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

Vemma Holdings Inc.
Claimant

v.

The Federal Republic of Mekar

(*Respondent)*

Memorial For Respondent

TABLE OF CONTENTS

Part I

TABLE OF AUTHORITIES

Treaties

Abbreviation	Citation
ARISWA	ILC, Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
ICSID	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, (1965)
ICSID ADDITIONAL FACILITY RULES	International Centre for Settlement of Investment Disputes Additional Facility Rules (2006)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
VCLT	Vienna Convention on the Law of Treaties (1969)

Arbitral Decisions

Abbreviation	Citation
AGUAS DEL TUNARI v. BOLIVIA	Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3. Decision on Respondent's objections to Jurisdiction (2005)
AES V. HUNGARY	AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22. Award, 2010.

ALMAS v. POLAND	Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland, UNCITRAL, Award, 27 June 2016, Ex. RLA-8 ("Almås v. Poland").
AMCO v. INDONESIA	Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1
AZURIX v. ARGENTINA	Azurix Corp v. Argentina, Award (2003) ICSID ARB 01/12
BS V. MONGOLIA	Beijing Shougang and others v. Mongolia, PCA Case No. 2010-20. Award, (June, 2017).
BUCG V. YEMEN	Beijing Urban Construction v. Yemen Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30).
BURLINGTON v. ECUADOR	Burlington Resources v. Ecuador ICSID ARB/08/05
CHEVRON CORPORATION et al. v. ECUADOR	Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador PCA Case No. 2009-23 Claimant's Counter Memorial on Jurisdiction (2009).
CHROMALLOY V. EGYPT	Chromalloy Aeroservices v. Arab Republic of Egypt, District Court, District of Columbia, United States of America, 31 July 1996, 94-2339
CME v. CZECH REPUBLIC	CME Czech Republic Bv v.Czech Republic , UNCITRAL
CONT´L CAS. CO. V. ARGENTINE	Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9
CSOB V. SLOVAKIA	CSOB. v. Slovakia Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic (ICSID Case No. ARB/97/4).
EL PASO V. ARGENTINA	El Paso Energy International Company v. Argentina, Award (2011) ICSID ARB 03/15

EBO INVEST AND OTHERS V. LATVIA	Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia, ICSID Case No. ARB/16/38. Award, 2020.
EDF v. ROMANIA	EDF (Services) Ltd. v. Romania, ICSID Case No. Arb/05/13, Award (8 October 2009)
ENRON v. ARGENTINA	Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007
EUREKO BV v. POLAND	Eureko BV v Poland, Partial Award and Dissenting Opinion, IIC 98 (2005), 19th August 2005, Ad Hoc Tribunal (UNCITRAL).
GLAMIS v. UNITED STATES	Glamis v. United States, Award, 8 June 2009, footnote 1087 to para. 542;
GUSTAV HAMESTER v. GHANA	Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24
HILMARTON V. OTV	Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A., ICC Case No. 5622 (1988), para. 23.
HIMPURNA V. PT.	Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara, Final Award, 4 May 1999
JAN DE NUL V. EGYPT	Jan de Nul NV and Dredging International NV v. Arab Repubulic of Egypt. ICSID (Arbitration Tribunal). 16 June 2006 ; 06 November 2008 .

LAURENTIUS v. THE SLOVAK REPUBLIC	Laurentius v. The Slovak Republic, UNCITRAL, Final Award para. 303 (23 April 2012);
LG&E v. ARGENTINA	LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 162.
LOWEN GROUP v. UNITED STATES	Loewen Group, Inc. and Raymond. L. Loewen v. United States ofAmerica, NAFTA (ICSID), Case No. ARB(AF)/98/3 (Award), 26 June 2003 (hereafter, Loewen).
MAFFEZINI v. SPAIN	Emilio Agustín Maffezini v. Spain (1999) ICSID ARB/97/7
METALCLAD V. MEXICO	Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1
MEXICO CORN PRODUCTS INC v. UNITED MEXICAN STATES	Mexico. Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1.
ORTIZ CONSTRUCCIONES Y PROYECTOS S.A v. ALGERIA	Ortiz Construcciones y Proyectos S.A v. République Algérienne Démocratique et Populaire
PLAMA V. BULGARIA	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24. Final Award 2008. para 184 (page 57)
ROBERT AZINIAN v. MEXICO	Robert Azinian & Others v. Mexico, ICSID ARB(AF)/97/2, award (November 1, 1999) §103 http://icsid.worldbank.org/
RONALD LAUDER V. CZECH REPUBLIC	Ronald Lauder v. The Czech Republic, Final Award of 3 September 2001,UNCITRAL, paras. 221,222,232; Schreuer, op.cit. pp.8-9.
SALINI v. ARGENTINA	Salini Impregilo v. Argentina, Jurisdiction and Admissibility (2018) ICSID ARB/15/39
S.D MYERS INC. v. CANADA	S.D. Myers, Inc. v. Canada, (November 13, 2000), Partial Award
SEMPRA ENERGY v. ARGENTINE (2007)	Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16. Award – 28 September 2007. p. 120. Ron Fuchs v.

	The Republic of Georgia, ICSID Case No. ARB/07/15.
SOABI v. SENEGAL	Societe Ouest-Africaine des Betons Industriels (SOABI) v. Senegal (1988) ICSID ARB/82/1
TECMED v. MEXICO	Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para 189.
TOKIOS TOKELS V. UKRAINE	Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award (26 July 2007)
TULIP REAL ESTATE v. TURKEY	Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey ICSID Case No ARB/11/28 Decision on Annulment (30 December 2015).
WASTE MANAGEMENT v. MEXICO	Waste Management v. Mexico, Award (2004) ICSID ARB (AF)/00/3
WENA v. EGYPT	Wena Hotels Ltd v. Egypt, Award (2000) ICSID ARB 98/4
WESTINGHOUSE v. PHILIPPINES	Westinghouse Int'l Projects Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v. Nat'l Power Corp. and The Republic of the Philippines, ICC Case No. 6401, Preliminary Award (19 December 1991)
WHITE INDUSTRIES v. INDIA	White Industries Australia Limited v. The Republic of India, Final Award. 30 Nov 2011. White Industries Australia Limited v. The Republic of India, UNCITRAL.
WORD DUTY FREE v. KENYA	World Duty Free Company Limited v The Republic of Kenya ICSID Case No. ARB/00/7, Award (October 4, 2006)

Secondary sources

Abbreviation	Citation
ARISWA (2001)	Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (2001)
AIKATERINI TITI (2014)	Aikaterini Titi, The Right to Regulate in International Investment Law 33 (2014)
BASSO (2021)	Elina A. Basso, Meagan B. Vestby, Vishakha Choudhary, Mitchell Dorbyk, and Aglaya Melnik "*Foreign Direct Investment International Arbitration Moot: Vemma Holdings Inc. v. Federal Republic of Mekar"* (2021): P. 80. Hereinafter cited as "The Case".
BLACKS LAW DICTIONARY (1999)	Black's Law Dictionary 100,7th ed, 1999)
COLUMBIA JOURNAL OF INTERNATIONAL LAW (1996)	"The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", 5 Columbia Journal of International Law (1966), 263, 265.
CORTESI (2017)	Giulio Alvaro Cortesi. "ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law" (2017)
FOCARELLI (2009)	Focarelli C (2009). Denial of justice. In: Wolfrum R, ed. The Max Planck Encyclopedia of Public International Law. Oxford University Press. Oxford.
ICSID REVIEW	ICSID Review - Foreign Investment Law Journal, Volume 31, Issue 1, Winter 2016, Pages 24–35
INTERNATIONAL VALUATION STANDARDS (IVS)	International Valuation Standards (IVS) "Glossary" (n.d) taken from: https://www.ivsc.org/standards/glossary
LEGAL INFORMATION INSTITUTE (N.D)	Legal Information Institute. "Arms Length" (n.d) taken from:

	https://www.law.cornell.edu/wex/arm%27s_length
MANIRUZZAMAN (1998)	A. F. M. Maniruzzaman, "Expropriation of Alien Property and the Principle of Non-Discrimination in International Law or Foreign Investment: An Overview"*Journal of Transnational Law & Policy, Vol. 8, No. 2, p. 57, 1998 at* page 69
PARTASIDES (2010)	Partasides, Constantine. "Proving Corruption in International Arbitration: A Balanced Standard for the Real World." *ICSID Review* 25.1 (2010): 47-62.
REINMAR (1958)	Wolff, Reinmar. "New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958." New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of. Vol. 10. 1958
SINCLAIR, MCTAGGART & ROBERTSON (1984)	Sinclair, Ian McTaggart, and Ian Robertson Sinclair. *The Vienna Convention on the law of treaties*. Manchester University Press, 1984.
S&P GLOBAL RATINGS (n.d)	Standard & Poors Rating Services. McGraw Hill Financial. "*Puerto Rico (and Greece)"* June 30, 2015.
STANLEY AND FUSS (2017)	Langbein, Stanley I., and Max R. Fuss. "The OECD/G20-BEPS-Project and the Value Creation Paradigm: Economic Reality Disemboguing into the Interpretation of the Arm's Length Standard." *Int'l Law.* 51 (2017): 259.
UNCTAD (2003)	UNCTAD (2003). International centre for settlement of investment disputes. Consent to arbitration. New York and Geneva.
UNCTAD (2012)	UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International

	Investment Agreements II, 2012.
UNCITRAL (N.D)	United Nations Commission on International Trade Law (UNCITRAL) "Model Law on International Commercial Arbitration. Arbitration Rules" (n.d)
UNITED NATIONS (1945)	U.N (1945) charter. Art. 1
VINCZE (2004)	Vincze, Andrea. "Jurisdiction Ratione Personae in ICSID Arbitration." *European Integration Studies* 3.1 (2004): 111-122.

TABLE OF ABBREVIATIONS

Abbreviation	Term
ARISWA	ILC, Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
BIT	1994 Mekar-Bonooru BIT
CAA	Civil Aviation Authority of the Commonwealth of Bonooru
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar
Claimant	Vemma Holdings Inc
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
ICSID Additional Facility Rules	International Centre for Settlement of Investment Disputes Additional Facility Rules
IICRA	Investment Information and Credit Rating Agency

IMF	International Monetary Fund
MON	Mekar's national currency
MRTPA	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
MST	Minimum Standard of Treatment
Respondent	Republic of Mekar
Shareholder's Agreement	Shareholder's Agreement relating to Caeli Airways
SOE	State Owned Enterprise
SOE'S	State Owned Enterprises

PART I

STATEMENT OF FACTS

Pre- Investment

01. ***1972.*** The CAA of Bonooru, an affiliated entity of the Ministry of Transport and Tourism, restructured the state-owned Bonooru Air, the national carrier, into an arm's-length enterprise. Nonetheless, in a speech delivered by the Prime Minister of Bonooru at the time, the government of the Commonwealth assured that:

> "*our plan is to maintain a significant interest in Bonooru's Air. The intended successor will be directed to ensure it operates routes to our most remote islands, regardless of profitability (…)".*

02. ***1984.*** Claimant succeeded Bonooru Air Holdings. Royal Narnian, one of the new airlines born from the Privatization of Enterprises Act of 1972, was chosen as Bonooru's flag carrier. As of today, Vemma owns and operates Royal Narnian.

03. ***1994.*** The governments of Mekar and Bonooru signed the BIT of 1994, with the aim of intensifying economic relations, creating a legal framework to protect investors and encouraging financial and industrial growth. However, Mekar has always been careful not to compromise its right to regulate internal affairs bearing in mind the economic hazards the country has faced since its independence from the Pevensian Empire.

04. ***2003.*** Until 2003, Mekar's aviation industry consisted of Aer Caeli and Caeli Airways, both state-owned enterprises. The Managing Director of Caeli Airways, Yangchen Su, presided over the 2003 merger between the two airlines, resulting in loss of market share, inflated debts, and projected decrease in future profits.

05. ***2009.*** Even though the government of Mekar tried to implement a programme to help Caeli recover from the crisis it faced, by 2009 it was imminent the need of privatizing State-Owned companies. The government enacted the Emergency Recovery Act of 2009, which authorized a large-scale sale of Mekar's SOE.

06. ***2009.*** Caeli Airways was deemed appropriate for privatization. In order to improve and inspire investor confidence, the legislative body of Mekar issued Mekar's MRTPA, with the purpose of creating an independent body to prevent practices that could have adverse effects on competition and protect consumers. The CCM was given the competence to initiate investigations and fine companies that did not comply with the provisions of the Monopoly and Restrictive Trade Practice Act.

Investment

07. ***2010.*** Vemma Holdings, among other three companies, participated in a tendering process to purchase Caeli. Vemma's bid proposal attracted Mekar's Committee on Reform of Public Utilities and thus the CCM approved Vemma's acquisition of an 85% stake in Caeli Airways. The remaining 15% shares were preserved by the government of Mekar. Nonetheless, Vemma's proposal did not envisage volatility of fuel prices and takeovers of long-distance routes by competitors and the over optimistic approach did not take into account the inheritance of debt liabilities associated with Caeli Airways.

08. ***2011.*** Mekar Airservices Ltd. and Vemma signed a Shareholder's Agreement. In the same year, Caeli bought eight and leased fifteen Boeing 737 aircraft through contacts with fellow Moon Alliance Members, especially Royal Narnian, a Moon Alliance Member, that also gave Caeli lounge access, terminals, IT platforms, check-in operations and even code sharing.

09. ***2011.*** In 2011, Bonooru's Minister of Transportation and Tourism revealed the "Horizon 2020 Scheme" and offered subsidies to Vemma, Caeli's controlling shareholder, even

though the subsidies were meant for companies investing in tourism-related infrastructure. Ms. Sabrina Blue explained that the subsidies were granted since Vemma would draw more travelers from Mekar to Bonooru.

10. ***2012.*** In the first annual Shareholder's meeting, representatives from Mekar Airservices - who owned 15% stake in Caeli - advised Vemma against taking an "extravagant approach" and focus on network development since Mekar's market was known for being volatile during fall and winter season. Nonetheless, Vemma decided to offer low-fare, long-distance flights, and added 20 new destinations in 2012 with the purpose of gaining market share. It also increased the number of Caeli's international routes to cushion the losses incurred during the low season.

11. ***2014.*** Mekar and Bonooru signed the CEPTA, terminating the pre-existing BIT.

12. ***2014.*** In 2014, several warnings were given to Caeli's controlling shareholder, Vemma, to reevaluate their optimistic and extravagant approach in Caeli's management. Such warnings were not only given by Mekar's representatives on Caeli's Board but also by renowned economist, and ex-employee of Bonooru's Ministry of Tourism, Ms. Misty Kasumi.

13. ***2015.*** By 2015, Caeli was already flying 35% of all Mekari citizens and generating profits by taking advantage of declining fuel prices. Despite such hopeful results, Mekar's representatives on Caelis Board advised the controlling shareholder to inject the profits to improve financial health and to reduce debt. However, Vemma ignored the advice of Mekar's board members and instead invested its earnings and opened a new credit line to *"consolidate its consumer base".*

14. ***2016.*** Because of Caeli's rapid growth, the CCM opened an investigation to conclude whether Caeli was adopting predatory pricing strategies and anti-competitive behavior.

Such investigation was carried under the rules of Chapter III, Article 2 of the Monopoly and Restrictive Trade Practice Act of 2009. Though Caeli enjoyed a 43% market share on its own, combined with Royal Narnian, an airline owned and operated by Claimant, the market share exceeded the CCM established 50% limit. Additionally, there were concerns that the subsidies granted to Vemma through the Horizon 2020 program allowed the controlling shareholder to promote predatory pricing strategies. Thus, the Commission placed caps on Caeli's Airways to prevent it from earning "supra-competitive profits in the future".

15. ***2016.*** By December 2016, a consortium of small regional airlines brought a complaint before the CCM, arguing that Caeli had made Phenac International Airport its fortress hub, making it almost impossible for these airlines to penetrate Mekar's market. Thus, the CCM, under Chapter III, Article 3 of the MRTPA, opened a second investigation.

16. ***2017.*** By 2017, the MON, Mekar's official currency, began to plummet. The IMF emphasized on the importance of establishing credibility in the local currency to overcome the financial crisis.

17. ***2018.*** Consequently, the government of Mekar passed a decree requiring all companies to offer goods and services in MON.

18. ***2018.*** In 2018, the first investigation launched by the CCM, concluded and reported Caeli had been using predatory pricing strategies and had benefited from the subsidies granted by Bonooru. The CCM imposed a fine on Caeli of MON 150 million. Additionally, the Executive branch of Mekar decided to grant subsidies to the airline industry but excluded Caeli from receiving financial aid since it had already received subsidies from Bonooru and Caeli, owned by Vemma, had the status of a SOE. Thus, SOE were excluded from Executive Order 9-2018.

19. ***2018.*** The second investigation launched by the CCM concluded and found that Caeli had been engaging in anti-competitive behavior and had been abusing its dominant position in Phenac International Airport. Thus, the CCM imposed a second fine of MON 200 million and maintained the air caps until Caeli had a market share below 40%.

20. ***2019.*** Caeli requested a loan from Mekar's national bank, but shortly after rejected the bank's offer due to the interest rate. It is noteworthy, however, that the rate was offered according to Caeli's CCC rating assigned by the IICRA.

21. ***2019.*** By the end of 2019, Vemma representatives expressed their desire to sell their stake in Caeli Airways. They found an investor, Hawthorne Group LLP, but the offer was artificially inflated according to the analysis made by Mekar Airservices. It was evident by then that Vemma not only led Caeli to financial distress but also that it was willing to leave the investment adrift.

22. ***2020.*** After negotiations failed between Mekar Airservices and Vemma, the dispute was brought to the Sinnoh Chamber of Commerce under Article 39 of the Shareholders Agreement. Arbitrator Rett Eichel Cavannaugh rendered an award in May 2020, declaring that the Hawthorne Group LLP offer could not be considered an offer from a *bona fide* third party due to its affiliation with Vemma through the Moon Alliance.

Post- Investment

23. ***2020.*** After failing to secure an offer from a third party, Vemma sold its stake of Caeli to Mekar Airservices for 400 million USD. At the same time, it filed a notice of arbitration under the CEPTA.

24. ***2020.*** Because Caeli was and still is a very important asset to ensure Mekari citizens mobility through and outside of Mekar, the Ministry of Civil Aviation along with the CCM,

authorized infusion of state capital; tax breaks and the depletion of the fines imposed by the CCM with the sole purpose of helping the financial recovery of Caeli for public interest.

25. ***2021.*** Through the Airways Infrastructure Rescue Act on 2 March 2021, Bonooru increased its stake in Vemma Holdings Inc to 55%. Additionally, the board of directors was replaced with government functionaries, Vemma started performing paramilitary activities and the legal team defending the Claimant is equipped with lawyers from Bonooru's Justice Department.

PART II

JURISDICTION

THIS TRIBUNAL LACKS JURISDICTION OVER THE DISPUTE DUE TO THE CLAIMANT'S NATURE AS A STATE-OWNED COMPANY

26. The tribunal's jurisdiction is founded on consent.[1] Requirements for consent in this case are found in the CEPTA, Section E - Dispute Settlements.[2]

27. Investors may submit a claim under the ICSID Additional Facility Rules since the CEPTA satisfies the requirements of consent demanded by Article II of the New York Convention for an "agreement in writing" and the ICSID Additional Facility rules for written consent of the parties.

28. Nevertheless, for the CEPTA to satisfy the requirements of consent to arbitration, the parties must comply with two jurisdictional preconditions: the first condition, the *ratione personae* condition, demands the contracting Party be an Investor. The second condition, the *ratione materiae* prerequisite, requires the nature of the transaction to be an investment.[3]

29. Respondent objects the Claimant's standing as an Investor under the CEPTA Treaty of 2014 and thus respectfully requests the Tribunal to decline to exercise jurisdiction.

A. This Tribunal does not have Jurisdiction Ratione Personae

[1] United Nations Conference on Trade and Development "Dispute Settlement" (2003) taken from: https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf

[2] Elina A. Basso, Meagan B. Vestby, Vishakha Choudhary, Mitchell Dorbyk, and Aglaya Melnik "*Foreign Direct Investment International Arbitration Moot: Vemma Holdings Inc. v. Federal Republic of Mekar"* (2021): P. 80. Hereinafter cited as "The Case".

[3] Vincze, Andrea. "Jurisdiction Ratione Personae in ICSID Arbitration." *European Integration Studies* 3.1 (2004): 111-122.

30. CEPTA Art. 9.1 defines "Investor":

> *"Investor means a Party, a natural person, or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;*
> *For the purposes of this definition, an enterprise of a Party is:*
>
> *a. an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or*
> *b. an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);"*[4]

31. The wording of article 9.1 clearly excludes SOE's as investors under the CEPTA. In this sense, even if Claimant is a company registered in Szeto, Bonooru, it can be classified as a SOE for the reasons set out below.

32. It is noteworthy that the BIT signed and ratified by Bonooru and Mekar in 1994[5], which was later replaced by the CEPTA, explicitly recognized government owned enterprises as investors in Article 1.[6]

33. Accordingly, the exclusion of government-owned enterprises as investors in the CEPTA, which replaced and left the BIT inoperative, explicitly manifests the will of the Contracting Parties to exclude such companies from the protection of the 2014 Treaty. In other words, the manifest exclusion of the previously included SOE's from the 2014 CEPTA is clear

[4] The Case P. 74.
[5] The Case P.70
[6] The Case P. 70

evidence of the Parties' intent that they are not granted CEPTA protection. Furthermore, Article 31(4) of the VCLT establishes 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 purpose (…) […] 4. A special meaning shall be given to a term if it is established that the parties so intended."*[7]

34. In CBQ v. Mongolia (2017), the PCA Tribunal noted that:

> "*in this respect, under Article 31(4) of the Vienna Convention on the Law of the Treaties, a special meaning shall be assigned to the term only "if it is established that the parties so intended "There is no indication that the Treaty drafters intended to assign any special meaning",*[8]

35. Contrary to the CBQ v. Mongolia dispute, in the present case there is evidence that both government of Mekar and Bonooru willingly *intended* to exclude SOE as protected investors under the CEPTA Treaty of 2014 by failing to provide a proper definition of enterprise; unlike the 1994 BIT, which explicitly recognized the nature of government-owned companies as Investors. It is therefore submitted that this Tribunal does not have Jurisdiction Ratione Personae since, under the CEPTA (2014), SOEs do not qualify as Investors.

i. As of March 2021, Bonooru has conducted governmental functions through Claimant

36. Claimant claims to be an investor under the 2014 Bonooru- Mekar CEPTA as stated in the Notice of Arbitration[9]. As for March 2021, however, the government of Bonooru owned a

[7] Sinclair, Ian McTaggart, and Ian Robertson Sinclair. *The Vienna Convention on the law of treaties*. Manchester University Press, 1984.
[8] Beijing Shougang and others v. Mongolia, PCA Case No. 2010-20. Award, (June 2017).
[9] The Case. P. 3.

55% controlling stake in the enterprise, making Vemma a SOE and eliminating, *ipso-facto,* the possibility for Vemma to submit a claim to arbitration under CEPTA chapter 9.

37. It is important to clarify that it is not the fact alone that Vemma can be classified as a SOE that precludes the company from submitting a claim under the CEPTA, which protects investors and investments in Mekar; it is, however, the fact that Bonooru conducts governmental functions through Vemma as stated by Bonooru's Constitutional Court in CCB Case No. 1981-17. [10]

38. In the above noted case, the Constitutional Court of Bonooru stated that:

> "*[…] Article 70 imposes positive obligations on the State to enable citizens' mobility through the archipelago […] As a result, air travel serves a unique purpose in Bonooru compared to other nations around the globe. Without modern air travel, most of our citizens could not move between our islands or even leave the islands for another nation."*[11]

39. Thus, it is clear that Bonooru fulfills the constitutional obligation of ensuring mobility rights through Vemma Holdings Inc.

B. The Tribunal must consider the purpose of Claimant's investment to determine standing ratione personae

40. According to "Broches Test", author Aaron Broches,[12] SOEs have standing as Claimants under ICSID. He concluded that:

> "*a mixed economy company or government-owned corporation should not be disqualified as a national of another Contracting State unless it is acting*

[10] The Case. P. 43
[11] The Case P. 44
[12] Giulio Alvaro Cortesi. "ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law" (2017)

> *as an agent for the government or is discharging an essentially governmental function".*

41. In several ICSID cases, such as BUCG v. Yemen (2017)[13] and CSOB v. Slovakia (2017)[14], the Tribunals held that SOEs had standing provided that the nature of the acts were, in essence, commercial. Note, however, that in the *CSOB v. Slovakia*[15] case, the Tribunal failed to address the purpose of an entity's activities when identifying whether a SOE is acting as an agent for the government or is discharging an essentially governmental function. Citing ICSID Review, Volume 31:

> *"One particularly noteworthy aspect of customary international law attribution rules is the ability to consider not only the nature, but also the purpose, of an entity's activities when identifying sovereign conduct. […] tribunals often consider both the nature and the purpose of an entity's activities when determining whether the entity has exercised government authority under customary international law attribution rules.The (CSOB) Tribunal, however, accorded weight only to the nature ('commercial'), and not the purpose ('promoting the governmental policies or purposes of the State'), of a State-owned bank's activities when determining whether the bank's ICSID claim gave rise to a State-to-State dispute.But the CSOB Tribunal cited no authority in support of its decision to exclude consideration of the motivations driving an SOE's activities, and did not address the customary international law attribution rule reflected in ILC Article 5, which places 'particular importance' of such corporate motivations when determining the boundaries of sovereign conduct."* [16]

42. Thus, according to Mark Feldman, author of State-Owned Enterprises as Claimants in International Investment Arbitration, published in the *ICSID* Review Vol. 31, it is

[13] Beijing Urban Construction v. Yemen Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30).
[14] CSOB. v. Slovakia Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic (ICSID Case No. ARB/97/4).
[15] CSOB. v. Slovakia Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic (1997), *supra* note 14
[16] ICSID Review - Foreign Investment Law Journal, Volume 31, Issue 1, Winter 2016, Pages 24–35

imperative for future Tribunals to analyze both the *nature* and the *purpose* of the acts made by a company, to analyze if such acts can be attributed directly to acts of state *Jus Imperium.*[17]

C. Attribution of State Responsability under ARISWA articles 4 and 5 respectively

43. The ARISWA (2001), have been applied in several cases to determine whether an act carried by an enterprise – in the present case Vemma – can be attributed to a State – in the present case, Bonooru.

44. In Staur Eiendom v. Republic of Latvia,. the ICSID Tribunal stated that:

> "*It has been recognized in the Commentary to the ILC Articles, other doctrinal writings and in the jurisprudence of international tribunals that a person or entity may be characterized as an organ of the State as a matter of international law even if it does not possess that character under the State's internal law.*[18] *As stated by the tribunal in Almås v. Poland: "Internal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way."*[19]

45. Thus, as of March 2021, Vemma was a *de facto* State Organ bearing in mind:

46. Vemma Holdings Inc does not have an independent Board of directors since the positions are held by government functionaries.[20]

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[17] ICSID Review supra. note 16.
[18] Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia, ICSID Case No. ARB/16/38. Award, 2020.
[19] Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland, UNCITRAL, Award, 27 June 2016, Ex. RLA-8 ("Almås v. Poland").
[20] The Case. P. 41

47. By March 2021, Bonooru implemented a bail-in program through the Airways Infrastructure Rescue Act, which ended in the acquisition of the government's 55% stake in Vemma's shareholding.

48. The Constitutional Court of Bonooru, establishes the positive obligation of ensuring Article 70 of Bonooru's Constitution, which recognizes mobility rights for the citizens of the country.

49. Such an obligation lies in the hands of Royal Narnian, a company owned and operated by Claimant.

50. In Vemma's Memorandum of Association, objective (h) establishes:

> *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 including servicing remote communities;*

51. which clearly indicates Vemma's responsibility to carry governmental functions through the airlines it owns. Ms Sabrina Blue has stated that Vemma has significantly contributed in enhancing Bonooru's mobility rights[21].

52. Claimant's legal team is equipped with Bonoorus justice department lawyers[22].

53. Claimant's functions were expanded under the Airways Infrastructure Rescue Act to include "*paramilitary activity"*[23]

[21] The Case, P. 89.
[22] The Case, P. 40.
[23] The Case, P.40

54. In this sense, according to Article 5 of the ILC:

> *"the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided that the person or entity is acting in that capacity in that particular instance".*[24]

55. Respondent argues that under Article 5, the acts conducted by Claimant clearly demonstrate empowerment by the state of Bonooru and the Ministry of Transport and Tourism. It is evident Claimant had interest in promoting the public policies of the government by appointing several officials in the Board of Directors of the enterprise; moreover, according to Bonooru's own Constitutional Court, Vemma, the successor of BA Holdings, had to continue to ensure the compliance of the positive obligations established in Article 70 of Bonoorus Constitution and thus advance in sovereign purposes and the public interest.

D. Claimant conducted its investment in Mekar from 2011 until 2020 under the direct control of the government of Bonooru

56. Finally, apart from the issue of attribution to the State of Bonooru for Claimant's actions in regards of articles 4 and 5 of the ILC, Article 8 sustains the Respondent´s submission that Claimant is, indeed, acting on behalf of Bonooru's government and thus the claim brought before this Tribunal under chapter 9 of the CEPTA constitutes a State-to-State arbitration.

57. Article 8 of the ILC states that:

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

[24] Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (2001)

conduct" The commentary of Article 8 affirms that *It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised, and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them."*.[25]

58. Thus, in accordance with the interpretation made in the General commentary of the Draft articles on Responsibility of States for Internationally Wrongful Acts, by proving one of the three elements – direction, instructions, or control – then the acts performed by an enterprise can be attributed to the State.

59. In this sense, the ICSID Tribunal in *Aguas del Tunari v. Bolivia,* stated that control is not necessarily expressed in the percentage of ownership an investor has over an investment. For instance, control can be expressed:

> "(...*) by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these*." [26]

60. In the present case, from the date Claimant made its investment; until the date it initiated the arbitral proceedings (November 2020), Bonooru exercised control of Vemma by:

    1. Having a minority shareholding ranging from 31% to 38% while other shareholders had a stake of more than 7%. [27]

[25] Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (2001)
[26] Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3. Decision on Respondent's objections to Jurisdiction (2005)
[27] The Case. P. 30

2. Ms. Sabrina Blue, head of the board of directors of Vemma, was simultaneously appointed Secretary of Transport of Bonooru. [28]
3. Direct financing from the government of Bonooru through the "Horizon 2020" Scheme. [29]
4. The Ministry of Transport and Tourism appoints the non-executive director of the Board of Directors of Vemma. [30]
5. Vemma's Board of Directors passes decisions by a majority vote. Decisions require 50% of the voting shares for a quorum at regular meetings. Bonooru's representatives on Vemma are present for every meeting, therefore, constituting a majority of the votes when other shareholders do not attend.[31]

61. The above in regard to the control the State of Bonooru exercised over Claimant *during* the years of the operations in Mekar, starting from 2011 until November 2020.

62. For the reasons stated, the Respondent submits that this Tribunal lacks jurisdiction to hear this claim since it constitutes a State-to-State arbitration.

E. If the Tribunal accepts Jurisdiction, the award rendered would bind the Commonwealth of Bonooru and the Republic of Mekar

63. As proven by Respondent, Claimant has been under control of Bonooru since the beginning of its operations in Mekar.

64. But it is an undisputed fact that by March 2021, Claimant became fully operated by Bonooru, discharging governmental functions attributable to Bonooru and carrying

[28] The Case. P 32
[29] The Case. P 33-34
[30] The Case. P. 47
[31] The Case. P. 87

paramilitary operations under the command of the government[32]. In this sense, as of today, October 2021, the award rendered by this arbitral tribunal would bind Mekar and Bonooru; violating the core principle of ICSID Additional Facility Rules of solving disputes between foreign nationals and a State.

65. For instance, Broches, father of the ICSID Convention, stated in the *travaux préparatoires* that: "[...] *private versus private and state versus state disputes are excluded from the jurisdiction of the ICSID."* [33]

66. *In casu,* the dispute constitutes a State-to-State arbitration, because of the control and ownership Bonooru has exercised over Claimant in the years it operated in Mekar. Accordingly, this tribunal must decline jurisdiction to preserve the core principles of ICSID and international investment law.

[32] The Case, P. 40.

[33] "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", 5 Columbia Journal of International Law (1966), 263, 265.

PART III

ADMISSIBILITY

A. The External Advisors to the Committee on Reform of Public Utilities is an admissible non-disputing *amicus curiae*.

67. Non-disputing amicus curiae have served as a mechanism to reinforce confidence through transparency in arbitration proceedings. In cases such as *Aguas del Tunari, S.A. (AdT) v. The Republic of Bolivia*[34], the denial of an *amicus curiae* submission by an NGO that documented firsthand the facts of the case provoked heavy criticism not only against the case's transparency but also against the entire investor-State arbitration system[35].

68. The similarity between the case mentioned and the present case is evident. The External Advisors to the Committee on Reform of Public Utilities (CRPU) assisted the people of Mekar in the process of privatization of state enterprises, Caeli Airways among them. The *Amici* has also closely followed the public sector of Mekar in executive and economic matters, therefore understands the panorama and the applicable legal framework of the alleged investment and the illegitimate and irresponsible actions carried out by the Claimant.[36]

69. The inclusion of the External Advisors to the CPRU as a non-disputing *amicus curiae* can improve the transparency of this arbitration. On the other hand, exclusion would constitute ignoring an independent perspective on the factual scope of the dispute from a primary source.

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[34] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3

[35] Editorial, 'The Secret Trade Courts', The New York Times, 27 Sep. 2004, http://www.nytimes.com/2004/09/27/opinion/27mon3.html

[36] External Advisors to the Committee on Reform of Public Utilities. Application for leave to file a non-disputing party amicus curiae submission ICSID Case No. ARB(AF)/20/78 May 28, 2021.

i. Article 9.19 (3) CEPTA Qualifies the External Advisors to the CRPU as a non-disputing amicus curiae.

70. CEPTA Article 9.19 (3) establishes the rules for the participation of non-disputing amicus curiae in an arbitration under the CEPTA as follows[37]:

a) The submissions are regarding a matter of fact or law within the scope of the dispute.

b) Interest in the arbitral proceedings.

c) Identification and disclosure.

71. The External Advisors to the CRPU meets the 9. 19.3 requirements;

a. The External Advisors to the CRPU's submissions relate to a matter of fact or law within the scope of the dispute:

72. The Procedural Orders define the proceeding's scope, including Phase II of the proceedings, as to whether Mekar violated CEPTA Article 9.9[38]. Since CEPTA follows the model of a BIT[39], both in form and in content, this dispute revolves around specific economic and commercial activities that constitute an alleged foreign investment. An impartial analysis on the legality of said investment could assist this tribunal's analytic and deliberator process.

73. The *Amici* application presents matters of fact, such as the ones regarding process of privatization and the acquisition of Caeli Airways, and a holistic perspective on Mekari commercial law, especially on privatization law, the same legal framework that regulated

[37] Article 9.19 [Conduct of the arbitration] (3) of the CEPTA
[38] Phase II (c). Procedural Order No. 2 ICSID Case No. ARB(AF)/19/78 July 1, 2021.
[39] Abbreviation for Bilateral Investment Treaty.

an investment in a former public enterprise.[40]The External Advisors to the CRPU's mastery on the applicable privatization law presents it as a provider of knowledge and interpretation over the legality of the alleged investment.

74. Accordingly, the External Advisors to the CRPU´s application to participate as a non-disputing *amicus curiae* comprises both, matters of fact and applicable law, within the scope of the dispute.

b. *The External Advisors to the CRPU has a significant interest in the arbitral proceedings:*

75. The procurement on the prevalence of legitimate and legal commercial activities in the market of Mekar, especially regarding enterprises that were once publicly owned, is in the best interest of the people of Mekar, and of the entire Greater Narnian Region, The *Amici* seeks to draw emphatic attention over the indispensability of the respect of the law, in this case, for an orderly and lawful economic development.[41] The legality of the investment in dispute, the respect of the rule of law in Mekar and the correct and fair development of this arbitration are the main interests of this *Amici*.

76. The acceptance of non-disputing amicus curiae in ICSID cases over the demonstration of compliance of all legal requirements, especially on the amici's interest over the arbitration is reflected in the case *Bear Creek Mining Corporation v Republic of Peru*[42], in which the

[40] External Advisors to the Committee on Reform of Public Utilities. Application for leave to file a non-disputing party amicus curiae submission ICSID Case No. ARB(AF)/20/78 May 28, 2021.
[41] External Advisors to the Committee on Reform of Public Utilities. Application for leave to file a non-disputing party amicus curiae submission ICSID Case No. ARB(AF)/20/78 May 28, 2021.
[42] Bear Creek Mining Corporation v Republic of Peru (ICSID Case No ARB/14/21), Procedural Order No. 5 Regarding the Association of Human Rights and Environment of Puno, Peru (DHUMA), and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists Application to File a Written Submission, 21 July 2016 (CL-136) and Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment (CCSI) to File a Written Submission, 21 July 2016 (CL-135).

DHUMA demonstrated its interest over the environmental and human-rights situation corresponding to the case.

c. *Identification and disclosure:*

77. The disclosure of the *Amici* is clear and concise, there are no conflicts of interests to report, nor any financial aid from any entity. Thereby, the *Amici* fulfils this requirement.

78. Accordingly, the External Advisors to the CRPU comply with CEPTA 9.19.3 criteria.

ii. *The External Advisors to the Committee on Reform of Public Utilities is admissible under Article 41(3) of the ICSID Arbitration (Additional Facility) Rules as a non-disputing amicus curiae.*

79. Article 41(3) of the ICSID Arbitration (Additional Facility) Rules, establishes rules for the participation of a non-disputing party in an arbitration proceeding. In summary, the requirements are:

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

b) *the non-disputing party submission would address a matter within the scope of the dispute;*

c) *the non-disputing party has a significant interest in the proceeding.*[43]

80. As with the CEPTA, the External Advisors to CRPU application complies with all requirements.

[43] Article 41 (3) ICSID Additional Facility Rules.

a. Assistance in a factual or legal issue…different from that of the disputing parties:

81. The *Amici's* submission relates to the *ratione legis* of the investment. The legality of the Claimant's commercial actions in Mekar is not considered or questioned in the Notice of Arbitration, nor in its response[44]. The tribunal could make proper use of a legal and factual evaluation of the alleged investment that originated this dispute, and if the measures enforced by maker were legitimate and proportional according to the Claimant´s compliance with the national law of Mekar.[45]

82. As to the other two requirements, interest and pertinency Claimant repeats and relies upon its submissions in the previous section relating to CEPTA, specifically section 1(c) and 1(b), respectively. Therefore, the External Advisors to the CRPU's application non-disputing party complies with both ICSID Additional Facility Rules and the CEPTA.

iii. Venma's application to bar the External Advisors to the Committee on Reform of Public Utilities amicus submission Raises No Valid Ground to Exclude

a. The submission does not challenge the tribunal's ratione legis.

83. The External Advisors to the CRPU's application propose an analysis over the *ratione legis*, that is to say, the legality of the commercial activities of the Claimant in Mekar through Caeli Airways. Venma's submission to bar this *Amici* from this procedure clearly misinterprets the purpose of the application.[46]

[44] Notice of Intent to Submit a Claim to Arbitration Under Chapter 9 of the Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement. Venma Holdings Inc.
[45] External Advisors to the Committee on Reform of Public Utilities. Application for leave to file a non-disputing party amicus curiae submission ICSID Case No. ARB(AF)/20/78 May 28, 2021.
[46] Claimant´s Comments on Application for Leave to File Amicus Submission ICSID Case No. ARB(AF)/20/78 June 15, 2021

84. As a matter of fact, questioning the legality of the investment and assisting this tribunal with interpretation regarding the legal framework of the facts that originated this dispute, complies with requirements under both CEPTA 9.19 (3) and ICSID AFR 41 (3).[47]

b. Raising a challenge on the investment's ratione legis does not constitute a contradiction to any of the legal requirements to participate as a non-disputing amicus curiae.

85. Taking into consideration that both cases, *Apotex Holdings Inc. and Apotex Inc. v United States of America*[48] and *Bear Creek Mining Corporation v Republic of Peru*[49], accepted non-disputing party *amicus curiae* submission, which were based on the demonstration of a "*perspective, particular knowledge or insight*"[50] that differed from that of the disputing parties.

86. Therefore, the participation of the External Advisors to the CRPU does not only comply with all legal requirements, but also both ICSID AFR and CEPTA encouragement of this Amici's participation.

B. The Consortium of Bonoori Foreign Investors are ineligible to be a non-disputing *amicus curiae*.

87. The non-disputing party amicus curiae submission by the CBFI, supported by the Claimant, does not comply with legal requirements established by both the CEPTA and the ICSID AFR. The concerns proposed by the Respondents can be summarized as follows:

[47] Article 9.19 [Conduct of the arbitration] (3) of the CEPTA
Article 41 (3) ICSID Additional Facility Rules.
[48] *Apotex Holdings Inc. and Apotex Inc. v United States of America* (ICSID Case No ARB (AF)/12/1), Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, 4 March 2013 (CL-133).
[49] Bear Creek Mining Corporation v Republic of Peru (ICSID Case No ARB/14/21), Procedural Order No. 5 Regarding the Association of Human Rights and Environment of Puno, Peru (DHUMA), and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists Application to File a Written Submission, 21 July 2016 (CL-136) and Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment (CCSI) to File a Written Submission, 21 July 2016 (CL-135).
[50] Article 41 (3) ICSID Additional Facility Rules.

a) No additional perspective, knowledge or insight, nor public interest.

b) Legal and partiality-related concerns.

88. Both of these concerns will be elaborated and will be demonstrated to contradict the legal requirements imposed to all non-disputing amicus curiae eligible for this case.

i. CBFI[51] are inadmissible under Article 9.19 (3) CEPTA as a non-disputing amicus curiae.

89. CEPTA Article 9.19 (3) requires any non-disputing amicus curiae submission to be impartial and disclose any conflict of interests. The CBFI's application fails to fulfil said requirements as follows:

a. The CBFI's application fails to disclose an evident conflict of interest.

90. In the CBFI's application the disclosure omits the evident conflict of interest related to Venma Holdings', SRB Infrastructure's and Wiig Wealth Management Group's memberships of the CBFI. All 3 entities are pursuing claims against Mekar, which clearly indicates partiality over the applicant's interpretation of facts and its participation is clearly biased by the interests of a disputing party.

91. Accordingly, the CBFI is not eligible under CEPTA 9.19 (3).

ii. The CBFI is inadmissible under Article 41(3) of the ICSID Arbitration (Additional Facility) Rules as a non-disputing amicus curiae.

[51] Abbreviation for Consortium of Bonoori Foreign Investors.

92. Article 41(3) of the ICSID Arbitration (Additional Facility) Rules, establishes rules for the participation of a non-disputing party in an arbitration proceeding, especially, it requires all submission to contribute "*perspective, particular knowledge or insight*" that differs from that of the disputing parties as follows:

> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;* [52]

a. The CBFI's application does not contribute any additional perspective, knowledge or insight, nor does it have public interest.

93. The CBFI, as a conflicted identity, will represent the perspective and the knowledge of Boonori investors. As stated above, such conflict of interest constitutes a clear representation of the Claimant's position and will confuse, instead of assisting, as non-disputing parties are supposed to, the tribunal.[53]

94. The Tribunal shall hear the Claimant's position through the Claimant's legitimately appointed advocates, not through any other actor. The participation of the CBFI would constitute a violation of both the disputing parties' rights, and of the ICSID costumery and legal procedure.

iii. *The Tribunal should deny the CBFI's non-disputing amicus curiae application.*

95. The preceding phrases have demonstrated the clear contradiction between the CBFI's application and the legal framework of non-disputing amicus curiae under both CEPTA and

[52] Article 41 (3) ICSID Additional Facility Rules.
[53] Application for leave to file a non-disputing party amicus curiae submission by the CBFI Investors. ICSID Case No. ARB(AF)/20/78

ICSID AFR. According to the amicus decision on the case *Eco Oro Minerals Corp. v. Republic of Colombia*, this tribunal, under the principle of equality, should deny the CBFI's application as a non-disputing amicus curiae.

96. In said case, the tribunal denied the application submitted by Comité para la Defensa del Agua y el Páramo de Santurbán, the Center for International Environmental Law (CIEL), the Asociación Interamericana para la Defensa del Ambiente (AIDA), MiningWatch Canada, Institute for Policy Studies (IPS) - Global Economy Project and the Centre for Research on Multinational Corporations (SOMO), that conformed the petitioners, to participate as non-disputing parties for failing to comply with all legal requirements established by both the Canada-Colombia FTA and ICSID AFR[54]. Likewise, as the CBFI's application does not fulfil with the applicable legal requirements, it should not be taken into account in this arbitration proceeding.

[54] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41. Procedural Order N°6. Decision on non-disputing parties' application.

PART IV

MERITS

A. The Respondent did not contravene the FET established in article 9.9 of the CEPTA.

i. Respondent did not act arbitrarily or discriminatorily towards Claimant

97. The FET has been extensively litigated before various ICSID Tribunals. Regarding the prohibition of manifest arbitrariness, the Tribunal in *Enron v. Argentina* stated that:

> "*The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place."*[55]

98. Thus, for Respondent to conduct arbitrary conducts against Claimant, a deferential standard must be fulfilled since national policies or decisions that affect investors do not, on their own, constitute arbitrary conducts, especially when undertaken in times of economic crisis. [56]

99. Regarding the prohibition of discrimination, tribunals have considered it constitutes a pillar of the FET of foreign investors and their investments. This requirement, part of the FET standard, prohibits discrimination in the sense of:

[55] Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007
[56] LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 162.

> "Specific *targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a "deliberate conspiracy […] to destroy or frustrate the investment"*.[57]

100. *In casu*, Respondent acted in accordance with the FET standard of non-discrimination by undertaking measures with due consideration and respect of Claimants investment.

B. The First Investigation conducted by the CCM was carried within the legal framework of Mekar

101. Chapter III (Tribunal Investigation) of the MRTPA, establishes that the CCM may open an investigation when a corporation obtains a market share greater than 50%.

102. The *first investigation,* launched by the CCM in 2016, under MRTPA Chapter III, was initiated on the basis of the anti-competitive behavior deployed by Claimant; the percentage of market share it owned in combination with Royal Narnian; and the actions Claimant took to push competitors out of the market.

103. *In casu*, it is true that the CCM approved the acquisition of Caeli by Claimant. But it is also an uncontested fact the CCM requested a clear and concise undertaking in which Claimant relinquished the use of the Moon Alliance and other strategic resources that could jeopardize the Mekari trade environment in matters of fair competence[58]. Even if Claimant originally affirmed it would fulfill its commitment; [59] it failed to do so by violating national laws regarding fair competence.

[57] Glamis v. United States, Award, 8 June 2009, footnote 1087 to para. 542;
[58] The case, P. 34
[59] The Case. P. 33

104. For instance, there was clear evidence of preferential secondary slot-trading[60] between the Royal Narnian and Caeli, both owned and controlled by Claimant. Additionally, the subsidies received by Claimant under the Horizon 2020 programme, allowed Claimant to implement predatory pricing strategies, overriding competitors from the market. Finally, Caeli benefited from its cooperation with other Moon Alliance Members. [61]

105. To add to the list of strategies implemented by Claimant that constituted a violation of Mekar's national antitrust laws, the market share by the time the CCM initiated the investigation was 54% if taken into consideration both Royal Narnian and Caeli. JetGreen, Caeli's closest competitor, enjoyed only a 21% share of the market by 2016. Thus, Claimant had control of more than half of the entire market, overriding competitors and acting contrary to the national laws of Mekar[62].

106. Respondent also notes that tribunals have concluded that arbitrary and discriminatory conducts must comply with a minimum standard of proof. For instance, in case *Myers v. Canada*, the UNCITRAL tribunal stated that:

> "*Only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case."*[63]

[60] The Case. P. 35
[61] The Case. P. 31.
[62] The Case, P.86
[63] S.D. Myers, Inc. v. Canada, (November 13, 2000), Partial Award

107. Claimant fails to provide evidence establishing the investigation conducted by the CCM, an independent and impartial body of the country of Mekar, was founded on grounds of discriminatory and arbitrary factors. On the other hand, Respondent proves that the investigation was conducted in accordance with national laws and irrefutable evidence of anti-competitive behaviour.

i. The air caps and the fine imposed by the CCM were in accordance with national antitrust laws

108. The fines and air caps imposed on Claimant, a direct consequence of the first investigation launched by the CCM, were proportionate and legal. The MRTPA establishes that the CCM may impose any interim and final remedy as long as it is proportional and seeks to bring a corporation in line with Mekar's national policy. [64]

109. Claimant confirmed, on several occasions, that the air caps imposed were reasonable and in accordance with the MRTPA.[65]

110. Respondent submits that the foregoing is conclusive that the aircaps and fine imposed by the CCM, result of the first investigation, were in accordance with the antitrust laws and the FET established in the CEPTA.

C. The Second Investigation launched by the CCM was legal within the framework of the State of Mekar

111. The second investigation launched by the CCM was initiated when a consortium of small regional airlines brought a complaint before the authority, calling attention to Caeli´s establishment of Phenac International Airport as its fortress hub, making it almost

[64] The Case. P. 48
[65] The Case P. 4

impossible for these airlines to participate fairly in Mekar's market. The CCM, in respect of due process, opened its investigation in light of its responsibility as stated in Chapter III, Article 3 of the MRTPA.[66]

112. As in the first investigation, all conditions to initiate said process were met. A complaint was presented by not one, but a group of competitors; the corporation in question had more than 5 times the percentage of the market share required to initiate an investigation; and the CCM had already recovered enough evidence to suspect the monopolic intentions of the Claimant.[67]

113. For the second investigation, the CCM concluded that Caeli had been engaging in anti-competitive behavior and had been abusing its dominant position in Phenac International Airport. Thus, the CCM imposed a second fine of MON 200 million and maintained the air caps until Caeli had a market share below 40%. Both of these fines were imposed according to the legal framework of Mekar´s commercial sector[68]. The CCM operated within its legal competences and according to its responsibility to defend the rule of law of the Federal Republic of Mekar.[69]

114. Respondent again refers to the standards of nondiscrimination and prohibition of arbitrary conducts of the FET according to case law and jurisprudence of tribunals subjected to ICSID.

115. For instance, the Tribunal in Plarna Consortium Limited v. Republic of Bulgaria establishes that:

> *"Unreasonable or arbitrary measures - as they are sometimes referred to in other investment instruments - are those which are not founded in reason or fact but on*

[66] The Case. P. 47
[67] The Case. P. 36
[68] The Case. P. 48
[69] The Case. P. 38

> *caprice, prejudice or personal preference.* [70] *With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds."*[71]

116. As Maniruzzaman notes, "*Unreasonable, arbitrary or invidious distinctions are undoubtedly prohibited at international law and are actionable*."[72]He states:

> *"The concept of discrimination entails two elements; first the measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the company's nationality. Second, discrimination entails like persons being treated in an inequivalent manner"*[73]

117. The UNCITRAL Tribunal in the case of *Ronald Lauder* v. *The Czech Republic*[74] in the absence of a treaty definition of "arbitrary" (as is the situation in the present case) applied the Black's Law Dictionary[75] definition being "(…) *depending on individual discretion (…) founded on prejudice or preference rather than on reason or fact*"[76]

118. Respondent submits that the measures taken by Mekar cannot be found to be discriminatory or arbitrary under either of these definitions.

D. The decree requiring all companies to offer services denominated in MON is not an arbitrary or discriminatory conduct against Claimant

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[70] Ronald Lauder v. The Czech Republic, Final Award of 3 September 2001, UNCITRAL, paras. 221,222,232; Schreuer, op.cit. pp.8-9.
[71] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24. Final Award 2008. para 184 (page 57)
[72] A. F. M. Maniruzzaman, "Expropriation of Alien Property and the Principle of Non-Discrimination in International Law or Foreign Investment: An Overview"*Journal of Transnational Law & Policy, Vol. 8, No. 2, p. 57, 1998 at* page 69
[73] A.F.M Maniruzzaman. supra note 50
[74] Ronald Lauder v. The Czech Republic, Final Award of 3 September 2001, UNCITRAL, para. 221
[75] Black's Law Dictionary 100,7th ed, 1999)
[76] Ronald Lauder v. The Czech Republic, Final Award of 3 September 2001, UNCITRAL, para. 221

119. In 2018, due to the severe economic crisis in the country, Respondent passed a decree requiring *all* companies operating in the country to offer goods and services denominated in MON to stabilize the national currency.[77] The IMF emphasized "t*he need to establish credibility in the [local] currency to avoid a debilitating economic situation".* [78]

120. Claimant argues that such a decision harmed the entire aviation industry but specifically Caeli Airways. But Respondent sustains that the deteriorating viability of Claimant's investment in Mekar, is attributable directly to Vemma Holdings Inc.

121. For instance: Claimant encouraged the expansion of cross-continental routes against the advice of Mekar Airservices, board members, who affirmed Claimant's extravagant approach would lead Caeli to future financial hardship.[79]

122. Instead of injecting the profits earned in 2014 in improving the financial health of Caeli and lowering debt, Claimant decided, against Mekar Airservices advice, to expand and renew the fleet. [80]

123. Claimant opened two credit lines to implement programmes to consolidate consumer base instead of paying existing debts. [81]

124. Additionally, the decree obligating companies to denominate goods and services in MON finds its legal support in the right to regulate provided in the CEPTA. For instance,

[77] The Case. P. 36
[78] The Case. P. 35
[79] The Case. P. 34
[80] The Case. P. 35
[81] The Case. P. 35

Article 9.8, Section D of the CEPTA, provides for the right of Respondent to regulate matters related to public policy.[82]

125. Different doctrinants such as Aikaterini Titi, have defined the right to regulate in international investment law as:

> "*The legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate*."[83]

126. Thus, by establishing measures to preserve the stability of Mekar's economy, Respondent did not violate the FET.

127. Furthermore, it is important to note that Section D grants the right to regulate in matters related to public policy such as national security, protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity. There are two matters that are of utter importance in the wording of Section D: First and foremost, it is an enunciative and not exhaustive list of what comprises public policy. Second, it states national security is part of the public policy of the country of Mekar. [84]

128. In this sense, international authorities such as the IMF and the United Nations, have recognized that national security may include economic stability.

> *"As to "essential security interests," it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of*

[82] The Case P. 77

[83] Aikaterini Titi, The Right to Regulate in International Investment Law 33 (2014)

[84] The Case. P. 77 *"For the purpose of this Chapter, the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security…"*

> *a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population".* [85]

129. This approach has been adopted by several ICSID tribunals such as in the case of the Continental Casualty Company v. Argentine Republic; LG&E v. The Republic of Argentina; and CMS v. The Republic of Argentina.[86]

130. Thus, Respondent reaffirms that the measures taken to preserve the economic stability of the Republic of Mekar, were all in accordance with the provisions established in the CEPTA. Furthermore, they were implemented without taking into consideration any discriminatory factor against Claimant and the measures responded to well supported evidence of the economic crisis Respondent was facing.

E. The granting of subsidies under Executive order 9-2018 did not constitute a discriminatory conduct

131. Under Executive order 9-2018, Respondent granted subsidies to airlines operating in the country of Mekar to aid alleviate the hardships of the 2017 economic crisis. [87]Though Claimant asserts Respondent´s non-subsidizing of Caeli was discriminatory Respondent denies the denial of subsidies to Caeli constituted discriminatory conducts. On the contrary, the policy was supported by evidence that Caeli had access to subsidies and capital injection from the government of Bonooru.[88]

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[85] See UN Charter Art. 1 (3) that includes amongst the purposes of UN "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character (…)."

[86] In the Casualty Company v. In The Argentine Republic case, the Tribunal stated that "*there is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Art. XI".* See CMS Award, para. 359. See also LG&E Award, para. 238; Enron Award, para. 332.

[87] The Case. P. 36-37

[88] The Case. P. 38

132. Through the Horizon 2020 program, Claimant received significant capital from the state of Bonooru.[89] Additionally, their status as SOE:

> "*Gives them unique advantages over other companies that enable them to outcompete privately-owned firms. It would be unfair to grant certain State-owned companies even more of an advantage in our airline market to the detriment of our people. [Mekar's citizens]"* [90].

133. Respondent opted not to grant subsidies to state majority owned SOE, including Caeli Airways and wholly government-owned Larry Air[91].

134. Additionally, the predominant recipients of subsidies under Mekar´s President Executive Order 9-2018 were airlines with less than 5% market share on domestic routes within Mekar. Caeli does not comply with such conditions to be eligible for subsidies under Executive Order 9-2018.

135. The facts stated above establish that Executive Order 9-2018 does not constitute a breach of the FET. In AES v. Hungary, the ICSID Tribunal determined that for a conduct to be considered discriminatory:

> *"There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's*

[89] The Case. P. 90
[90] The Case. P. 38
[91] The Case, P. 37

public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented." [92]

136. Respondent has established that Executive Order 9-2018 did not discriminate against Caeli. Subsidies were granted to airlines complying with requisites demanded by the government of Mekar, such as low market share and no ownership by foreign governments. Thus, Respondent act neither arbitrarily nor discriminatorily against Claimant.

i. Respondent ensured access to justice and due process to Claimant

137. Denial of justice is understood as any misapplication of justice by national courts as a consequence of a malfunction of the State judicial system[93]. Article 9.9 (2) (a) of the CEPTA expressly includes a reference to denial of justice in the MST clause. It is commonly understood in investment protection treaties that the denial of justice encompasses[94]:

> *"(a) Denial of access to justice and the refusal of courts to decide; (b) Unreasonable delay in proceedings; (c) Lack of a court's independence from the legislative and the executive branches of the State; (d) Failure to execute final judgments or arbitral awards; (e) Corruption of a judge; (f) Discrimination against the foreign litigant; (g) Breach of fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard"*[95].

[92] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22. Award, 2010.
[93] Focarelli C (2009). Denial of justice. In: Wolfrum R, ed. The Max Planck Encyclopedia of Public International Law. Oxford University Press. Oxford.
[94] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2012.
[95] UNCTAD (2012), *supra* note 30, P. 80.

F. International Standards of the principle of denial of justice in criminal, civil or administrative proceedings;

138. Denial of justice may concern criminal, civil or administrative proceedings. In *Tokios Tokelés v. Ukraine*; Tokio Tokelės, a corporation registered in 1989 as a cooperative enterprise under the laws of Lithuania, owned a publishing house in Ukraine. In the request for arbitration submitted by Tokios Tokelés, it alleged that because the Ukrainian publishing house in which Tokios Tokelés had invested published a book that favorably portrayed a politician from the opposition party, tax investigations were initiated by the Ukrainian authorities against Tokios Tokelés, which hindered their commercial activities, and for that reason, Ukraine violated the BIT between Ukraine and Lithuania. The ICSID tribunal highlighted the existence of violations of basic principles of conduct in criminal proceedings as a manifestation of denial of justice[96].

139. In Metalclad v. Mexico; Metalclad, a US corporation, created a Mexican subsidiary to build a hazardous waste landfill in Guadalcázar, in the state of San Luis Potosí. Five months after construction began, the Municipality of Guadalcázar notified Metalclad that it was operating without a municipal construction permit. Metalclad applied for a municipal permit and, in the meantime, completed construction of the landfill. The plaintiff brought this action against the defendant under Chapter 11 of the North American Free Trade Agreement. In this case, the denial of justice affected local administrative procedures[97].

140. Nevertheless, it has not been clear what is the duration necessary to consider that there is a denial of justice. In *Jan de Nul v. Egypt,* the ICSID tribunal held that the 10 year period to obtain a judgment in the first instance was unsatisfactory, but did not reach a level of denial of justice because "the issues were complex and highly technical"[98]. Moreover, in *White Industries v. India,* the tribunal to evaluate the denial of justice considered the

[96] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award (26 July 2007)
[97] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1
[98] Jan de Nul NV and Dredging International NV v. Arab Repubulic of Egypt. ICSID (Arbitration Tribunal). 16 June 2006 ; 06 November 2008 .

population of the State and the current functioning of its judicial system. The Uncitral Tribunal noted that India was a country with a population of more than 1.2 billion people with an overloaded judiciary, and that White Industries is aware of the conditions of the Indian judicial system; therefore, he rejected excessive delays as a denial of justice[99].

G. The delay in the hearings requested by Claimant do not constitute a denial of justice according to the FET principle

141. Mekar experienced an exponential growth of more than 4 million in its population between 1980 and 2015[100]. This led to its judicial system being more affected, as it did not expand at the same rate as its population. As a consequence, the average time between the initiation of an action and the receipt of a final decision in the Mekari courts increased from 9 months in 1980 to 22 months in 2015[101]. This was presented with more concurrence in commercial matters as Mekar prioritized criminal cases in order to avoid prolonged detention of the accused[102].

142. This demonstrates that by 2011, when the Claimant made the investment in Mekar, it was well aware of the situations that the judicial system was presenting in Mekar. Therefore, the delay in scheduling a hearing cannot be considered a denial of justice, as this is a consequence of the economic crisis that Mekar was facing, and of which the Claimant was aware. Claimant accepted this situation when it decided to invest in Mekar. Further, the Court continued to prioritize criminal matters due to their far-reaching consequences; so it could not resolve all the issues that were presented to them for immediate redressal[103].

[99] White Industries Australia Limited v. The Republic of India, Final Award. 30 Nov 2011. White Industries Australia Limited v. The Republic of India, UNCITRAL.
[100] The case, P. 29, para. 13
[101] The Case, P. 30, para. 13.
[102] The Case, P. 30.
[103] The Case, P. 36.

i. Terms and Conditions of the Shareholders Agreement between Mekar Airservices Ltd and Vemma Holdings Inc.

143. Article 39 of the Shareholders Agreement between Mekar Airservices Ltd and Vemma Holdings Inc stipulates the Right of First Refusal.[104]

144. The first condition that needs to be met for the approval of the disposal of shares by Vemma is the reception of a *bona fide written offer for a Third-Party arm's length Transaction that Mekar Airservices desires to accept.*

ii. Respondent did not violate the FET by rejecting Hawthorne's Group Offer and enforcing Mr. Cavannaugh Arbitral Award.

145. In international investment law, abusive treatment includes:

> "*Coercion, duress and harassment that involve unwarranted and improper pressure, abuse of power, persecution, threats, intimidation and use of force"* [105]

146. For host states to violate this standard of FET, repetitive and sustained conducts must be deployed with the purpose of harming, frustrating or destroying an investment.

147. In the present case, Respondent respected the FET established in the CEPTA because:

1. The decline of Hawhtorne's group offer does not constitute a breach of the FET and

[104] The Case P. 52
[105] United Nations Conference on Trade and Development. "Fair and Equitable Treatment. UNCTAD Series on Issues in International Investments Agreements II" (2012)

2. The enforcement of arbitral award rendered by Mr. Cavannaugh was legal and in accordance with the Shareholder's Agreement and the CEPTA.

H. Hawthorne group cannot be considered a *bona fide* offer, nor the price can be considered an arm's length commercial price, unfulfilling the requirements for the disposal of shares established in the Shareholders Agreement

148. Parties to international business transactions must always act in accordance with the principle of good faith and fair treatment. According to the ICSID Tribunal in the case Gustav F W Hamester GmbH & Co KG v. Republic of Ghana[106]:

> "*An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law"* [107]

149. The offer presented by the Hawthorne Group in December 2019, cannot be considered *bona fide* since the offeror is not a party independent from the Claimant due to its status as an active member of the Moon Alliance. It should be noted that Caeli benefited throughout its operation from the cooperation with other Moon Alliance members, including lounge access, terminals, IT platforms, check-in operations and code-sharing. Thus, Hawthorne Group does not fulfill the requirements pursuant to Article 39 (a) of the Shareholders Agreement.[108]

[106]Gustav F W Hamester GmbH & Co KG. Claimant v. Republic of Ghana. Respondent. (ICSID Case No. ARB/07/24).
[107] Supra note. 106
[108] Supra note 33.

150. Furthermore, Article 39 (a) also requires the offer to be considered an arm's length commercial transaction. On this matter, the Legal Information Institute of Cornell University, defines arm's length as:

> *"Transactions between two parties who are independent and do not have a close relationship with each other. Presumably, these parties have equal bargaining power and are not subject to undue pressure or influence from the other party."* [109]

151. Correspondingly, the OECD defined the arm's length principle as *[the principle]:*

> *"That requires that transfer pricing between associated enterprises should be the same as if the two companies involved in the transaction were two unrelated parties negotiating in the market, rather than part of the same corporate structure."*[110]

152. In this sense, the offer made by Hawthorne Group exceeded the value of the assets of the investment of Vemma in Caeli, bearing in mind: By the third quarter of 2019, Caeli's market share in Mekar dropped below 40% with its operations on most routes generating deep losses. From May through June 2019, Caeli Airways was forced to shut down several loss-making routes, return aircraft to their lessors following the breakdown of sale and leaseback deals. The cost-cutting measures implemented in 2019, such as extra charges for baggage and refreshments hurt Caeli's popularity, decreasing their respective profits and market share. The IICRA gave Caeli a rating of CCC+ in 2019.[111]

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[109] Legal Information Institute. "Arms Length" (n.d) taken from: https://www.law.cornell.edu/wex/arm%27s_length

[110] Langbein, Stanley I., and Max R. Fuss. "The OECD/G20-BEPS-Project and the Value Creation Paradigm: Economic Reality Disemboguing into the Interpretation of the Arm's Length Standard." *Int'l Law.* 51 (2017): 259.

[111] When a company has a CCC+ rating, it means "The *issuer is currently vulnerable and is dependent upon favorable business, financial, and economic conditions to meet its financial commitments. The issuer's financial commitments appear to be unsustainable in the long term, although the issuer may not face a near term (within 12 months) credit or payment crisis"* S&P Global Ratings (n.d)

153. The valuation of Vemma's investment in Caeli in USD 600 million by Hawthorne Group, does not correspond to the reality of the investment's market value. According to the International Valuation Standards (IVS):

> *"The market value is the estimated amount/price for which an asset or liability should be exchanged on the particular valuation date between a willing buyer and seller in an arm's length transaction, after properly marketing it and where both parties had each acted knowledgeably, prudently and without compulsion."*[112]

154. In this sense, by 2019, the year in which the offer was received, the valuation of Vemma's investment in Caeli was far inferior from the price Hawthorne Group was offering. This can be proved by the loss in the market share; the debts incurred by Caeli in 2019; the loss-making routes; the decrease in Caeli's popularity; the IICRA rating; and the return of several aircrafts to the corresponding lessors.

155. Additionally, it is important to highlight that Vemma failed to provide evidence that supported the value of their investment in Caeli, both when sending the Right of First Refusal Offer Notice to Mekar Airservices Ltd. and during the arbitration process before the Sinnoh Chamber of Commerce. [113]

156. On these terms, it is more than evident that Hawthorne Group does not comply with the terms of Article 39(A) of the Shareholders Agreement between Mekar Airservices Ltd and Vemma Holdings Inc and thus Mekar was in their legal right to reject the offer made in 2019 by Hawthorne Group LLP. [114]

I. The enforcement of the Award rendered by the Sinoh Chamber of Commerce was legal under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Mekar's national laws.

[112] International Valuation Standards (IVS) "Glossary" (n.d) taken from: https://www.ivsc.org/standards/glossary
[113] The Case. P. 58-59
[114] Supra note, 59

157. On August 1, 2020, the Claimant, in accordance with Sinnoh law, applied to the Sinnoh courts to set aside the arbitral award rendered by Mr. Rett Eichel Cavannaugh in favor of the Respondent, Mekar Aiservices Ltd[115]. The award rendered by the sole arbitrator, supported the Respondent's claims that the Hawthorne Group offer could not be considered an arm's length commercial transaction given that the latter was affiliated with Vemma by virtue of the Moon Alliance membership[116]. Consistent with its rights as a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the Arbitration Rules of the Sinnoh Chamber of Commerce; and the national legislation of the Republic of Mekar; Respondent sought the enforcement in Mekar of the Cavannaugh Award.

158. Bonooru and Mekar are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article V of that Convention states:

> *"Recognition and enforcement of the award <u>may be refused</u>, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."* [117]

159. In this sense, the Respondent emphasizes on the introductory sentence of Article V, which uses permissive language that allows Contracting States to enforce an award even if it has been set aside or suspended by a competent authority of the country in which the award was made. [118] In this regard, in the case *Chromallow Aoerservices v. Arab Republic*

[115] Supra note 63
[116] Supra note 6
[117] Wolff, Reinmar. "New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958." *New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of.* Vol. 10. 1958
[118] Supra note 117.

of Egypt (1996), the United States Court for the District of Columbia enforced the arbitration award even though the Cairo's Court of Appeals suspended and issued an order nullifying the award. The District Court in the present case noted that under Article V of the New York Convention, it had discretion to decline to enforce the award that:

> *"Has (...) been set aside (...) by a competent authority of the country in which, or under the law of which, that award was made".*[119]

160. Furthermore, it is important to mention that the report delivered by the CILS (Centre for Integrity in Legal Service), a non-profit organization in Mekar, lacks authenticity and fails to achieve the standard of proof required in international arbitration to assert fraud and corruption behind the rendering of an award. In this sense, it is critical to recall that the CILS has been recognized by the Mekari Ministry of Home Affairs as an:

> *"Entity funded by foreign donations to interfere in Mekar's domestic affairs. The Ministry has frozen CILS' bank accounts until investigations into suspicious foreign funding are complete and designated activities of the organisation illicit under Mekari Law in the interim. It is against Mekar's public policy to give credence to the reports prepared by such an organisation."*[120]

161. Case law sets a high standard of proof needed to assert corruption in international arbitration and the importance of national public policies to enforce awards that have been set aside in their country of origin.

162. In regard to the existing case law on the matter of the standard of proof needed to assert corruption, in the final award rendered in the case Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia)[121], the ICSID Tribunal manifested:

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[119] Chromalloy Aeroservices v. Arab Republic of Egypt, District Court, District of Columbia, United States of America, 31 July 1996, 94-2339.
[120] Supra note, 67
[121] Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara, Final Award, 4 May 1999.

> *"The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality (…) The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption. But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have."*[122]

163. Along this same line, in the Award in EDF (Services) v. Romania, rendered on October 2009, The:

> "[ICSID] *Tribunal reached the view that the allegation of the bribe demand had not been proven, largely based on its view that Claimant's witnesses lacked credibility (though it noted, interestingly, that it also had doubts as to the reliability of the Respondent's witnesses)."* [123]

164. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing[124]

[122] Supra note 121, paras. 219–220
[123] Partasides, Constantine. "Proving Corruption in International Arbitration: A Balanced Standard for the Real World." *ICSID Review* 25.1 (2010): 47-62.
[124] EDF (Services) Ltd. v. Romania, ICSID Case No. Arb/05/13, Award (8 October 2009)

165. Other cases in which tribunals have demanded a high standard of proof are the Westinghouse case, where the Tribunal demanded: *"clear and convincing evidence" of corruption amounting to "more than a mere preponderance.*"[125] and the Hilmarton case, where the Tribunal demanded *proof "beyond doubt" of corruption.*[126]

166. It is also important to note that the burden of proof relies on Claimant, bearing in mind the principle of *actori incumit probatio* which states that:

> "*Each party shall have the burden of proving the facts relied on to support its claim or defence...a reversal of the burden of proof does not seem to be aceptable or compatible with the right to a fair trial."*[127]

167. Thus, in accordance with Mekar's national policies and the standard of proof required to set aside an award that is tainted with corruption, it is more than evident that the CILS report, the only evidence weighing in the Applicant's favor, does not constitute sufficiently, serious, specific, and consistent indicia of corruption. Therefore, the enforcement of the award rendered on May 9, 2020, was not only legal under Mekar's national laws but also under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the jurisprudence of ICSID.

168. Respondent also argues that the rejection of the offer and the enforcement of the arbitral award does not violate the FET.

[125] Westinghouse Int'l Projects Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v. Nat'l Power Corp. and The Republic of the Philippines, ICC Case No. 6401, Preliminary Award (19 December 1991), paras. 33–35.
[126] Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A., ICC Case No. 5622 (1988), para. 23.
[127] United Nations Commission on International Trade Law (UNCITRAL) "odel Law on International Commercial Arbitration. Arbitration Rules" (n.d)

PART V

COMPENSATION

169. Even though Mekar did not violate CEPTA Article 9.9 if this tribunal awards in favor of the claimant, it should rule according to a fair compensation standard. Considering that a previous legitimate acquisition has already taken place, the tribunal should recognize that Mekar Aiservices' acquisition of Venma's shares in Caeli Airways correspond to fair compensation.

170. Therefore, Vemma is not entitled to any additional compensation sums. According to Procedural Order N°2, the last phase of the arbitration proceeding corresponds to the analysis on the appropriate compensation standard and subsidiary factors to this matter[128]. The Respondent hereby submits the corresponding arguments to support an already paid and existent compensation and the evident lack of a right for the Claimant to allege any further compensation.

A. Compensation standard

i. "Fair market value" is a different compensation standard from "Market Value".

171. Compensation standards in international arbitration differ from one another. Fair Market Value has been used differently as a compensation standard from tribunal to tribunal in ICSID cases. In *Sempra Energy International v. The Argentine Republic*, the tribunal took into account the Fair Market Value of the investment as the most valid and an appropriate standard to apply in the case. It was also the case of *Ron Fuchs v. The Republic of Georgia*.[129]

[128] Procedural Order No. 2 ICSID Case No. ARB(AF)/19/78 July 1, 2021.

[129] 404-405 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16. Award – 28 September 2007. p. 120.

Ron Fuchs v. The Republic of Georgia, ICSID Case No. ARB/07/15.

172. Market value has also been used as the appropriate compensation standard in other ICSID awards. Such is the case of *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, under the Mexico-Spain BIT. The final award of this case recognized the Market Value as the appropriate compensation standard, according to the agreed dispositions in the applicable Bilateral Investment Treaty, as follows:

> *"(…) the Claimant is entitled to receive compensation in accordance with the provisions of the Agreement and on the basis of the market value of the assets the Claimant has been deprived of."*[130]

173. Different tribunals have used different compensation standards, and Fair Market Value is a different standard from Market Value. The previously exposed ICSID awards have made proof of this.

ii. CEPTA allows compensation under Fair Market Value only in expropriation cases, thus excluding this claim.

174. Within the procedural orders established by the tribunal, a clear exclusion of any expropriation claim under CEPTA Article 9.12 is agreed upon[131]. The Notice of Arbitration, in the compensation section, requests the tribunal to determine the compensation, if Mekar's violation of CEPTA Article 9.9 is proven, under the standard of Fair Market Value. The Claimant fails to support this claim based on no legal or jurisprudential arguments[132].

175. Article 9.21 of the CEPTA, which regulates the final award of an arbitration procedure under this BIT, clearly determines that the compensation standard shall be Market Value. There would be no valid reason why this tribunal should acknowledge Fair

[130] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para 189.
[131] Procedural Order No. 3 ICSID Case No. ARB(AF)/20/78 July 16, 2021. parr. 2.
[132] Notice of Intent to Submit a Claim to Arbitration Under Chapter 9 of the Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement. Venma Holdings Inc.

Market Value as the compensation standard on a claim that does not comprises an expropriation and fits under Article 9.21 of the CEPTA[133]

B. Date of valuation and applicable interests.

i. Acquisition of Venma's shares in Caeli by Mekar Airservices.

176. This tribunal should acknowledge that the acquisition of Venma's shares in Caeli Airways, on 8 October 2020, for a sum of 400 million USD corresponds to a full payment of the Claimant's corresponding investment. According to the facts of the case, Mekar allowed the Claimant to seek a *bona fide* offer for its shares in Caeli, however the Claimant tried to deceive the Government of Mekar by hyperinflating the value of the investment in Caeli[134].

177. This scam was uncovered by Mekar's authorities and, in good faith, the State decided to allow the sale of the Claimant's shares in Venma under a single, logical and rational offer made by the State through Mekar Airservices. It is important to note that there was no coercion for the acceptance of the 400 million USD offer[135].

178. The acquisition and the transaction fulfilled all legal requirements and are legitimate according to Mekar's legal framework. Therefore, the acquisition of the Claimant's shares in Caeli Airways was not only legal but also an act of good faith and condescendence towards the Claimant.

179. If the tribunal finds that the Federal Republic of Mekar violated CEPTA Article 9.9 the sum given to the Claimant under the concept of the acquisition should be considered as the full and complete compensation for the damages.

[133] Article 9.21: Final Award (c) – 2014 Bonooru – Mekar CEPTA.
[134] 56 & 57 Statement of Uncontested Facts on ICSID Case No. ARB(AF)/20/78.
[135] 63 Statement of Uncontested facts on ICSID Case No. ARB(AF)/20/78.

C. Mekar's public economic situation.

180. The people of Mekar have been struggling with one of the hardest economic crises of the country's history. According to the FMI, the economic panorama in Mekar is not promising. 700 million USD in payment to the Claimant would not only constitute an unfair ruling but might also provoke Mekar's downfall.

181. 700 million USD correspond to twice the annual public spending of Mekar. The State would have to gravely indebt itself in order to compensate the Claimant for damages that do not constitute a liability to Mekar.[136]

[136] Procedural Order No. 3 ICSID Case No. ARB(AF)/20/78 July 16, 2021. parr 4.

PART VI

PRAYER FOR RELIEF

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01. For the following reasons, respondent hereby respectfully requests the Arbitral Tribunal to render the award in favor of the claimant, for the following:
    01. Declare that this tribunal does not have jurisdiction over the present dispute;
    02. Declare that the impugned measures can be solely attributed to the Claimant;
    03. Declare that the Respondent did not violate Chapter 9 of the CEPTA;
    04. Declare that the Claimant's investment is not entitled to a protection under the CEPTA;
    05. In case that the respondent did indeed violate chapter 9.9 of the CEPTA, then this tribunal should state that the State of Mekar has already acquired the Claimant's investment at a "market value" and award the Claimant no compensation whatsoever;
    06. Order Claimant to bear all the costs of this arbitration.