILC Articles, Article 8.

the conduct. Vemma Holdings was acting on the instructions of and under the directions of the Bonoorian government.

1.2.2. Vemma Holdings is Discharging an Essentially Governmental Function

28. Vemma Holdings is discharging essentially commercial activities in the Mekari market. A governmental function varies from that of a commercial nature. Governmental functions are those that are normally exclusively reserved to the state or to a government.[40] They are those which by their nature, are not normally undertaken by private businesses or individuals.[41] Governmental functions are often listed by the internal laws of the contracting party.[42] A mixed economy enterprise exercises either governmental or commercial functions. Thus, an investor would be precluded from investor-state arbitration if it exercises governmental or public roles and not commercial functions.[43] Thus, to properly determine governmental functions Tribunals should look at the nature of the functions and not the purpose of the activities.[44] For an essential governmental function of an enterprise that is partially owned by a state as a principal is whether the function is Commercial-interest based or government-interest based.[45]

29. In contrast, in the present dispute, Vemma Holdings was performing functions which are essentially governmental in nature. Pursuant to its Memorandum of Association, one of its objectives includes: 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.[46] Additionally the Constitutional Court of Bonooru found that Article 70 bestows positive obligations upon the State to assist and ensure provision of essential transportation to the population living in remote areas.[47] Subsequently, Vemma contributed to enhancement of Bonooru's tourism

[40]Shixue Hu, 'State Enterprises in International Investment Disputes: Focus on Actor or Action? 51 Geo. J. Int'l L. 323, pg. 7.
[41] State Enterprises in International Investment Disputes, pg. 7.
[42] State Enterprises in International Investment Disputes, pg. 22.
[43] Chittharanjan Felix Amerasinghe, 'Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 47 Brit. Y.B. Int'l L. 231, pg. 233, 234.
[44]*CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/ 4, Decision on Objections to Jurisdiction, May 24, 1999, para 20.
[45]*BUCG v. Yemen*, para 3.
[46]Memorandum of Association of Vemma Holdings, ANNEX IV.
[47]SOUF, para 5.

infrastructure, which has, in turn, enhanced the mobility rights of the population within the Greater Narnian region.[48]

2.0. The Tribunal should grant leave to the External Advisors to Mekar's CRPU and bar the submissions by CBFI under Article 9.19 of CEPTA.

30. The Tribunal should allow application by the External Advisors to Mekar's Committee on Public Utilities Reform (CRPU) under Article 9.19 of the CEPTA as the Amicus Curiae and reject the application by the Consortium of Bonoori Foreign Investors (CBFI). The amicus curiae is a medium through which Tribunals are made aware of the public's view in a case and the public interest at stake.[49] Furthermore, they increase the transparency of adjudication.[50] The amicus curiae not only soothe the imperfections that may exist in the dispute, especially where the parties are unwilling or unable to provide the relevant information but also where a judge faces a novel legal issue that lies outside his area of specialization.[51] Amicus participation improves the acceptance and credibility of proceedings by guaranteeing public input and substantive presentation of all interests involved in the dispute.[52] By allowing amicus curiae to partake in dispute, it increases procedural legitimacy.[53]

31. Further, this Tribunal has the power to reject the amicus submission. This Tribunal has this authority granted to it if the amicus does not fulfil the legal test espoused in Article 9.19 of CEPTA and Article 41(3) of the Additional Facility Rules. Further, this legal test was applied in the case of *Piero Foresti et al. v. The Republic of South Africa*,[54] where it was held that the amicus must: first, help the arbitral Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of disputing parties; second, address matters within the scope of

[48] Procedural Order No 4, para 6.
[49] Astrid Wiik, Amicus Curiae before International Courts and Tribunals (Hart Publishing, 2016) pg. 43.
[50] Astrid Wiik, Amicus Curiae before International Courts and Tribunals (Vol. 4, Hart Publishing, Heildelberg Uni, 2016) pg. 43.
[51] G. Umbricht, an "amicus curiae brief" on amicus curiae briefs at the WTO, 4 Journal of International Economic Law (2001), p. 783.
[52] R. Howse (Ed.), The WTO system: law, politics and legitimacy, London 2007, pg. 57.
[53] F. Orrego Vicuña, International dispute settlement in an evolving global society: constitutionalisation, accessibility, privatization, Cambridge 2004, p. 29.
[54] *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, Petition for Limited Participation as Non-Disputing Parties of 17 July 2009, Para. 4.6.

the dispute; third, have a significant interest in the matter.[55] Therefore, the Claimant submits that the submission by the CRPU fulfils the legal test because; first, submission by CRPU helps this Tribunal in determining the factual and legal issue in dispute by bringing in new perspective, knowledge or insights that differs from that of disputing parties; second, submission by CRPU addresses matters which are within the scope of this dispute, and; third, CRPU has significant interest in this matter. Vemma Holdings submits that this Tribunal should reject the submission by CBFI because; first it does not help this Tribunal in determining this dispute since it does not bring new perspective, knowledge or insights that differs from that in dispute; second, CBFI does not address matters which are within the scope of this dispute; third CBFI does not have significant interest in this matter.

2.1.1. CRPU submissions helps this Tribunal in determining the factual and legal issue in dispute by bringing in new perspective, knowledge or insights that differ from that of disputing parties as provided under Article 9.19(3) of CEPTA.

32. Submissions by CRPU assists this Tribunal in determination of factual and legal issue in this dispute as it brings new perspective, knowledge or insight that is not similar to that of disputing parties. The arguments presented by a non-disputing party are not limited to the subject matter of the dispute but need to represent an interest different from that of the parties.[56] This is one of the limbs that the Tribunal uses to determine the admission of the amicus.[57] It is important to note that the acceptance by the Tribunal of the amicus' brief is dependent on the factual or legal issue relating to the dispute in which a new perspective, particular knowledge or insight that is different from that of the disputing parties is presented to the Tribunal.[58] The amicus must show that he possesses substantive knowledge, experience and expertise on the case that surpasses that of parties.[59]
33. This test is certainly satisfied by particular knowledge and point of view that CRPU brings to the attention of the Tribunal. CRPU are members of Mekar civil society whose

[55] CEPTA, Article 9.19.
[56] Eric De Brabandere, ''Amicus Curiae (Investment Arbitration) in Hélène Ruiz-Fabri, Max Planck Encyclopedia of International Procedural Law (Oxford: Oxford University Press, 2019).
[57] Eric De Brabandere, ''Amicus Curiae (Investment Arbitration) in Hélène Ruiz-Fabri, Max Planck Encyclopedia of International Procedural Law (Oxford: Oxford University Press, 2019).
[58] Additional Facility Rules, Article 41(3).
[59] *Bear Creek Mining*, Procedural Order No. 6, 21 July 2016, ICSID Case No. ARB/14/21, Para. 20

professional focus is investment banking.[60] Thus they will help this Tribunal in investment banking. Further, in 2010 they were engaged as external advisors to CRPU ("Committee") which is set up under the Law on Privatization of State Property ("Law on Privatization") to advice on the privatization, liquidation, and/or restructuring of Caeli Airways. They actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Vemma Holdings therefore, since they were part of acquisition process, they are able to provide new perspectives which the parties may not reveal.[61]

34. In *Biwater Gauff v. Tanzania*, the case concerned a water sewage infrastructure project in Dar es Salaam, Tanzania. In November 2006, five NGOs filed a "Petition for Amicus Curiae Status," contending that the case involved issues related to sustainable development, the environment, human rights and governmental policy in which they held expertise. Having considered the submission, the Tribunal found that it could benefit and that allowing such submission would secure a wider confidence in the arbitral process.[62] The Claimant submits that, CRPU are experts in investment bank. They are able to perform an audit, an analysis of the economic, technical and financial performance of Caeli Airways, bring indicators in the financial statements in line with accounting standards, preparation of a financing model, determine the attractiveness of the enterprise for investors and ways on airlines, as well as identify potential investors.[63] As such, CRPU are able to help this Tribunal in determining the dispute as they offer expertise which is crucial for this Tribunal.[64]

2.1.2. <u>CRPU addresses matters within the scope of this dispute as provided for under Article 9.19(3) of CEPTA.</u>

35. The CRPU submissions advocate for issues which are within the scope of this dispute. What is within the scope of the dispute is a question of the applicable law in investment arbitration.[65] As a prerequisite condition, non-disputing parties are required not to bring

[60]Record, pg. 19.
[61]Record, pg. 19.
[62]*Biwater v. Tanzania*, Procedural Order no.5, 2 February 2007), ICSID Case No. ARB/05/22, Para.54.
[63]Record, pg. 19.
[64]Record, pg. 19.
[65] Wiik, Amicus Curiae before International Courts and Tribunals, Hart publishing, pg. 291.

matters which the Tribunal cannot consider.[66] As a rule, non-disputing parties must state how their information is useful to the solution of the dispute at hand. Further, the information must be within the scope of the dispute and not repetitive of the parties.[67] This factor is intended to 'avoid the unnatural broadening' of the scope of the dispute.[68] Where an amicus submission addresses a matter within the scope of the dispute will typically be a straightforward issue.[69]

36. Notably, in *Philip Morris v. Uruguay*, the Tribunal accepted a submission from Pan American Health Organization on the basis that it provided 'official technical information and evidence regarding distinct trends in tobacco marketing and consumption'. The Tribunal found that the information fell within the scope of the dispute, which concerned the implementation of domestic tobacco control legislation. Similarly, CRPU submission matters within the scope of this dispute. This can be seen through its content in assessment of the legality of Vemma's investment which is crucial to the determination of the Tribunal's competence-competence. Further, CRPU raises important issues regarding the ability of investor-State dispute settlement to address policy issues fairly and in an unbiased manner, taking the regulatory interests of the State into account.[70]

37. However, Vemma Holdings argue that the introduction of *ratione legis* is not within the scope of the dispute. *Ratione legis* is a matter that is not raised by either party but which if raised goes to the jurisdiction of the Tribunal. We appreciate the fact that the Tribunal in *UPS v. Canada*, refused to allow amicus submissions on questions of jurisdiction and procedure…[71] However, the Tribunal in *Apotex v. USA*, concluded that there was no such 'hard and fast rule' and that it was 'perfectly conceivable that issues of jurisdiction might raise matters of public interest…on which non-disputing parties might be well-placed to provide assistance'.[72] It is not in dispute that submission by CRPU raises a new jurisdictional question *ratione legis* which the parties had not raised. It should be noted that CRPU

[66] C. Schliemann, Requirements for amicus curiae participation in international investment arbitration, a deconstruction of the procedural wall erected in joint ICSID Cases ARB/10/25 and ARB/10/15, 12 The Law and Practice of International Courts and Tribunals (2013), pp. 374.
[67] Astrid Wiik, Amicus Curiae before International Courts and Tribunals, Hart publishing, pg. 287.
[68] *Apotex*, Order on BNM. Para 60
[69] Gary Born and Stephanie Forrest, Amicus Curiae Participation in Investment Arbitration, ICSID Review, Vol. 34, No. 3 (2019) pg. 649
[70] Record, pg. 19.
[71] *UPS*, Para. 71.
[72] *Apotex*, Procedural Order No 2, para 32.

submission on *ratione legis* is a public interest issue since it informs this Tribunal on legality of Vemma Holdings. Further, in light of the above, the rights received by Vemma Holdings were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee. Since CRPU was involved in the entire privatization process, they are in the unique position to adduce unbiased facts to this effect before this Tribunal which either party may not produce.[73] In light of the above, it is the Claimant's submission that this Tribunal should allow the introduction of *ratione legis* issue on corruption which is a public interest matter.

2.1.3. The CRPU submission advances a matter of public interest in accordance with Article 9.19 of CEPTA

38. The CRPU submissions have sufficient interest to warrant its admission as amicus in this dispute. Tribunals have not limited the term interest to legal interest but also to public and economic interest.[74] Interests that are not concrete or that are purely commercial have been rejected by the Tribunals.[75] The *Apotex II v. USA* the Tribunal held that the applicant needs to show that he has more than a "general" interest in the proceeding. For example, the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.[76] It is the Claimant's submission that the outcome of this dispute has a direct impact on the amicus. The amicus will be affected directly taking into account the stagnation in anti-corruption efforts in Mekar which impacts their financial operations and thus they are at verge of suffering lose since they regularly advise potential investors prospecting opportunities in Mekar.
39. Further, in *Aguas province de Santa v, Argentina*[77] stated that a public interest matter is a decision in an investment dispute that affects person beyond those immediately involved. CRPU possesses general interest in promoting fair business practices in Mekar. They have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization of projects which in essence has been in

[73]Record, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, pg. 19.
[74] Wiik, Amicus Curiae before International Courts and Tribunals, Hart publishing, pg. 294.
[75]*Apotex I v. USA*, Para. 28.
[76]*Apotex II v. USA*, Para. 38.
[77]*InterAguas v. The Argentine Republic*, Para. 14.

the heart of Mekar citizens who had at one point refused the idea of privatization of state enterprises in Mekar.

2.2. The Tribunal should deny leave to CBFI to file its submission as amicus pursuant to Article 41(3) of the Additional Facility rules

40. This Tribunal should refuse the submission of CBFI as amicus. The acceptance of amicus submission is conditional. The Tribunal shall only accept the amicus submissions if it does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.[78] The Tribunal in *United Parcel Service of America v. Canada* where the Council of Canadians made an amicus request to intervene as amicus curiae in the proceeding, outlined that the fact that amicus participation can be permitted does not imply that any particular amicus or scope of participation should be allowed.[79] For amicus' submission to be allowed they must conform to the provision of Article 9.19 of CEPTA and Article 42(3) of the Additional Facility Rules. which requires that the amicus must; first, help the arbitral Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of disputing parties; second, address matters within the scope of the dispute; third, have a significant interest in the matter.[80] These are prerequisite test that must be fulfilled for the admission of the amicus in any dispute.

41. Mekar supports openness and transparency in arbitration proceedings under Chapter 9 of the CEPTA, including through the appropriate participation of amicus curiae. However, to allow their participation, they must meet the legal test as provided for under Article 9.19 of the CEPTA and Article 42(3) of the ICSID Arbitration (Additional Facility) Rules. it is the Claimant's submission that; CBFI does not; first help the arbitral Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of disputing parties; second, address matters within the scope of the dispute; third, have a significant interest in the matter.

[78]The UNCITRAL Rules on Transparency, Article 4(5), 5(4).
[79]*UPS v. Canada*, Para. 61.
[80] CEPTA, Article 9.19.

2.2.1. CBFI does not file its amicus application in pursuit of any public interest or advance any novel arguments

42. The submission by CBFI does not pursue any public interest or advance any novel argument. *Bernhard von Pezold v. Zimbabwe* and *Philip Morris v. Uruguay*, the Tribunal rejected the submission by the amicus because the amicus was not independent and they did not possess sufficient interest in the matter.[81] It is the Claimant submission that CBFI does not possess sufficient interest in the matter. They have argued through their submission that they have sufficient interest in the matter because they input stability and reasonableness of investment protection regime in Mekar. The Claimant submits that, the reason why they input stability is for their own benefit and hence it does not qualify to amount to sufficient interest. Further, CBFI submits that they have paramount interest because it represents firms of vastly different sizes that play different roles in Mekari economy. It is the Claimant's submission that this does not amount to sufficient interest. It is personal interest initiative in which CBFI wants to advance for its own personal benefit.

2.2.2. The CBFI submission does not advance any novel argument

43. Further, the CBFI submission does not advance any novel argument. In *Aguas Provinciales de Santa v. Argentina*, the Tribunal ascribed that perspective is new if it is different from parties rather than a repetition of what parties have argued. It is the Claimant's submission that CBFI does not help the Tribunal by offering a different point of view from that of disputing parties. CBFI argues that, they bring new knowledge and insights regarding business climate in Bonooru and the nature of aviation industry, the existing corporate framework in which enterprise operate, the nature of aviation industry in Bonooru and the impact of uncertainty on access to capital in Greater Narnia. It is the Respondent's submission that these contributions by CBFI are not novel arguments. These are submission that this Tribunal can analyse without recourse to amicus.

2.2.3. The CBFI is not independent from Vemma Holdings Inc.

44. Vemma Holding is a member of CBFI hence it is not independent. An essential attribute of amicus curiae is independence from disputing parties. In *Philip Morris v. Uruguay*, the

[81] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, (ICSID Case No. ARB/10/15), Procedural Order No. 2 of 26 June 2012.para 62.

Tribunal denied request for leave to the Inter-American Association of Intellectual Property for lack of independence from the Claimants, after the Respondent notified the Tribunal that Claimants 'lawyers served on the petitioners' board of management and other committees.[82]Similarly, in *Eli Lilly v. Canada*, two *amicus curiae* petitions were rejected because the Claimant's Canadian subsidiary was a member in the two associations IMC and Biotecanada and, in addition to paying membership fees and publicly acknowledging to having relied on their services for lobbying purposes in respect of one of the disputed issues, several senior employees served on the associations' board of directors. Noting the interlinkage, the Respondent in the case stressed: 'the role of *amicus* in international arbitration proceedings … is to assist the Tribunal, not to support a disputing party.'[83]

45. The Respondent submits that CBFI is not independent from disputing parties. This is evident through the participation of Lapras Legal Capital in this arbitration through CBFI. Thus, this raises a conflict of interest. It is important that this Tribunal should note that in CBFI submissions, they accepted that Vemma Holdings Inc. and Lapras Legal Capital are members of the CBFI in good standing. Vemma Holdings Inc. have brought this matter before this court as Claimants, therefore, its association with CBFI paints lack of independence of CBFI who appears as the amicus.

2.2.4. CBFI submissions are not within the scope of this dispute

46. The Respondent submits that CBFI does not submit its submission under the scope of this dispute. It is the Tribunal's discretion to determine what is within the scope of the dispute through application of applicable laws.[84] The Claimant submitted that there will be negative consequences as a result of deviation from international norms. They submitted that this will introduce uncertainty into business framework.

47. Further, the Claimant listed statutes which were enacted to include regulatory framework in Bonooru which introduced Corporation Act 1969, the Privatization of Enterprise Act 1972, and the Air Corporation (Amendment) Act 1984 which foster market competition among business entity. It is the Respondent's submission that these Acts are not to be challenged in this Tribunal since they form national laws of Mekar and hence it is not within the scope of

[82]*Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, Para. 55.
[83]*Eli Lilly v. Canada*, letter by Canada on *amicus curiae* applications, 19 February 2016, Case No. UNCT/14/2, Para.6.
[84] Astrid Wiik, Amicus Curiae before International Courts and Tribunals, Hart publishing, pg. 291.

this Tribunal to determine conformity with international norms of these statutes. Thus, this Tribunal should reject the CBFI's submission and admit that submitted by the external advisors to Mekar's Committee on Public Utilities Reform, recognizing the public.

3.0. Mekar granted Vemma Holdings Fair and Equitable Treatment in accordance with Article 9.9 of the CEPTA

48. Mekar guaranteed and upheld the Fair and Equitable standard of Treatment owed to Vemma Holdings pursuant to Article 9.9 of the CEPTA. The CEPTA provides that each party should accord to covered investments and to investors with respect to their covered investments Fair and Equitable Treatment and full protection and security.[85]The Fair and Equitable Treatment can be breached in five listed ways: first, where there is denial of justice in criminal, civil or administrative proceedings; secondly, where there is a fundamental breach of due process; thirdly, where there is arbitrary or discriminatory conduct; fourthly, where there is abusive treatment of investors; and lastly, where there is a breach of further elements agreed upon by the parties.

49. Consequently, the Respondent submits three interrelated arguments; firstly, the Mekar granted Vemma Holdings justice in civil proceedings; secondly, Mekar adhered to due process in her relation with Vemma Holdings; and thirdly, Mekar acted in a non-arbitrary and non-discriminatory in its relation with Vemma Holdings in accordance with Article 9.9 of the CEPTA. In any case and subsequent to these arguments, the Respondent submits that Mekar has a right to regulate pursuant to Article 9.8 of the CEPTA.

3.1. Mekar granted Vemma Holdings justice in accordance with Article 9.9.2(a) of the CEPTA

50. Pursuant to Article 9.9.2(a) of the CEPTA, Mekar guaranteed Vemma Holdings access to justice. Parties agree to guarantee to covered investments and their investors access to justice in civil and administrative proceedings.[86] Justice can be denied in five instances: first where there is denial of access to the courts;[87] secondly, where there is undue delay in proceedings;[88] thirdly, where there is non-existence of courts and human resources;[89]

[85]CEPTA, Article 9.9.
[86]*Loewen v. USA*, ICSID, Award, Para.123.
[87]*Azinian v. Mexico*, ICSID, Award, Para.102.
[88]*Jan de Nul v. Egypt*, Award, Para. 193.
[89]*Philip Morris v. Uruguay*, ICSID, Award, Para. 501.

fourthly, where courts issue unjust sentences in violation of the substantive laws of the country[90] and lastly, where the state refuses to execute a final sentence.[91] As such, the legal test is that the Claimant is granted access to courts, is heard in due time and that the courts properly apply the law.[92] It is not in contention that Vemma Holdings were granted access to the courts. The main contention of the Claimant is that there was undue delay in the proceedings and that the courts misapplied the law in enforcing the award. Consequently, the Respondent advances three arguments: first that there was no delay in the determination of the matters concerning Vemma Holdings; second that in the unlikely event that this Tribunal finds that there was a delay, the delay in determination of matters concerning Vemma Holdings was justified; and third that the Mekari courts did not misapply the law in enforcing the award set aside at Sinnoh.

3.1.1. <u>There was no delay in the determination of matters concerning Vemma Holdings</u>

51. There was no delay in the determination of the matters filed by Vemma Holdings Inc. in the Mekari courts. As a matter of principle, the failure to render justice within a reasonable period of time may constitute a breach of FET.[93] In *Roussalis v. Romania* where the Tribunal ruled that a ten-year delay in proceedings was significant and was tantamount to denial of justice.[94]Similarly, the Tribunal in *Jan de Nul v. Egypt* ruled that a ten-year delay was clearly a violation.[95] Like in the *Toto* case where the Tribunal determined that a two-and-a-half-year delay in the proceedings to annul an administrative order was acceptable, the delay in the Vemma case was only thirteen months long given the judiciary's stretched capacity and its long-standing policy to give priority to criminal cases which have a bearing on the liberty of the person.[96] Notably, the matter was heard in thirteen months, below the anticipated 27 months it would have taken commercial matters to be determined.[97] Therefore, the

[90]*Azinian v. Mexico*, ICSID, Award, Para.103.
[91]Jan Paulsson, 'Denial of Justice in International Law,' (Cambridge University Press, 2005), pg. 256.
[92]*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999.
[93]*Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Para. 156.
[94]*Roussalis v. Romania*, ICSID, Award, Para. 602.
[95]*Jan de Nul v. Egypt*, para 163.
[96] SOUF, Para. 13.
[97]SOUF, paras. 13, 44.

Respondent submits that there was no delay in the determination of the matters filed by Vemma Holdings Inc. in the Mekari courts.

3.1.2. In the unlikely event that this Tribunal finds that there was a delay, the delay in determination of Vemma proceedings is justified

52. The delay in handling matters filed by Vemma Holdings is justifiable. Not every delay in determination of matters amounts to denial of justice. Indeed, delays in determination of cases can be excused where for instance, the complexity of the case and the significance of interests at stake demands so.[98] The test for justification of delays is thus drawn on the complexity of the case, and the significance of interests at stake.[99] Consequently, the Respondent submits that there are significant interests at stake occasioning the delay in determination.

53. Like the award in *Toto v. Lebanon* where the Tribunal considered the unstable environment in Lebanon, the test is whether the Claimant stands to suffer from the delay in light of the overriding interest.[100] The Tribunal further relied on the *Chevron v. Ecuador*, that while considering the deteriorating economic context of Ecuador considered that before a determination of delay is reached, due weight must be given to the circumstances and context of the case.[101] Just like the Tribunal in *Chevron*, the economic situation in Mekar has been poor since independence. The economic crisis has beleaguered the Mekari economy and as a result, the population has increased while the institutions have not grown to match.[102]Furthermore, just like the case in *Toto v. Lebanon*, Mekar has been rocked with political instability since independence and this has had a huge bearing on its economic growth.[103]In light of the above, the delay in handling matters filed by Vemma Holdings is justifiable.

[98]*White Industries v. India*, Ad hoc Arbitration, Final Award, Para.10.4.10.
[99]*White Industries v. India*, Ad hoc Arbitration, Final Award, Para.10.4.10.
[100]*Toto v. Lebanon*, Para. 160.
[101]*Chevron Corporation and Texaco Petroleum Corporation v. Ecuador* (II), PCA Case No. 2009-23, Para. 113.
[102]SOUF, Para. 13.
[103] SOUF, Para. 12.

3.1.3. The Mekari courts did not misapply the law in proceedings involving Vemma Holdings

54. The Mekari courts correctly applied the law in the matters concerning Vemma Holdings. To be considered to be a misapplication of the law, it can take the form of; wilful disregard of due process of law,[104] administering justice in a seriously inadequate way,[105] conducting fundamentally unfair proceedings and passing outrageously wrong, final and binding decisions.[106]Mere errors in law and disagreement with the reasoning of a judicial officer does not amount to denial of justice.[107] Thus the appropriate legal test is that judiciary breached the FET standard by conducting fundamentally unfair proceedings and outrageously wrong, final and binding decisions.[108] The Respondent submits that the courts did not misapply the law and that the decision to enforce the award was not wrong.

55. Article V of the New York Convention grants the courts of Mekar discretion in enforcement of awards.[109] Like the Tribunal in *Mamidoil v. Albania* which while rejecting the denial of justice claim had regard to the well-reasoned judgement of the municipal courts, this Tribunal should be persuaded by the erudite judgements of the High Commercial Court and the Superior Court of Mekar.[110] Firstly, both courts had recourse to the discretionary phrase in the New York Convention, the Commercial Arbitration Act concerning enforcement of awards.[111]Secondly, the courts relied on well settled jurisprudence that had enforced an award that had been set aside at the seat of arbitration.[112] Over and above the fact that the Judicial system of Sinnoh has been ranked as corruption free, the courts in Mekar noted that the Sinnoh court set aside the award without convincing itself ion whether the act of bribery had in fact taken place.[113] As such, the Respondent submits that the judgements are understandable, coherent and embedded in the legal system just like in *Mamidoil* and do not

[104]*Agility v. Iraq*, Para. 209; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Para. 769.
[105]*Azinian v. Mexico*, paras. 102, 103.
[106]*Arif v. Moldova*, Para. 445.
[107]*Agility v. Iraq*, ICSID, Final Award, Para.212.
[108]*Arif v. Moldova*, *Para.*445.
[109] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article V.
[110]*Mamidoil v. Albania*, Para. 769.
[111]Record, pg. 65, 68.
[112]Record, pg. 65, 68.
[113]Record, pg. 64.

amount to wilful disregard of the law. In light of the above, The Mekari courts correctly applied the law in the matters concerning Vemma Holdings and guaranteed Vemma Holdings access to justice.

3.2. Mekar adhered to the due process of the law in its relation with Vemma Holdings pursuant to Article 9.9.2(b) of the CEPTA

56. Mekar followed the due process of the law in its actions against Vemma Holdings. Fundamental breach of due process is conduct reflecting lack of transparency and conduct amounting to breach of natural justice.[114] Breach of natural justice involves breach of the two core tenets: the right to be heard and the rule against bias.[115] The notion of due process also entails the issue of transparency[116] and this connotes the aspect of predictability.[117] The test thus for breach of due process is: first, that the fair hearing and bias tenets of natural justice have been adhered to and secondly, that the cause taken is predictable.[118] Consequent to this test, the Respondent submits two arguments; first, that the tenets of natural justice were adhered to and secondly, that the cause of action was predictable.

3.2.1. Mekar adhered to the tenets of natural justice

57. Mekar adhered to the tenets of natural justice in its relation with Vemma Holdings. Breach of natural justice involves breach of the two core tenets: the right to be heard and the rule against bias.[119] It involves the obligation to notify an investor of hearings and not to decide about a claim in the investor's absence.[120] Pursuant to the Monopoly and Trade Restrictive Practices Act, the Competition Commission of Mekar notified the Claimant through a press release of its first investigation.[121] The Claimant was involved in every step of the investigation and conceded that the airfare caps when implemented were not detrimental to their business.[122]

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[114] C. L. Lim, Jean Ho, Martins Paparinskis, 'International Investment Law and Arbitration Commentary, Awards and other Materials' (2nd edn, Cambridge University Press, 2021) 820.
[115] *Waste Management Inc. v. Mexico* (II), ICSID Case No. ARB (AF)/00/3, Award, Para. 98.
[116] CEPTA Article 9.9.2.b.; *Joshua Dean Nelson v. Mexico,* ICSID, Final Award, Para. 359.
[117] *Tecmed v. Mexico,* Para. 154.
[118] *Waste Management Inc. v. Mexico* (II), ICSID Case No. ARB (AF)/00/3, Award, Para. 98; *Metalclad Corp v. Mexico,* ICSID Case No. ARB (AF)/97/1, paras. 49, 76.
[119] *Waste Management Inc. v. Mexico* (II), ICSID Case No. ARB (AF)/00/3, Award, Para. 98.
[120] *Al-Bahloul v. Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, Para.221.
[121] SOUF, Para. 36.
[122] SOUF, Para. 37.

3.2.2. The cause of action undertaken by the Competition Commission of Mekar was predictable

58. The actions undertaken by the CCM were predictable to Vemma Holdings Inc. The aspect of predictability connotes that the foreign investor may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[123]

59. Secondly, the CCM only approved Vemma's membership to the Moon Alliance on condition that they would not cooperate on competition parameters.[124] They proceeded to engage in fleet purchase and cooperated with Royal Narnian in respect of lounge access, check-in operations and code-sharing[125] which have been classified as grounds for collusion and possible investigation.[126] Thus, having had a due-diligence appraisal of Mekar's regulatory framework, they should have known that these are grounds for investigation.[127] As such, Mekar submits that she followed the due process of the law in its actions against Vemma Holdings.

3.3. Mekar acted in a non-arbitrary and a non-discriminatory manner in its relations with Vemma Holdings pursuant to Article 9.9.2(c) of the CEPTA

60. Mekar treated the Claimant in a non-arbitrary and a non-discriminatory manner in accordance with Article 9.9.2(c) of the CEPTA. Arbitral conduct has been described as action founded on prejudice or preference rather than on reason or fact.[128] Arbitrariness in decision-making has to do with the motivations and objectives behind the conduct concerned. A measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary.[129] Discriminatory conduct occurs where there is differential treatment between like

[123] *Tecmed v. Mexico,* Para. 154.
[124] SOUF, Para. 25.
[125] SOUF, Para. 27.
[126] Organization for Economic Cooperation and Development, Policy Roundtables, Airline Mergers and Alliances, 1999, pg. 9, 28.
[127] *Toto v. Lebanon, Para.*147.
[128] *Lauder v. Czech Republic,* UNCITRAL, Award, Para. 221; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, Para. 184.
[129] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, Para. 385.

circumstances.[130] Like circumstances cover those investors who are in a situation similar to that of the impugned investor.[131] Hence, the Respondent submits a two-pronged argument: first, that Mekar acted in a non-arbitrary manner against Vemma Holdings and secondly, that Mekar acted in a non-discriminatory manner against Vemma Holdings.

3.3.1. Mekar acted in a non-arbitrary manner against Vemma Holdings in accordance with Article 9.9.2(c) of the CEPTA

61. Mekar acted in a non-arbitrary manner against Vemma Holdings pursuant to Article 9.9.2(c) of the CEPTA. Arbitrary conduct has been described as conduct founded on prejudice or preference rather than on reason or fact.[132] Arbitrariness in decision-making has to do with the motivations and objectives behind the conduct concerned.[133] Consequently, a measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary.[134] Thus, the test is that the actions taken by a government are without any justifiable reason.[135] Subsequently, the Respondent submits that the actions undertaken by Mekar are justifiable.

62. The two elements to consider in order to determine whether a state's act was justifiable are: firstly, the existence of a rational policy; and secondly, the reasonableness of the act of the state in relation to the policy. The Tribunal in *Global Telecom Holding (GTH) v. Canada* dealt with the issue of a transfer network policy implemented by the Canadian government. The Tribunal determined that GTH had not evidenced any fundamental inconsistency with Canada's spectrum management policy objectives or with the objectives of the 2008 Advanced Wireless Services (AWS) auction.[136] Through the policy on anticompetitive acts and abuse of dominant position regulation, the state of Mekar seeks to protect consumer interest. There is a rational connection between the action taken against Vemma Holdings as

[130] *Cengiz v. Libya,* ICC, Award, Para.525.
[131] *Cengiz v. Libya,* Para. 525.
[132] *Lauder v. Czech Republic,* UNCITRAL, Award, Para. 221; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Para. 184.
[133] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Para. 385.
[134] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, Para. 385.
[135] *Lemire v. Ukraine, Para.*385.
[136] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Para. 561.

reports are rife that collusion in the airline industry is risky and can hedge away other mid-sized corporations.[137]

63. Furthermore, the Tribunal in *GTH v. Canada* considered that the evidence adduced showed that references to spectrum concentration in the 2013 Transfer Framework that brought Industry Canada to block the transfer of set-aside spectrum licences to Incumbents were essentially adopted to enhance competition.[138] The CCM investigated Caeli airways for its partnership in the Moon Alliance and the low airfares and the loyalty programmes maintained over its routes.[139] These grounds are sufficient grounds for investigation, because while airline alliances are normal in the aviation industry, predatory programmes need to be stemmed.[140]

64. Additionally, the Tribunal in *GTH* determined that the policy reflected the change in the market between 2008 and 2012 due to the rising use of smartphones which made it critical for the government to control spectrum concentration through the Telecommunications Act which provides that the policy has as its objectives to enhance the efficiency and competitiveness of Canadian telecommunications. Similarly, the Monopoly and Trade Restrictive Practices Act, upon which the CCM investigation was founded, provides that it was enacted to enhance and insulate competition in the Mekari market.[141] In light of the above, Mekar acted in a non-arbitrary manner against Vemma Holdings pursuant to Article 9.9.2(c) of the CEPTA.

3.3.2. <u>Mekar acted in a non-discriminatory manner in its relation with Vemma Holdings pursuant to Article 9.9.2(c) of the CEPTA</u>

65. Mekar did not discriminate against Vemma Holdings in accordance with Article 9.9.2(c) of the CEPTA. The Tribunal in *Saluka* outlined a three-tier conjunctive test to determine discrimination i.e., similar businesses treated differently for no justifiable reason.[142] We concede that there was difference in treatment occasioned to Caeli from that to Jetgreen and

[137]Airline Mergers and Alliances, pg. 28.
[138]*GTH v. Canada*, Para. 561.
[139]SOUF, paras 36 & 45.
[140] Organization for Economic Cooperation and Development, Policy Roundtables, Airline Mergers and Alliances, 1999, pg. 9, 28.
[141]Monopoly and Trade Restrictive Practices Act, Preamble.
[142]*Saluka v. Czech Republic*, Partial Award, Para. 313.

Starwings. However, Caeli is not similar to the two entities and in any case, there are justifiable reasons for the difference in treatment.

3.3.2.1. Caeli is not similar to Jetgreen and Starwings

66. Similar businesses are defined to be businesses engaging in the same trade in similar circumstances.[143] While it is true that Caeli airways, Starwings and Jetgreen are airline companies operating in the Mekari market,[144] they are not in the same circumstances. Caeli is owned substantially by the Bonoorian government, while Starwings and Jetgreen are owned by Private holding groups from Arrakis.[145] Furthermore, Vemma Holdings received recurring payments under the Horizon 2020 scheme between October 2011 and June 2016 while Jetgreen and Starwings had received a one-time lump sum payment from their home State in 2017 to alleviate the effects of the economic downturn.[146] Being a conjunctive test, Mekar did not discriminate against Vemma Holdings in accordance with Article 9.9.2(c) of the CEPTA.

3.3.2.2. In any case there were legitimate reasons to discriminate

67. Discrimination is unjustified if no reasons or insufficient reasons are given for the discrimination.[147] The Tribunal in *PSEG v. Turkey*, noted that all the measures adopted, rightly or wrongly, related to the whole array of BOT projects under consideration. It determined that Konya Ilgin was not singled out arbitrarily.[148] The predominant recipients of subsidies under Executive Order 9-2018 were airlines operating important domestic routes within Mekar with less than 5% market share on these routes unlike Caeli which had a staggering 40%.[149] The assistant minister for transportation rationalised that since state-owned enterprises have and enjoy an upper hand in commercial matters, it would be improper to deal them any more subsidies.[150] In any case Vemma has been a consistent receiver of subsidies under the Horizon 2020 scheme.[151] While it is true that Jetgreen and Starwings

[143]*South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Para. 710.
[144] Bundle of facts, Procedural order no. 3, pg. 87.
[145] Bundle of facts, SOUF, Para. 46.
[146]Procedural Order no. 4, Para. 6.
[147]*South American Silver v. Bolivia*, Para. 710.
[148]*PSEG v. Turkey*, ICSID, Award, Para.262.
[149]Procedural order no. 7, Para. 7.
[150]SOUF, Para. 46.
[151]Procedural order no. 4. Para. 6.

have in the past received subsidies from their home state, these subsidies only lasted for three years.[152] In light of the above, Mekar did not discriminate against Vemma Holdings in accordance with Article 9.9.2(c) of the CEPTA.

3.4. In any event, any violations are justified by Mekar's right to regulate pursuant to Article 9.8 of the CEPTA

68. Mekar has properly exercised its right to regulate in accordance with Article 9.8 of the CEPTA. The right must be exercised with caution in order achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity.[153] There is a need to find a better balance between protecting foreign investors from adverse regulatory changes and the right of host States to regulate in the public interest.[154] The right to regulate is related to the police powers of the state and the stability obligation owed to investors.[155]

69. To constitute a legitimate exercise of state regulation, the measure must be *bona fide* and enacted for the purpose of protecting public welfare.[156] The notion of stability implies that an investor has the right to expect that a general regulatory framework that exists at the time of investment will not be significantly altered by a host State.[157] However, the State's obligation to offer a stable and predictable legal framework must be balanced against other legally relevant interests such as the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests.[158] Thus, the legal test is a consideration of the legitimacy of the measure and the necessity and proportionality of the measure undertaken.[159] Consequently, the Respondent submits two arguments: first that Mekar had legitimate grounds to regulate in exercise of consumer protection and second that the CCM

[152]Procedural order no. 4, Para. 7.
[153]*Saluka v. Czech Republic*, Para.255.
[154]*Lemire v. Ukraine (II)*, ICSID, Decision on Jurisdiction and Liability, 14 January 2010, Para.285.
[155]*Philip Morris v. Uruguay*, ICSID, Para.305.
[156]*Philip Morris v. Uruguay*, ICSID, Para.305.
[157] Valenti, M., 'The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard,' in G. Sacerdoti and others (eds.), General Interests of Host States in International Investment Law, Cambridge University Press, 2014, pg. 41.
[158]*Lemire v. Ukraine (II)*, ICSID, Decision on Jurisdiction and Liability, Para. 285.
[159] Yulia Levashova, 'The right of states to regulate in their public interest and the right of investors to receive Fair and Equitable Treatment; The search for a balance in treaties and cases on international investment law,' (2018); *Lemire v. Ukraine (II)*, Para. 285.

investigation and imposition of airfare caps were necessary and proportionate to the legitimate aim of the measure.

3.4.1. Mekar had legitimate grounds to regulate pursuant to Article 9.8 of the CEPTA

70. Mekar exercised its right to regulate in the interest of consumer protection in accordance with Article 9.8 of the CEPTA. Article 9.8 of the CEPTA provides that Mekar has the right to regulate for public welfare in areas such as, *inter alia*, consumer protection.[160] Furthermore, the preamble to the CEPTA provides for a non-exhaustive list of legitimate objectives that parties preserve the right to regulate.[161] To constitute a legitimate exercise of regulatory authority, the measure must be *bona fide* and enacted for the purpose of protecting public welfare.[162] In assessing whether the *bona fide* condition is satisfied, Tribunals often analyse the government's decision-making process and the information on which the decision to adopt the measure was based.[163]
71. The Tribunal in *OEG v. Ukraine* in finding that Ukraine had not violated the FET standard, had regard to the fact that the Gambling Ban Law was passed with wide support from politicians from all over the political spectrum having been a pertinent issue and problem.[164] The Tribunal in *Global Telecom Holding (GTH) v. Canada* dealt with the issue of a transfer network policy implemented by the Canadian government. The Tribunal determined that GTH had not evidenced any fundamental inconsistency with Canada's spectrum management policy objectives or with the objectives of the 2008 AWS Auction.[165] Through the policy on anticompetitive acts and abuse of dominant position regulation, the state of Mekar seeks to protect consumer interest.
72. There is a rational connection between the action taken against Vemma Holdings as reports are rife that collusion in the airline industry is risky and can hedge away other mid-sized corporations. The preamble to the Monopoly and Trade Restrictive Practices Act (MTRPA) provides that it was passed to protect the interest of the consumers, to prevent practices having adverse effect on competition and to promote and sustain competition in the Mekari

[160]CEPTA, Article 9.8.
[161]CEPTA, Preamble, Recital 7.
[162]*Philip Morris v. Uruguay*, Para.305.
[163]*Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, paras 94, 95.
[164]*OEG v. Ukraine*, Para. 94.
[165]*Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Para. 561.

market.[166] When the CCM undertook its first investigation, it gave notice to the Claimant and subsequently involved it in every part of the investigation.[167] Furthermore, the Respondent has a well laid out method of initiating investigations in Chapter three of the MTRPA: either though a *suo motu* investigation or acting on complaints from players in the market.[168] The Respondent thus submits that these are legitimate grounds upon which she can regulate given the precarious nature of its economy and the risk that anticompetitive habits pose.

3.4.2. <u>The measures undertaken by Mekar were necessary and proportional pursuant to Article 9.8 of the CEPTA</u>

73. The CCM investigation undertaken by Mekar in pursuit of consumer protection was necessary and proportional. The necessity and proportionality tests look to whether there are alternative, less restrictive ways to achieve the said objectives including an assessment of the means and the ends.[169] States should assess the availability of reasonable and less restrictive alternatives to address risks.[170] The MTRPA contemplates that the alternative measures to fines are forced sale of assets and any other measures to bring violation in line with the regulation.[171] Subsequently, the fines imposed on Caeli following the two investigations were the least restrictive in light of the other measures available to the Mekari CCM.
74. Similar to the gambling ban law in *OEG v. Ukraine*, the Mekari CCM has had issues with the regulatory gap in situations where there is foreign funding to entities trading in Mekar.[172] Likewise, the unimpeded predatory actions of Caeli airways would have pushed other medium sized corporation out of the market. The second CCM report outlines that it concentrated on minimal profit margins on routes to and from Phenac International thus hedging out other competitors without helping Caeli create new customers or increase revenues.[173] As a result, the measures undertaken were necessary. In light of the above,

[166]Record, Annex V, Preamble.
[167]SOUF, Para. 46.
[168]Record, Monopoly and Trade Restrictive Practices Act, Chapter three.
[169] Alice Giest, 'Interpreting Public Interest Provisions in International Investment Treaties,' Chicago Journal of International Law, pg. 349.
[170]Newcombe, A., The Boundaries of Regulatory Expropriation in International Law, in Kahn, P. and Walde, T.W. (eds.), New Aspects of International Investment Law, 2007, pg. 427.
[171]Record, Monopoly and Restrictive Trade Practice Act, pg. 47.
[172]Record, SOUF, pg. 34, footnote 3.
[173]Record, SOUF, Para. 49.

Mekar exercised its right to regulate in the interest of consumer protection in accordance with Article 9.8 of the CEPTA.

4.0. The Respondent owes the Claimant no compensation under article 9.21 of the CEPTA

75. Mekar owes Vemma Holdings no compensation under Article 9.21 of the CEPTA. Mekar has not violated the CEPTA and therefore, Mekar owes no compensation to the Claimant. However, if the Tribunal concludes that Mekar has violated the CEPTA and owes the Claimant compensation, the Tribunal should apply the market value standard contained in Article 9.21 of the CEPTA and therefore find that the Respondent has already availed the compensation. Neither the most favoured nation clause in the CEPTA nor international law allows the Claimant to derogate from the Market Value standard expressly prescribed in the to achieve, the Respondent advances two interrelated arguments: first, that the CEPTA provides for the use of the market and second, that the compensation should be reduced in light of the Claimant's contributory negligence and the poor economic situation.

4.1. A Good Faith and Plain Interpretation of Article 9.21 of CEPTA requires the use of Market Value standard of Compensation

76. Article 9.21 of the CEPTA requires that the market value standard, not the fair market value standard, be applied in violations of the FET standard. The CEPTA in Article 9.21 (1) (a) states that; "…Where a Tribunal makes a final award against a Respondent, the Tribunal may award…monetary damages at a market value, except as otherwise provided for in Article 9.12."[174] Article 9.12 deals expropriation.[175] In interpreting the text of the treaty, Article 1.3 (2) of the CEPTA provides that "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives…and in accordance with applicable rules of international law."[176]

77. Further, Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT) provides that "…A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

[174]CEPTA, Article 9.21 (1) (a).

[175] CEPTA, Article 9.12 (2).

[176] CEPTA, Article 1.3 (2)

purpose…"[177] An 'ordinary', 'clear', 'plain'[178] reading of article 9.21 (1) (a) of the CEPTA reveals that the CEPTA requires the use of the 'market value' standard of compensation for all treaty violations except the expropriation violation.[179]

78. Notably, this present claim is not an expropriation claim, in fact, the parties have expressly agreed to not contest expropriation.[180] The Claimant's call to adopt the fair market value standard of compensation is a call to deviate from the CEPTA.[181] As noted in *CME v. Czech Republic*, deviating from treaty provisions is unacceptable.[182] Furthermore, the intention of the text of Article 9.21, as guided by article 31 (1) of the VCLT, is that the fair market value standard is included only under compensation for violations amounting to expropriation.[183] Clearly, the drafters of the CEPTA intended that the fair market value standard shall apply only in cases of expropriation.[184]

79. The present dispute is not an expropriation claim, but rather, a claim of a violation of the Fair and Equitable Treatment standard, under which application of the fair market value standard is not intended by the CEPTA. In *CMS v. Argentina*, where guiding BIT provided for the fair market value standard only in respect of expropriation and a general provision for a standard of compensation for other violations, the Tribunal stated that the fair market value standard of compensation is then applicable only in cases involving expropriation.[185] Comparably in this matter, the fair market value standard applies only as far as expropriation is concerned.[186] In the locution of *CME v. Czech Republic*, use of the fair market value as an alternative method of valuation where the BIT did not provide for the same would be substantially flawed in the terms of the treaty.[187]

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[177] Vienna Convention on the Law of Treaties, 1969, Article 31 (1). *CME Czech Republic B.V. v. The Czech Republic*, Separate Opinion on the Issues at the Quantum Phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C., Para. 15.
[178] U. Linderfalk, 'On the Interpretation of Treaties the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties', (Springer, 2007) pg. 95.
[179] CEPTA, Article 9.21 (1) (a).
[180]Record, Procedural Order No. 3, pg. 86, Para. 2.
[181]Record, Notice of Arbitration, pg. 5, Para. 30.
[182]*CME v. Czech Republic*, para. 105.
[183] CEPTA, Article 9.12 (2).
[184]CEPTA, Article 9.12 (2).
[185]*CMS v. Argentina*, Para. 409,410.
[186] CEPTA, Article 9.12 (2).
[187]*CME v. Czech Republic*, Para. 72.

80. Additionally, while the Claimant could argue, and correctly so that international agreements and customary law favour application of the fair market value standard the market value provision in CEPTA prevails. In article 1.4 on application of other international agreements, the CEPTA states that the CEPTA shall prevail in the event of any conflict of laws.[188] Further, the maxim *lex specialis derogat lex generali (lex specialis)* requires that in the event of conflict of laws, the particular law carries the day over the general rule.[189] As stated in *Camuzzi v. Argentina (I), lex specialis* is expressed in bilateral and multilateral treaties,[190] which in this matter is the CEPTA, a bilateral treaty.[191] The CEPTA provides for the applicability of the market value standard, not the fair market value.[192] In light of the above, Article 9.21 of the CEPTA requires that the market value standard, not the fair market value standard, be applied in violations of the FET standard.

4.2. Any additional compensation should be reduced due to the Claimant's contributory negligence and the Respondent's dire economic situation

81. In the unlikely event that this Tribunal finds that the market value is not applicable, any compensation awarded should be reduced primarily because that the Claimant bears responsibility for the losses it has incurred. Additionally, any compensation that may be awarded would have to take the dire economic situation in Mekar into account. Consequently, the Respondent advances two arguments: first that the Claimant bears responsibility for the losses it has incurred and second that this Tribunal should take into account the Respondent's dire economic situation and not award a crippling compensation.

4.2.1. The Claimant bears responsibility for the losses it incurred and therefore, any compensation should be reduced

82. The Claimant undertook risky business choices which contributed to its nosedive and thus Mekar should not bear full responsibility for its losses. Article 39 of the International Law Commission Article Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides that "…in the determination of reparation, account shall be taken of the

[188]CEPTA, Article 1.2 (2).
[189] ILC Study Group on Fragmentation, (United Nations) pg. 1,3,4; A. Gourgourinis, 'Lex Specialis in WTO and Investment Protection Law', (The Society of International Economic Law) pg. 1.
[190]*Camuzzi International S.A. v. Argentine Republic (I),* Para. 145.
[191]CEPTA, Preamble.
[192] CEPTA, Article 9.21 (1) (a).

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."[193] The Tribunals in *MTD v. Chile*, *Azuri v. Argentina*, and *Burlington v. Ecuador*, have interpreted article 39 of the ARSIWA to mean that there is need for the Claimants' contributory conduct to be taken into account in determining compensation, regardless of the treatment given by the Respondent.[194] Further, as explained by the ILC commentary to article 39, the contribution of the investor must be material and significant.[195] In determining the material and significant contribution of an investor in the Tribunal in *Occidental v. Ecuador*, agreed with the *Abengoa Award*, in stating that a causal link has to also be established between the actions and the harm suffered.[196]

83. In the present case, the Claimants intentionally undertook risky business choices, focusing on expansion rather than servicing its debts and being conscious of its losses, despite being advised by the Mekar against undertaking the choices.[197] For instance, at the first annual shareholders' meetings, representatives of Mekar Airservices cautioned the new Vemma-appointed management against taking an extravagant approach, given the volatility of demand in the region, and especially in Mekar, during fall and winter months, but the Claimant dismissed the caution.[198]

84. Into the bargain, in one of its financial seasons, the Claimant suffered a decline in profits.[199] Citing these losses, Mekar through its representative in Mekar Airservices, cautioned that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and hedge the liability of additional financing, but the Claimant ignored the caution yet again.[200] When the Claimant made profits, Mekar advised that the same be injected to clearing the outstanding debt and financial health, instead, the

[193] ILC Articles on Responsibility of States for Internationally Wrongful Acts, Article 39.
[194]*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Para. 178, 242; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID, Decision on Reconsideration and Award, Para.572.
[195]ILC Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Art. 39, paras. 1 and 2; *MTD v. Chile, Para.*101; *Occidental v. Ecuador*, Para. 670.
[196]*Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/09/2, Para. 670; *Bear Creek Mining*, Para.410, Para.663.
[197] SOUF, pg. 33, paras 29, 30, 31.
[198] SOUF, pg. 33, Para. 29.
[199] SOUF, pg. 33, Para. 30.
[200] SOUF, pg. 33, Para. 31.

Claimant embarked on buying new aircrafts.[201] These overambitious overexpansion was the beginning of the end of the Claimant, its poor economic decisions could not sustain it when an unforeseen economic storm hit Mekar.[202]

85. Notably, in the words of the Tribunal in *Maffezini v. Spain*, "…Bilateral Investment Treaties are not insurance policies against bad business judgments … they cannot be deemed to relieve investors of the business risks inherent in any investment."[203] It will be unjust to punish Mekar for the Claimant's bad business risks that were predictably inherent in its investment. This in like fashion with the dictum of Tribunal in *Occidental v. Ecuador*, damages may be reduced if the Claimant also committed an act(s) which contributed to the prejudice it suffered.[204]
86. Similarly, in *Copper Mesa v. Ecuador*, the Tribunal considered the negligent conduct of the Claimant and, pursuantly, reduced the amount of damages awarded.[205] Likewise as stated in *MTD v. Chile*, any compensation ought to be reduced if the Claimant played a contributory in their losses.[206] In light of the above, the Claimant undertook risky business choices which contributed to its nosedive and thus the Respondent should not bear full responsibility for its losses.

4.2.2. <u>This Tribunal should take into account the Respondent's dire economic situation and not award a crippling compensation</u>

87. Pursuant to the crippling economic situation that the Respondent is facing, this Tribunal should reduce any additional compensation. Agreeably, Article 34 of ARSIWA provides for reparation in the form of compensation, restitution and/or satisfaction, for the injury caused by an internationally wrongful act.[207] In commentary 5 of the article, the ILC recognises that "… the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible state is concerned…"[208] Further, in its Third Report

[201] SOUF, pg. 33, Para. 34, 35.
[202] SOUF, pg. 33, Para. 53.
[203]*Maffezini v. Spain, Para.*64, 69; Sabahi, B., Duggal K., Birch, N., 'Chapter 12 – Principles Limiting the Amount of Compensation, in, Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration, Nijhoff International Investment Law Series', (Brill | Nijhoff, 2018) pg. 326-327.
[204]*Occidental v. Ecuador* (II) ICSID, Award, Para.678, Para.687.
[205]*Copper Mesa v. Ecuador***,** PCA, Award, Para.6.100, Para.6.101, Para. 6, 102.
[206]*MTD v. Chile*, Para.243.
[207] ILC Articles on Responsibility of States for Internationally Wrongful Acts, Article 34.
[208]International Law Commission, ILC Articles on Responsibility of States for Internationally Wrongful Acts, Commentary 5 of Article 34.

on State Responsibility, the ILC acknowledges that pursuant to the possibility of crippling reparation, consideration is merited in the context of compensation, since the rule are not guaranteed to prevent extreme being awarded in compensation.[209] As noted in *CME v. Czech Republic*, a Respondent state "…should have the benefit of civilised modern standards in the treatment of States. Even States which have been held responsible for wars of aggression and crimes against humanity are not subjected to economic ruin…"[210] Responsible states are susceptible to financial exacerbation by the requirement of full reparation, this necessitates safeguard measures.[211]

88. In the present case, the Respondent is facing a currency crisis, after the Mekari MON begun devaluating back in 2016.[212] The Respondent is further destabilized by high foreign-currency debt.[213] While the cause of the fall of the currency is unclear, it is undebatable that an inflation has ensued in Mekar and this is terribly affecting the purchasing power of consumers in Mekar.[214] As noted in *CME v. Czech Republic*, states would not consciously accent to BITs that allow for liabilities that would have catastrophic repercussions for the economic health of its population.[215] The consumer base in Mekar has grown so weak that the Respondent has had to undertake emergency relief measures to try prevent businesses from totally crashing.[216]

89. So bad is the economic situation that the attempts by the Respondent have not salvaged the country.[217] Mekar has witnessed many foreign investors pull out of the Mekari market.[218] The Respondent humbly requests this Tribunal to significantly slash, any compensation it would consider awarding just as the Tribunal in *El Passo v. Argentina*, in light of the Respondent's dire economic situation.[219] In conclusion, considering the crippling economic

[209] International Law Commission, 'Third report on State responsibility', (United Nations, 2000) Para. 162.
[210] *CME v. Czech Republic*, Separate Opinion on the Issues at the Quantum Phases by Ian Brownlie, Para. 70.
[211] Martins Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (John Wiley & Sons Ltd on behalf of Modern Law Review Limited, 2020), pg. 1257.
[212] Record, SOUF, pg. 35, Para. 39.
[213] Record, SOUF, pg. 35, Para. 39.
[214] Record, SOUF, pg. 35, Para. 39.
[215] *CME v. Czech Republic*, Separate Opinion on the Issues at the Quantum Phases by Ian Brownlie, Para. 78.
[216] Record, SOUF, pg. 35, Para. 41, 46.
[217] Record, SOUF, pg. 35, Para. 41.
[218] Record, SOUF, pg. 35, Para. 41.
[219] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. Arb/03/15, Para. 745.

situation that the Respondent is facing, this Tribunal should reduce any additional compensation.

PLEADINGS FOR FINDINGS

90. In light of the above, Respondent hereby respectfully requests the Tribunal to:

a. Decline to exercise jurisdiction due to the Claimant's status as a State-owned enterprise;
b. Reject the CBFI's submission and admit that submitted by the external advisors to Mekar's Committee on Reform of Public Utilities.
c. Find that Mekar did not violate Article 9.9 of CETPA; and
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.